UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs, v. NOOR ALAUJAN, Defendant.	Civ. Act. No. 03-cv-11661-NG (LEAD DOCKET NUMBER)
SONY BMG MUSIC ENTERTAINMENT, et al., Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

MOTION TO EXCLUDE TESTIMONY OF DR. J.A. POUWELSE

INTRODUCTION AND BACKGROUND

Defendant has designated Dr. J. A. Pouwelse as an expert witness in this case and has produced three reports from Dr. Pouwelse.[1] Defendant offers Dr. Pouwelse to provide testimony concerning peer-to-peer ("P2P") technology, the economic and market impacts of file sharing, and certain purported business models regarding record sales and copyright litigation. While Dr. Pouwelse is a staunch promoter of P2P technologies, under no definition of the term can he

[1] The first report dated March 27, 2009 (**Exhibit A** hereto) stated no actual opinions and failed to satisfy the requirements of Rule 26(a)(2). Defendant supplemented this report on May 11, 2009 (**Exhibit B** hereto) and again on June 22, 2009 (**Exhibit C** hereto). A copy of Dr. Pouwelse's Curricula Vita is attached as **Exhibit D**.

be considered an "expert" on the wide variety of economic and business issues described in his reports. He has no education, training, or expertise in economics, market analysis, or business models. Indeed, during parts of his deposition, Dr. Pouwelse stated that he could not answer questions without consulting an Economics 101 textbook. His background is as a computer scientist. Therefore, Dr. Pouwelse is not qualified to testify as an expert on economic issues, market analysis, or business models, and he should not be permitted to do so under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 403.

In his report, Dr. Pouwelse seeks to offer opinions such as:

- "researchers" have found no "relation between illegal downloads and decreases in Audio CD sales," (Exhibit B at lines 112-114);
- MediaSentry "may be" involved in a so-called "accusation—payment-or-litigation" business model, (Exhibit B at lines 342-414);
- CD sales are in decline purportedly "due to technology progress and destructive business strategies," (Exhibit C at 2);
- "Digital alternatives to peer-to-peer file sharing became usable roughly in the 2006-2008 timeframe," (Exhibit C at 2); and
- "punitive lawsuits against noncommercial music fans are fruitless in stopping peer-to-peer file sharing," (Exhibit C at 3).

By his own admission, however, Dr. Pouwelse is not economist, has never done any independent study of any of these and other economic issues on which he would offer opinions, and is not qualified to do such studies. Because he has no education in the areas of economics, econometrics, or industrial organization, his opinions merely reflect his own personal views or the views of others that he has read, mostly on the Internet. The law does not permit such personal, unscientific, and unsupported views to be presented to the jury under the guise of "expert" testimony, and such testimony from Dr. Pouwelse must be excluded.

This is not a situation where the jury should be permitted to consider the strength or weight of the testimony; rather, this is an example of testimony that MUST be excluded under applicable law.[2]

ARGUMENT

A. Where a putative expert lacks the qualifications in the area in which he seeks to testify, the testimony must be excluded.

The Supreme Court has set an unequivocal bar that expert testimony must be excluded absent strict intellectual rigor. The issue is not whether the proffered expert has sufficient credentials; rather, "[t]he trial court [must] decide whether [the] particular expert [has] sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (quotation omitted). The trial court must act as the gatekeeper for all types of expert testimony. *Kumho Tire*, 526 U.S. at 141. All proffered expert testimony is governed by the Federal Rule of Evidence 702 reliability requirements. *Id.* at 149. The party offering expert witness evidence bears the burden of establishing that the expert is qualified to give the opinion and that the opinion to be offered is both reliable and relevant within the meaning of Rule 702. *Cook v. CTC Communs. Corp.*, 2007 U.S. Dist. LEXIS 80849, at *5 (D.N.H. Oct. 15, 2007).

"In performing its gatekeeping function, a court must consider whether the putative expert is qualified by knowledge, skill, experience, training, or education." *Prado Alvarez v. R.J. Reynolds Tobacco Co.*, 405 F.3d 36, 40 (1st Cir. 2005) (internal quotation omitted); *see also Daubert*, 509 U.S. at 592 ("relaxation of the usual requirement of first-hand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge

[2] While this motion does not concern Dr. Pouwelse's opinions regarding P2P technology, or his criticisms of MediaSentry and of Plaintiffs' expert Dr. Doug Jacobson, Plaintiffs reserve all rights to object to any opinions that Dr. Pouwelse may offer at trial on these topics.

and experience of his discipline"). It is "beyond debate" that a testifying expert "should have achieved a meaningful threshold of expertise" before being allowed to offer opinions to a jury. *Prado Alvarez*, 405 F.3d at 40.

Moreover, that "a witness qualifies as an expert with respect to certain matters or areas of knowledge, [does not mean] that he or she is qualified to express expert opinions as to other fields." *Levin v. Dalva Bros.*, 459 F.3d 68, 78 (1st Cir. 2006) (citing *Nimely v. City of New York*, 414 F.3d 381, 399 n.13 (2d Cir. 2005)). "[A]n expert must have specific knowledge, not mere capacity to acquire knowledge." *Silva v. American Airlines*, 960 F. Supp. 528, 531 (D.P.R. 1997).

Where a putative expert lacks the qualifications in the area in which he seeks to testify, the testimony must be excluded. *Prado Alvarez*, 405 F.3d at 40 ("to grant the status of expert to one . . . with such a variegated and unfocused record of scholarly efforts and minimal attention to analysis, would threaten the effective functioning of the gatekeeper process"); *Levin*, 459 F.3d at 78 ("a district court acts properly by excluding opinions that are beyond the witness's expertise"); *Apostol v. United States*, 838 F.2d 595, 598 (1st Cir. 1988) (proponent's failure to present evidence of proposed expert witness's qualifications requires exclusion); *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 724 (7th Cir. 1999) (reversible error for district court to allow a metallurgy professor to testify on toxicology or health effects of manganese because "these conclusions were rooted in medical knowledge and training which [expert witness] did not have"); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 969-970 (10th Cir. 2001) (board-certified orthopedic surgeon was not qualified to testify about intramedullary nailing since she was not familiar with that surgical technique); *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224, 227 (5th Cir. 2007) (polymer scientist who had never been employed in any

capacity dealing with tire design or manufacture, and who had never published any articles about tires or examined a tire professionally before the litigation, held not qualified to testify as tire expert in products liability action); *Thomas J. Kline, Inc., v. Lorillard, Inc.*, 878 F.2d 791, 799-800 (4th Cir. 1989) (abuse of discretion to permit witness with M.B.A., but with no training or experience in antitrust or making credit decisions, to give expert opinion regarding credit practices); *Silva*, 960 F. Supp. at 531 (holding that civil engineer was not qualified to testify about aircraft interior safety hazards because he had never tested or studied those hazards and, therefore, such testimony was beyond witness's expertise).

B. Dr. Pouwelse has no expertise in economics and is not qualified to offer opinions on any topics concerning the economic and market impacts of illegal file sharing, the reasons for the decline in CD sales, or the market impact of copyright litigation.

Dr. Pouwelse is a computer scientist and advocate for the use of P2P technology. His education is in computer science, in the areas of computer resource management and TCP/IP communication protocol on the Internet. (Pouwelse Dep. at 93:5 to 93:8, 94:5 to 95:9, 95:1 to 95:3, excerpts attached as **Exhibit E**.)

Dr. Pouwelse is not an economist. (*Id.* at 167:15 to 167:19, 181:2 to 181:19.) He has taken no course work in economics, econometrics, or microeconomics either at the masters or doctoral level. (*Id.* at 117:5 to 118:7.) Nor has he taken any course work in industrial organization at either the masters or doctoral level. (*Id.* at 118: to 118:11.) He has no degrees other than his computer science degrees. (*Id.* at 300:13 to 300:20.)[3]

To form his opinions regarding the impact of illegal file sharing on the market for album sales, Dr. Pouwelse references two studies that he read. (*Id.* at 125:9 to 125:17, 126:4 to 127:2.)

[3] While Dr. Pouwelse has worked with economists in the past, he provided the only technical aspects regarding P2P technology and the economists provided the economic aspects of the research. (*Id.* 119:3 to 119:13.)

He was not involved in these studies and has not reviewed the underlying data. (*Id.* at 135:18 to 135:19, 136:4 to 136:6.) His knowledge of economics is so limited that he could not explain the meaning of basic economic concepts involved in these studies, such as "pooled regression," "simultaneity," and "instrumental variables." (*Id.* at 137:7 to 137:25, 148:16 to 149:11.) In fact, he said he would need to look at his "Economics 101" book before he could describe these basic economic terms. (*Id.*) He has done no independent study regarding the effects of file sharing and admits that, "not being an economist," he is "not qualified" to do so. (*Id.* at 181:2 to 181:19.) Indeed, when asked to describe how he would rate the quality of a particular economic paper or study, the only factor Dr. Pouwelse listed was the paper's apparent "popularity on the Internet." (*Id.* at 173:25 to 174:13.)

To form his opinion that CD sales are in terminal decline "due to technology progress and destructive business strategies," Dr. Pouwelse claims to have relied on unspecified "various studies" and a "lifetime of reading." (*Id.* at 304:1 to 306:10.) He admits that he has done no independent study of this issue. (*Id.*) Nor is he qualified to do an economic analysis regarding the reason for the decline in CD sales. (*Id.* at 181:2 to 181:19.)

For all of these reasons, Dr. Pouwelse is not qualified to offer opinions on any topics concerning the economic and market impacts of illegal file sharing, the reasons for decline in CD sales, or the market impact of copyright litigation on P2P file sharing, and he should not be permitted to present such testimony to the jury. *Prado Alvarez*, 405 F.3d at 40 (holding that a testifying expert must have "a meaningful threshold of expertise" before being allowed to offer opinions to a jury).

C. Dr. Pouwelse is not an expert in business models and must not be allowed to offer testimony concerning business models related to record sales or copyright litigation.

Defendant also seeks to have Dr. Pouwelse testify concerning a host of issues related to certain purported "business models." Dr. Pouwelse claims, for example, that MediaSentry "may be" involved in a "accusation—payment-or-litigation" business model, where companies purportedly turn file sharing users into a revenue stream (Exhibit B at lines 343-343), and that the record companies have engaged in "destructive business strategies" and operate an "outdated business model" (Exhibit C at 2.) Again, Dr. Pouwelse has no degrees other than his degrees in computer science and is not qualified to offer opinions on alleged "business models," which opinions, as demonstrated below, reflect nothing more than his own personal views and significant bias against the record companies.

First, Dr. Pouwelse's report demonstrates that he bases these "business model" opinions on nothing more than his experience as "a file sharing system developer," a "close following of the literature," and his "interaction and personal discussions" with others. (Exhibit C at 3-4). Not one of Dr. Pouwelse's reports references a single academic study by him concerning any of the so called business models he seeks to present to the jury, and Dr. Pouwelse concedes that he is "not a business model expert." (*Id.* at 282:13 to 282:22.)

Second, with respect to his opinion that MediaSentry "may be" involved in a "accusation—payment-or-litigation" business model, Dr. Pouwelse concedes that he made this term up after reading discussions in "various Internet forums," and that this business model has never been referred to in any academic journals. (*Id.* at 281:13 to 282:22.) This accusation against MediaSentry also rests on a misrepresentation of the evidence in this case. Dr. Pouwelse opines that one of the factors supporting this so-called business model is MediaSentry's purported failure to validate the files found a P2P user's computer. (*Id.* at 288:3 to 288:10.)

Dr. Pouwelse ignores evidence produced to Defendant that MediaSentry downloaded actual copies of the songs Defendant was distributing, which match the legitimate copies sold by Plaintiffs. Remarkably, Dr. Pouwelse did not even "request[]" if such song files existed in this case before making his accusation against MediaSentry, and ignored or overlooked the discussion of these downloaded music files in the report of Plaintiffs' expert Dr. Doug Jacobson. (*Id.* at 288:23 to 289:12.)[4] Thus, not only does Dr. Pouwelse have no expertise to discuss this so-called business model he invented, but his opinion is not reliable because it misstates and ignores facts in the record. *See Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 757 (8th Cir. 2006) ("Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case."); *Daubert*, 509 U.S. at 589-90 (scientific knowledge "connotes more than subjective belief or unsupported speculation"); Fed. R. Evid. 702 advisory committee's note (2000) ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted.").

Likewise, Dr. Pouwelse's opinion that CD companies are trying to save an "outdated business model" with legal claims against minors is based on nothing more than his own personal views formed after what Dr. Pouwelse calls "a lifetime of reading and the evolving of the media business." (*Id.* at 306:11 to 307:9.) This opinion has no scientific or factual basis whatsoever.

Finally, to support his business model opinions, Dr. Pouwelse has claimed that digital alternatives to peer-to-peer file sharing did not become "usable" until "roughly in the 2006-2008

[4] Information regarding the music files downloaded by MediaSentry from Defendant is listed in paragraphs 23-24 of Dr. Jacobson's report, a current version of which is attached as Exhibit B to the Appendix to Plaintiffs' Motion for Summary Judgment Re Fair Use. (*See* Doc. No. 875.) This report, including the information regarding the downloaded files, was initially produced to Defendant on October 7, 2008.

timeframe." (Exhibit C at 2.) This claim, however, is based on nothing more than "Internet conversations and press coverage" (Pouwelse Dep. at 310:20 to 312:17), and conveniently ignores basic facts such as, for example, that iTunes launched in April 2003 and sold 3 million songs in its first month (*id.* at 312:23 to 313:3). Indeed, the iTunes success story happened three years before Dr. Pouwelse's patently unscientific date range of "roughly in the 2006-2008 timeframe." This claim in Dr. Pouwelse's report, like all of his purported "business model" opinions, reflects only his own personal views and biases against the record companies and is not based on any "independent" or scientific study. (*Id.* at 311:3 to 311:8.)

For all of these reasons, Dr. Pouwelse is not qualified to offer opinions on any topics concerning business models related to record sales or copyright litigation and he should not be permitted to present such testimony to the jury. *See Prado Alvarez*, 405 F.3d at 40.

D. Dr. Pouwelse's testimony should be excluded under Rule 403 because any relevance is substantially outweighed by the danger of unfair prejudice.

Rule 403 provides for the exclusion of testimony when its relevance is substantially outweighed by its potential prejudice:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

Fed. R. Evid. 403; *see also United States v. Garcia-Morales*, 382 F.3d 12, 19 (1st Cir. 2004) (holding that where the probative value of expert testimony, which is otherwise admissible, is outweighed by a risk of unfair prejudice, the testimony may be excluded under Federal Rule of Evidence 403). The Rule 403 balancing process is especially important in the context of expert testimony. "Because 'expert evidence can be both powerful and quite misleading,' a trial court must take special care to weigh the risk of unfair prejudice against the probative value of the evidence under Fed. R. Evid. 403." *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 884 (8th Cir.

1998) (citing *Daubert*, 509 U.S. at 595). A Court should exclude expert evidence which is "uncertain and speculative and would confuse rather than enlighten the jury." *United States v. Curnew*, 788 F.2d 1335, 1337 (8th Cir. 1986).

In jury trials, the danger of prejudice resulting from the presentation of expert testimony is significant, because of the potential for the jury to automatically accept an expert witness's testimony. *Jinro America v. Secure Investments, Inc.*, 266 F.3d 993, 1005-07 (9th Cir. 2001) (district court abused its discretion in admitting defense expert's unreliable, inflammatory, ethnically-biased testimony, given likelihood that statements as a purported expert would carry special weight with the jury); *Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 613 (N.D. Ind. 1997) (professional engineer's expert testimony excluded because, while it was relevant and sufficiently reliable to warrant admission into evidence, proponent did not show sufficient reliability to overcome potential for prejudice).

Here, the probative value of Dr. Pouwelse's testimony concerning economic and business matters is nil because Dr. Pouwelse has no expertise in these areas and because his opinions reflect only his own personal views devoid of any competent scientific analysis. Because Dr. Pouwelse's testimony regarding economic and business issues has no scientific foundation, the dangers of unfair prejudice to Plaintiffs, of confusing of the issues, and of misleading the jury substantially outweigh any probative value and his testimony should be excluded.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court exclude the testimony and opinions of Dr. J. A. Pouwelse concerning the economic and market impacts of illegal file sharing, the reasons the for decline in CD sales, the market impact of copyright litigation, and alleged business models related to record sales and copyright litigation.

Respectfully submitted this 16th day of July, 2009.

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS LLC; and UMG RECORDINGS, INC.

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