UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC., Plaintiffs/Counterclaim Defendants, v. LIME GROUP LLC; LIME WIRE LLC; MARK GORTON; GREG BILDSON, and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP Defendants.	ECF CASE 06 CV 5936 (GEL)

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO EXCLUDE PLAINTIFFS' PROFFERED EXPERT SUMMARY JUDGMENT EVIDENCE FROM THE DEPOSITIONS AND REPORTS OF ELLIS HOROWITZ, Ph.D. AND RICHARD P. WATERMAN, Ph.D

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INTRODUCTION

Plaintiffs' response to Defendants Motion[1] is short on law and long on expletives such as "misleading," "disingenuous," "ridiculous," "nonsense," and "absurd." But for all their yelling, Plaintiffs ignore the basic rules of evidentiary admissibility and fail to establish either the reliability or relevance of Waterman's and Horowitz's expert opinions offered in support of Plaintiffs' summary judgment motion. Plaintiffs do not, because they cannot. Accordingly, the challenged opinions must be excluded.

I. WATERMAN'S REPORT IS INVALID AND UNRELIABLE

Plaintiffs begin their resuscitation efforts on Dr. Waterman with clumsy sleight-of-hand, claiming his study "provides clear evidence of the massive scope of the infringement defendants have induced and facilitated . . . ." Ps' Resp. at 3. But Waterman's Report is not evidence, clear or otherwise, of infringement that "defendants have induced." In their own words, Plaintiffs retained Waterman to design a study to determine "(i) the authorization status of files offered for download to LimeWire users, and (ii) the authorization status of files that LimeWire users affirmatively seek to download," (Ps' Resp. at 4), ***not*** to quantify the amount of infringement defendants have allegedly induced. Plaintiffs' misrepresentation of what Waterman's invalid and unreliable report shows only reinforces the necessity of excluding it.

A. THIS CASE IS NEITHER *GROKSTER* NOR *NAPSTER*.

Defendants' Motion challenges Waterman's Report on the following grounds: (1) use of an invalid methodology; (2) reliance on categories of downloaded files "made up" by a nonexpert attorney; (3) "cherry-picking" files for inclusion; (4) failure to ascertain

[1] "Defendants' Motion" refers to Memorandum of Law in Support of Defendants' Motion to Exclude Plaintiffs' Proffered Expert Summary Judgment Evidence from the Depositions and Reports of Ellis Horowitz, Ph.D. and Richard P. Waterman, Ph.D.

whether protocol was implemented properly; (5) invalid sampling frame; and (6) no expertise required to calculate percentages based on categorization of files by nonexpert attorney. Plaintiffs' primary response is that Waterman's protocol and report are "very similar to the methodology used in studies conducted by Dr. Ingram Olkin in both *Grokster* and *Napster*." Ps' Resp. at 4. In fact, Plaintiffs repeat their "that's how we did it in *Grokster* and *Napster*" refrain at least 11 times. *See id.* at 1, 2, 4, n.4, 9 ("[s]imilar protocols were relied on by the *Grokster* and *Napster* courts" **and** "[v]irtually identical categories were used to classify authorization status of the files in *Napster* and *Grokster*"), 10-11, 11, n. 20, 16, and n. 36.

Plaintiffs, however, miss the mark, as this case is neither *Grokster* nor *Napster*, and Dr. Waterman is not Dr. Olkin.[2] And despite surface similarities between LimeWire and the P2P applications at issue in those cases, LimeWire differs from them in important aspects.[3] Importantly, Dr. Olkin's report and testimony were not challenged in those cases.[4] Plaintiffs concede as much. *See id.* at 10-11 (arguing that "in *Napster*, the data collected by the expert statistician was classified by 'anti-piracy counsel for the RIAA', and was ***simply accepted*** by the court.") (emphasis added). In fact, in *Grokster*, the district court on remand ***expressly denied*** defendant StreamCast's Rule 56(f) request to

[2] Plaintiffs passing comment that defense expert Gribble found an analysis like Waterman's to be "doable" is incorrect and should be ignored. Gribble's study of years ago was very different from Waterman's. To be sure, if they were the same, there is no doubt that it would be the centerpiece of Plaintiffs' response.

[3] Napster's architecture was centralized in that all user search requests were funneled through Napster's servers. In order for Napster to fulfill its sole purpose of locating and downloading mp3 files, users had to log in to Napster's servers giving Napster absolute knowledge and perfect control. Moreover, as detailed extensively in LW's Motion for Summary Judgment and LW's Response to Plaintiffs' Motion for Summary Judgment, LimeWire has a great deal of functionality not seen with Napster or Grokster.

[4] *Napster* was decided in the early stages of the litigation on the plaintiffs' motion for a preliminary injunction. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000). Similarly, *Grokster* was decided on a motion for summary judgment. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 927 (2005). Presumably, had those cases proceeded to trial, the defendants would have challenged Dr. Olkin's methodology via a *Daubert* motion or vigorous cross-examination.

depose Dr. Olkin. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 993 (C.D. Cal. 2006). Thus, Plaintiffs' assertion that Waterman's Report is based on a methodology similar to "that used and ***approved*** in *Grokster*" (Ps' Resp. at 1 (emphasis added)), is at best an overstatement, and at worst, a misstatement.[5]

B. WATERMAN'S PROTOCOL WAS A COLLABORATIVE EFFORT.

Plaintiffs do not dispute, and in fact defend, the fact that Waterman's protocol was a collaborative effort. *See* Ps' Resp. at 7-8. Yet while Plaintiffs contend that "the statistical decisions were made by [Waterman] alone," they fail to shed any light on what those decisions were. *Id.* at 7. Plaintiffs claim it is "plainly not true" that their counsel drafted Waterman's Report, (Ps' Resp. at 8), but offer no explanation for the remarkable similarities between it and the protocol that Plaintiffs' counsel sent to Bogle, the implementer, approximately one year prior to the date on which Waterman first laid eyes on "his" report at Plaintiffs' counsel's offices. *See* Ds' Mot. at 8. Glossing over that, Plaintiffs argue that under Rule 26, counsel is not precluded from providing assistance to experts in preparing their reports. Ps' Resp. at 8. True, but where the expert plays no apparent role in drafting his report, counsel has gone beyond "providing assistance." Rule 26 "'does not contemplate blanket adoption of reports prepared by counsel or others.'" *Stein v. Foamex Int'l, Inc.*, No. CIV. A. 00-2356, 2001 WL 936566, at *5 (E.D. Pa. Aug. 15, 2001) (finding expert's affidavit violated Rule 26) (citation omitted).

[5] To the extent Plaintiffs' "that's what we did in *Napster* and *Grokster*" position is a legitimate legal argument, which it is decidedly not, absent an express finding by those courts that Dr. Olkin was qualified under Rule 702 and that the P2P applications at issue were identical to LimeWire, Dr. Olkin's declaration in those cases has no bearing on the present case. *See, e.g., Ling Nan Zheng v. Liberty Apparel Co., Inc.*, 556 F. Supp. 2d 284, 292 n.4 (S.D.N.Y. 2008) (noting that in another case involving the *same* device at issue in that case, that court *found* the expert was qualified under Rule 702 to serve as an expert and his testimony was relevant to an issue in the case).

Plaintiffs' counsel's role in developing Waterman's protocol and ghostwriting Waterman's Report, Bogle's unchecked implementation of the protocol, and German's legal analysis of the data generated by the protocol cannot fairly be considered "quibbles" with Waterman's methodology. Waterman's Report, based on an invalid and unreliable methodology, should be excluded.

C. THE CATEGORIES TO WHICH THE NONEXPERT ATTORNEY ASSIGNED DOWNLOADED FILES WERE "MADE UP" AND ARE MEANINGLESS

German "made up" the classifications into which he sorted the downloaded files. Ds' Mot. at 10. Plaintiffs dismiss this as "nonsense," arguing strenuously that "German did not 'make up' categories." Ps' Resp. at 9. But these were German's ***own*** words:

> Q: Has anyone else verified your categories, your categorization of each file?
> A: Well, I told you before that lawyers at Cravath collected some backup information that confirmed my analsyis.
> Q. Confirmed what you believed to be the correct classification, correct?
> A. Well, **I mean I made up the classifications**, right? I told you in paragraph 13 what my classifications are, so I'm telling you, you know, it's a fact that these files are -- fall into these categories.
> Q. Okay. Has anybody -- *has anybody examined each of your classifications* and decided -- and agreed that those are the exact -- that those are the classifications?
> A. **I have no idea.**
> Q. Okay.
> A. **I did**.
> Q. All right. *Has anybody else done that*?
> A. **I don't know**.
> Q. *Has any court ruled that you're correct in each of your classifications*?
> A. **I don't think so**.
> Q. *Has any expert on copyright law and infringement, and categorization of files examined these* and looked at them and said yes, Mr. German, you've correctly identified each of those?
>
> * * * * * *
>
> A. **I have no idea**.

German Depo. at 72-73. Not that it matters, but German did not testify that these were "virtually identical" to categories used in *Napster* and *Grokster*. *See* Ps' Resp. at 9-10. German testified plainly and arrogantly that he "made up" the categories into which he attempted to sort the downloaded files.

Plaintiffs sidestep the fact that German is an attorney and his analysis of downloaded files was a legal one, arguing "[n]either Dr. Waterman nor Mr. German offers opinions on inducement or contribution to infringement." *Id.* at 11. Defendants do not claim German offered a legal opinion on that issue. Rather, it was German's determination of whether a particular file was infringing that called for a legal—not factual—determination. Ds' Mot. at n.8. Even Waterman agrees: "The nuances between types of infringement were a legal decision." Waterman Depo. at 188:2-3. Plaintiffs studiously avoided designating German as an expert, and Plaintiffs' counsel represented German in order to have attorney-client privileged communications with him. They may not now funnel German's legal opinions through Waterman.

With respect to the "slivers" German classified as "highly likely infringing," Plaintiffs argue they were slices of larger copyrighted programs, then claim "these files could have been excluded as irrelevant–since nobody goes searching for these slivers."[6] Ps' Resp. at 13. Waterman's study, however, was supposed to analyze the authorization status of what was *available for download* on LimeWire and the status of files LimeWire users affirmatively seek to download, not to analyze files for which LimeWire users might want to search. Plaintiffs' suggestion that certain files such as these that were

[6] Plaintiffs argue that "it is an uncontestable legal proposition that portions of copyrighted works are protectable under copyright law." Ps' Resp. at 12. Plaintiffs do not cite any authority, however, for the proposition that if the portion of the copyrighted work at issue is a big blank screen, that is entitled to protection under the Copyright Act. Copyright law protects expression; blank screens are not expression.

purportedly available for download could simply be excluded is typical of Plaintiffs' impermissible cherry-picking and representative of the myriad problems with Waterman's protocol.[7] The only thing properly excluded is Waterman's Report.

D. WATERMAN AND THE NONEXPERT ATTORNEY "CHERRY-PICKED" FILES

Expert opinions are routinely excluded where they are based on a "cherry-picked" version of the facts or data. *Barber v. United Airlines, Inc.*, 17 F. App'x 433, 437 (7th Cir. 2001) ("cherry-pick[ing] . . . of facts fails to satisfy the scientific method and *Daubert*"); *see also Caraker v. Sandoz Pharms. Corp.*, 172 F. Supp. 2d 1046, 1049 (S.D. Ill. 2001) (excluding report where experts "selectively pluck[ed] favorable numbers . . . and herald[ed] them as crucial pieces of their . . . puzzle. . . . Their [methodology] . . . [based on] cherry-picked numbers [is] suspect").

Plaintiffs defend Waterman's exclusion of viruses, spoof, and spam files by arguing "[p]eople want to *avoid* viruses, spoofs and spam." Ps' Resp. at 13. Again—the stated purpose of the study was to analyze the authorization status of what was available for download on LimeWire and the status of files LimeWire users affirmatively seek to download, ***not*** to analyze files for which LimeWire users might want to search.[8]

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[7] Additionally, if these files were, as Plaintiffs' claim, a "quirk" of Waterman's protocol, and Waterman's protocol did not emulate a true LimeWire user experience, it fails *ab initio* as unreliable.

[8] Plaintiffs further claim that these files were irrelevant to the sample, the "relevant framework" of which was "one of 'substantial noninfringing use.'" Ps' Resp. at 14. Plaintiffs have pulled this "framework" out of thin air. Their only interest in designing this skewed study was to inflate the percent of infringing files available for download as high as possible. *See id.* at 17 ("the purpose of the study was to assess *percentages of infringing content* offered") (emphasis added). Then, after the cherry-picking and the inflation were complete, Plaintiffs and Waterman compounded the problem. For Waterman's opinion allegedly related to the status of files LimeWire users affirmatively seek to download, Plaintiffs "offered" their limited group of files (of which they claim 92.7% were infringing files) for download and logged requests for files contained within that limited group, thereby skewing the results. It does not take a Wharton statistician to determine that if Plaintiffs offer a set of files they claim contain 92.7% infringing files, that the number of requests for infringing files would also be high. After all, if they claimed 100% of the files in the set being offered for download were infringing, 100% of the requests would have to be for claimed infringing files—that is all that is offered.

E. WATERMAN IS MERELY A MOUTHPIECE FOR THE LEGAL CONCLUSIONS OF NONEXPERTS

Waterman's conclusions, which do little more than repeat the numbers at which German arrived after classifying the downloaded files into his "made up" categories, will not aid the trier of fact to understand the evidence or determine a fact in issue—"anyone with a calculator could plug in German's classification numbers and arrive at the same unreliable percentages." Ds' Mot. at 21. Plaintiffs do not, and cannot, dispute this.[9]

Courts consistently exclude experts who serve as nothing more than a mouthpiece for the otherwise inadmissible hearsay conclusions of others.[10] For example, in ***Loeffel Steel Prods., Inc v. Delta Brands, Inc.,*** 556 F.Supp. 2d 794, 807 (N.D. Ill. 2005), the expert's damage model and calculation of economic loss violated Rule 703 because he "uncritically relied" on data the defendants supplied, and the expert and his assistants "were incapable of assessing the validity" of that data. Although Rule 702 "was intended to liberalize the rules relating to expert testimony, it was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Id*. at 808. "The problem, then, is that the expert is vouching for the truth of what another expert told him—he is merely that expert's spokesman. But, '[a] scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty. That would not be responsible science.'" *Id.* (citation omitted). As Judge Posner explained in *In re James Wilson Associates*, 965 F.2d 160, 173 (7th Cir. 1992):

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[9] Instead, Plaintiffs tout Waterman's credentials. *See* Ps' Resp. at 1, n.5. Defendants to do not dispute that Waterman is capable of performing basic arithmetic—with or without a calculator.

> If, for example, the expert witness (call him A) bases his opinion in part on a fact (call it X) that the parties lawyer told him, the lawyer cannot, in closing argument, tell the jury, "see we proved X through our expert witness, A."

Waterman did not analyze the results of the data collected via the protocol he purportedly devised in collaboration with Plaintiffs' counsel. He accepted German's analysis without question and advocated it as his own. The Court should reject Plaintiffs' attempt to slip into evidence the hearsay legal conclusions of a nonexpert through their mouthpiece Waterman.

F. WATERMAN'S SAMPLING FRAME IS FLAWED

Plaintiffs assert numerous arguments in response to Defendants' challenges to Waterman's sampling frame. In the end, Plaintiffs simply miss the point. Waterman claims he did not use a cluster sample, but instead used a random sample. As explained in detail in Defendants' Motion and the Mercurio Declaration, this is wrong—Waterman used a cluster technique to create a biased and invalid sampling frame, and then drew a random sample. This is an unacceptable methodology that does not yield a representative sample from which any valid conclusions can be drawn. Tacitly acknowledging this, Plaintiffs now backpedal, arguing that cluster sampling is perfectly valid. Indeed, sometimes it is, but it was not done here—Waterman drew a random sample from a sampling frame created by a cluster technique. Cluster sampling and random sampling are not synonymous, and the methods cannot be mixed. Waterman's protocol is invalid.

II. HOROWITZ'S REPORT AND TESTIMONY VIOLATE RULE 703.

Plaintiffs accuse LW of "conflat[ing] the analytical process with the *conclusions* that Dr. Horowitz drew" and "arguing that Dr. Horowitz's *conclusions* are excludable because they cannot be 'tested.'" Ps' Resp. at 22 (emphasis added). Plaintiffs'

accusations are misplaced. LW contests certain conclusions by Dr. Horowitz because they are outside the bounds of reasonableness and do not follow from the methodology he used to test the LimeWire software. *See In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 284–85 (E.D.N.Y. 2007) ("Unfounded extrapolations not supported by, or sufficiently related to, scientific data or expertise should be rejected").

First, while experts may make inferences based on their experiences, "if relying solely or primarily on experience, then the witness must explain how the experience leads to the conclusion reached, why the experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Sorto-Romero v. Delta Int'l Mach. Corp.*, No. 05-CV-5172 (SJF)(AKT), 2007 WL 2816191, at *9 (E.D.N.Y. Sept. 24, 2007). Horowitz's Report contains no such explanation, nor do Plaintiffs attempt to offer one, even though Plaintiffs argue that Horowitz relied primarily on his experience for his conclusions. Ps' Resp. at 21–22. Absent an explanation, Horowitz's statements are merely bald assertions with no basis for the Court to judge their reliability and are, therefore, inadmissible speculation and conjecture. *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 473 n.2 (S.D.N.Y. 2005) ("Expert testimony that is 'speculative or conjectural,' therefore, is inadmissible.").

Second, LW does not argue that Rule 703 prohibits experts from forming opinions based on facts outside of their personal knowledge. The rule does, however, require that when the facts or data relied upon are inadmissible, the proponent must show those facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences." FED. R. EVID. 703. In opining that other P2P networks have successfully implemented filtering, Horowitz relies on the declarations of

two witnesses from the *Grokster* case. *See* Horowitz Report at ¶¶ 104, 108. These declarations are clearly hearsay. *See Chamberlain v. Principi*, 247 Fed. App'x 251, 253–54 (2d Cir. 2007) (finding affidavits from another proceeding inadmissible hearsay); *see also Santos v. Murdock*, 243 F.3d 681, 683-84 (2d Cir. 2001). Because Horowitz's opinion is based on inadmissible evidence, Plaintiffs must show that the affidavits are "reasonably relied upon" by other computer scientists when measuring the success of a program; a showing Plaintiffs cannot and *did not* make.

Finally, the *Bilzerian* and *Mulder* cases discuss the permissibility of expert opinions that embrace ultimate issues or bear on the issue of intent, and the expert's qualifications to opine on such. *See United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (noting expert was qualified to discuss facts embracing ultimate issues of securities law); *United States v. Mulder*, 273 F.3d 91, 100–02 (2d Cir. 2001) (discussing expert's qualification to give testimony that "bore on the issues of intent"). Plaintiffs fail to show Horowitz's qualifications to offer opinions on these issues—even he said he was not qualified to make that judgment. *See* Horowitz Tr. 208:8–11 ("Q: Okay Do you believe it was [the software developer's] intent to make those changes to allow users to find unauthorized content easier? A: I really can't judge what his intent was.").

Horowitz lacks any experience that would qualify him to opine on the issues of LW's intent or the effectiveness of filtering, the primary issues for which Plaintiffs offer his testimony. At a minimum, Plaintiffs fail to explain how Horowitz's experience qualifies him to opine on such issues.

CONCLUSION

Defendants respectfully request that their Motion to Exclude be granted.

Dated: November 25, 2008.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing pleading was filed by means of the Court's ECF system on the 25th day of November, 2008. Accordingly, it is assumed that all counsel of record received notice of this filing from the ECF system. Lead counsel, listed below, will also receive a courtesy copy via email.

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