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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 PAUL K. MEYER**

1 Having considered Defendants' Motion to Exclude Expert Testimony of Paul K. Meyer,
2 the supporting evidence filed with the Court on August 19, 2010, as well as the papers and
3 evidence filed by Plaintiffs in response thereto:

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

5 The damages issue in this case is the extent to which alleged copyright infringement by
6 TomorrowNow ("TN") caused actual harm to Plaintiffs. Plaintiff's damages expert, Paul Meyer,
7 purports to have calculated the value of use of TN's alleged infringement at over \$2 billion and
8 SAP's alleged infringer's profits at \$288 million. Meyer achieves these numbers by relying on
9 speculative assumptions, applying arbitrary, subjective, and inconsistent approaches, and ignoring
10 relevant facts and legal standards.

11 **COPYRIGHT DAMAGES STANDARDS**

12 Actual damages for copyright infringement are calculated "by the loss in the fair market
13 value of the copyright," which is determined by "the profits lost due to the infringement" or "the
14 value of the use of the copyrighted work to the infringer." *Polar Bear Prods., Inc. v. Timex*
15 *Corp.*, 384 F.3d 700, 708 (9th Cir. 2004). The Ninth Circuit has held that "in situations where the
16 infringer could have bargained with the copyright owner to purchase the right to use the work,"
17 value of use may be determined using a hypothetical license. *Jarvis v. K2 Inc.*, 486 F.3d 526, 533
18 (9th Cir. 2007). The value of use approach requires "an objective, not a subjective analysis," and
19 "[e]xcessively speculative" damage claims are to be rejected. *Id.* at 534; *see also Polar Bear*, 384
20 F.3d at 709 (hypothetical lost license fee may be awarded "provided the amount is not based on
21 undue speculation") (citation omitted); D.I. 628 (Order Denying Defendants' Motion for Partial
22 Summary Judgment), at 4-5. Plaintiffs' subjective view "has no place in this calculus." *Mackie*
23 *v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002). The value of use amount must be based on the
24 actual use of the copyrighted work made by the defendant. *Wall Data, Inc. v. Los Angeles Co.*
25 *Sheriff's Dept.*, 447 F.3d 769, 786 (9th Cir. 2006). This objective standard is incorporated into
26 the *Georgia-Pacific* analysis in the requirement that the willing buyer and willing seller be
27 considered "prudent" and acting "reasonably." *Georgia-Pacific Corp. v. United States Plywood*
28 *Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

1 Indirect profits are recoverable only “under certain conditions” because of their “more
2 attenuated nexus to the infringement.” *Mackie*, 296 F.3d at 914. Courts scrutinize such claims,
3 requiring that “a copyright holder must establish the existence of a causal link before indirect
4 profits damages can be recovered.” *Polar Bear*, 384 F.3d at 6. When an infringer’s profits “are
5 only remotely and speculatively attributable to infringement,” the claim should be denied. *Frank*
6 *Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 517 (9th Cir. 1985).

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

8 Rule 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist
9 the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an
10 expert by knowledge, skill, experience, training, or education, may testify thereto in the form of
11 an opinion or otherwise ...” Fed. R. Evid. 702. “The expert’s testimony must be based on
12 ‘sufficient facts or data,’ it must be ‘the product of reliable principles and methods,’ and the
13 expert must have ‘applied the principles and methods reliably to the facts of the case.’” *Redfoot*
14 *v. B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 U.S. Dist. LEXIS 40002, at *11 (N.D. Cal. Jun.
15 1, 2007) (quoting Rule 702). Thus, as gatekeeper, the trial court must determine whether the
16 testimony is “reliable and trustworthy” and “relevant to the task at hand.” *Id.* (citing *Daubert v.*
17 *Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

18 **DISCUSSION**

19 Mr. Meyer’s value of use calculations are based on inappropriate methods and rely on
20 undue speculation and inappropriate metrics. In addition, his failure to consider relevant evidence
21 and his reliance on the self-serving statements of Oracle’s executives regarding the threat that TN
22 posed make his opinion subjective, speculative, and unreliable. *See, e.g., Nilssen v. Motorola,*
23 *Inc.*, No. 93 C 6333, 1998 U.S. Dist. LEXIS 12882, at *40-41 (N. D. Ill. Aug. 14, 1998).

24 Moreover, Mr. Meyer’s reliance on evidence precluded by this Court’s prior orders render
25 the evidence not relevant to any fact in issue and therefore it should be excluded under Rule 702.
26 That was the purpose of the Court’s ruling that the evidence not be admitted through the back
27 door. *See* D.I. 482 (the Sanctions Order), D.I. 532 (the Adopting Order).

1 Meyer purports to determine a hypothetical license fee based on the 15 factors set forth in
 2 *Georgia-Pacific Corp.*, 318 F. Supp. at 1120. However, his analysis lacks the “intellectual rigor”
 3 required under Rule 702. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999). Rather,
 4 Meyer engages in a superficial, one-sided, and result oriented process that does not comport with
 5 the willing buyer/willing seller test.

6 Meyer calculates alleged infringer’s profits at \$288 million. This claim is for the *indirect*
 7 profits of SAP from selling its own software and services. Meyer’s infringer’s profits analysis is
 8 too rudimentary to pass muster under Rule 702. Meyer makes no genuine effort to establish a
 9 causal link between TN’s allegedly infringing support services and SAP’s sales of its own
 10 software and services. Mr. Meyer’s opinion is not based on “sufficient facts or data,” as required
 11 by Rule 702. His opinion his unduly speculative and should be excluded. Fed. R. Evid. 702; *see*
 12 *also Mackie*, 296 F.3d at 914 (plaintiff failed to offer sufficient non-speculative evidence to create
 13 a triable issue of fact because plaintiff’s expert did not articulate a non-speculative correlation
 14 between the alleged infringement and alleged infringer’s profits: “In the absence of concrete
 15 evidence, [plaintiff’s theory] is no less speculative than [the court’s] effort [here] to enumerate
 16 even a relatively short list of the myriad factors that could influence an individual’s purchasing
 17 decisions.”).

18 For the foregoing reasons, the Court excludes Mr. Meyer’s testimony on value of use and
 19 infringer’s profits damages.

20 **IT IS SO ORDERED.**

21
 22 DATED: _____

By: _____
 Hon. Phyllis J. Hamilton