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18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,
23 Plaintiffs,
24 v.
25 SAP AG, et al.,
26 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO
EXCLUDE EXPERT TESTIMONY
OF PROFESSOR DOUGLAS G.
LICHTMAN**

1 Having considered Defendants' Motion to Exclude Expert Testimony of Douglas G.
2 Lichtman, the supporting Declaration of Tharan Gregory Lanier, and exhibits thereto, which were
3 filed with the Court on August 19, 2010:

4 IT IS HEREBY ORDERED THAT: Defendants' motion is GRANTED.

5 **RULE 702 OF THE FEDERAL RULES OF EVIDENCE**

6 Defendants argue that the Court should exclude the expert testimony of Plaintiffs' expert,
7 Professor Douglas G. Lichtman, because it consists of improper legal opinion. Rule 702 of the
8 Federal Rules of Evidence ("Rule 702") "permits experts qualified by 'knowledge, experience,
9 skill, expertise, training, or education' to testify 'in the form of an opinion or otherwise' based on
10 'scientific, technical, or other specialized knowledge' if that knowledge will 'assist the trier of
11 fact to understand the evidence or to determine a fact in issue.'" *Salinas v. Amteck of Ky., Inc.*,
12 682 F. Supp. 2d 1022, 1029 (N.D. Cal. 2010) (Hamilton, J.) (quoting Fed. R. Evid. 702). The
13 proponent of expert testimony bears the burden to establish "by a preponderance of the evidence
14 that the admissibility requirements are met." *Id.* at 1029; *see also Pierson v. Ford Motor Co.*, No.
15 C 06-6503 PJH, 2009 U.S. Dist. LEXIS 65297, at *7 (N.D. Cal. Apr. 16, 2009) (Hamilton, J.);
16 *Redfoot v. B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 U.S. Dist. LEXIS 40002, at *11 (N.D.
17 Cal. June 1, 2007) (Hamilton, J.). Under Rule 702, the court is obliged to act as a "gatekeeper" to
18 ensure that expert testimony is both reliable and relevant to the issues being tried. *Salinas*, 682 F.
19 Supp. 2d at 1029-30 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993));
20 *Pierson*, 2009 U.S. Dist. LEXIS 65297, at *7; *Redfoot*, 2007 U.S. Dist. LEXIS 40002, at *11-12.

21 Although Rule 702 contemplates admission of relevant, reliable, and qualified expert
22 testimony to assist the trier of fact understand the evidence or determine a fact in issue,
23 "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge."
24 *United States v. Brodie*, 858 F.2d 492, 497 (9th Cir. 1988) (affirming court's exclusion of expert
25 testimony regarding the law of trusts), *overruled on other grounds, United States v. Morales*, 108
26 F.3d 1031 (9th Cir. 1997); *Mannick v. Kaiser Found. Health Plan, Inc.*, No. C 03-5905 PJH,
27 2006 U.S. Dist. LEXIS 38430, at *49 (N.D. Cal. June 9, 2006) (Hamilton, J.). As a result, legal
28 opinions fall outside the parameters of permissible expert testimony. *See Pinal Creek Group v.*

1 *Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005). “The principle that legal
2 opinion evidence concerning the law is inadmissible is ‘so well-established that it is often deemed
3 a basic premise or assumption of evidence law—a kind of axiomatic principle.’” *Id.* (internal
4 citations omitted).

5 “Accordingly, federal courts typically prohibit lawyers, professors, and other experts from
6 interpreting the law for the court or from advising the court about how the law should apply to the
7 facts of a particular case.” *Id.*; *see also Mannick*, 2006 U.S. Dist. LEXIS 38430, at *49
8 (sustaining objections to expert testimony regarding whether public facilities were subject to and
9 complied with regulations under the Americans with Disabilities Act); *Specht v. Jensen*, 853 F.2d
10 805, 808 (10th Cir. 1988) (holding that testimony “which articulates and applies the relevant law .
11 . . . circumvents the [fact finder’s] decision-making function by telling it how to decide the case”).
12 Similarly, courts preclude such experts from testifying as to any legal conclusions drawn from
13 applying law to facts. *See Nationwide Trans. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058
14 (9th Cir. 2008) (affirming district court’s exclusion of expert opinion that repeatedly
15 characterized defendant’s conduct as “wrongful” or “intentional” under the law).

16 Relying on these black-letter principles, courts have rejected attempts to offer “experts”
17 on copyright law. *See Jonathan Browning, Inc. v. Venetian Casino Resort LLC*, No. C 07-03983
18 JSW, 2009 U.S. Dist. LEXIS 57665, *3-4 (N.D. Cal. June 18, 2009) (precluding expert from
19 testifying regarding copyrightability of light fixtures alleged to have been infringed); *Religious*
20 *Tech. Center v. Netcom On-Line Commc’n Servs., Inc.*, No. C-95-20091 RMW, 1997 WL
21 34605244, at *8 (N.D. Cal. Jan. 6, 1997) (striking declarations of copyright “experts,” noting that
22 “[i]t is well-established that interpretations and explanations of the law are not proper subjects of
23 expert testimony”); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-07654 HLH (VBKx),
24 2003 WL 25781901 at *1 (C.D. Cal. Feb. 10, 2003) (granting motion to exclude law professor’s
25 expert testimony on whether website content was subject to copyright protection and whether
26 copying of that content constituted “fair use”).

27 Lichtman, a 1994 graduate of Duke University and 1997 graduate of Yale Law School,
28 teaches intellectual property courses at the Law School at the University of California, Los

1 Angeles. In his capacity as a lawyer, Lichtman also represents clients in copyright infringement
2 matters. In a previous matter, Lichtman's proposed expert testimony was excluded because it
3 provided nothing more than improper legal opinion and argument. *See Charter Nat'l Bank v.*
4 *Charter One Fin., Inc.*, No. 01 C 0905, 2001 U.S. Dist. LEXIS 13919, at *18-20 (N.D. Ill. Aug.
5 31, 2001). Here, Lichtman again attempts to opine on legal matters and "advance[s] no
6 arguments that could not have been presented to this court as legal argument in a brief or
7 memorandum." *Id.*, at *20. Throughout his report, Lichtman cites and recites excerpts from
8 numerous cases, statutes, and legal treatises. Lichtman opines on various principles of copyright
9 law, including those on copyright protection and liability under the Copyright Act. He also
10 advances legal argument regarding copyright damages. Lichtman further applies his articulation
11 of copyright law to various facts, including assumed facts, facts alleged in Plaintiffs' Fourth
12 Amended Complaint, and facts derived from conversations with various Oracle employees. In so
13 doing, Lichtman draws legal conclusions about the legality or illegality of Defendants' alleged
14 conduct. Lichtman's deposition testimony further confirms that he plans to offer legal opinion
15 testimony at trial. Because legal opinion, argument, and conclusions so pervade Lichtman's
16 proffered testimony, the Court excludes the entirety of his testimony under Rule 702.

RULE 403 OF THE FEDERAL RULES OF EVIDENCE

18 Defendants also argue that the Court should exclude Lichtman's testimony under Rule
19 403 of the Federal Rules of Evidence ("Rule 403") because it would waste time and cause unfair
20 prejudice. Rule 403 states that "evidence may be excluded if its probative value is substantially
21 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or
22 by considerations of undue delay, waste of time, or needless presentation of cumulative
23 evidence." Fed. R. Evid. 403; *see also Redfoot*, 2007 U.S. Dist. LEXIS 40002, at *14.

24 Testimony that does not help a jury understand the evidence or determine a fact in issue
25 "is properly excluded under Rule 702 and also Rule 403 as a waste of court time." *Kolesar v.*
26 *United Agri Prods., Inc.*, 412 F. Supp. 2d 686, 698 (W.D. Mich. 2006). Because Lichtman's
27 testimony consists entirely of legal opinion, by definition, it is not helpful to the jury. Lichtman
28 also claims no specialized knowledge of the facts in this case or expertise in any area beyond

1 copyright law. Although Lichtman purports to testify as a damages expert, he does not offer
 2 damages calculations. Rather, Plaintiffs' expert Paul K. Meyer plans to testify about Plaintiffs'
 3 damages claims. The jury has no need or use for Lichtman's opinions on the rationale behind
 4 copyright law's damages scheme.

5 In addition to being excludable under Rule 702, expert legal opinion testimony may be
 6 excluded under Rule 403 as unduly prejudicial. *See, e.g., SEC v. Leslie*, No. C 07-3444, 2010
 7 U.S. Dist. LEXIS 76826, at *25-27, 30 (N.D. Cal. July 29, 2010) (excluding pursuant to Rule 403
 8 portions of expert opinion regarding "legal concepts, the legal interpretation of case law and
 9 statutes, [and] whether specific conduct was fraudulent, intentional, or misleading in the legal
 10 sense," noting that the risk of undue prejudice from the expert's use of legal terminology "would
 11 substantially outweigh its minimal probative value"). The rationale behind prohibiting expert
 12 legal opinion is the fear that "the jury may believe the attorney-witness, who is presented to them
 13 imbued with all the mystique inherent in the title 'expert,' is more knowledgeable than the judge
 14 in a given area of law." *Specht*, 853 F.2d at 809 (finding that expert legal testimony should have
 15 been excluded because "[n]otwithstanding any subsequent disclaimers by the witness that the
 16 court's instructions would govern, a practical and experienced view of the trial world strongly
 17 suggests that the jury's deliberation was unduly prejudiced by the expert's testimony"). Allowing
 18 Lichtman to testify regarding his legal conclusions on copyright protection, liability, legality, and
 19 damages would impermissibly usurp the "distinct and exclusive province of the trial judge" and
 20 will unfairly prejudice Defendants. *Mannick*, 2006 U.S. Dist. LEXIS 38430, at *49.

21 For these reasons, the Court also excludes Lichtman's testimony under Rule 403 on the
 22 bases that it would waste court time and would unfairly prejudice Defendants.

23 **IT IS SO ORDERED.**

24
 25 DATED: _____

By: _____
 Hon. Phyllis J. Hamilton