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16 Netbula, LLC

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN FRANCISCO DIVISION**

20 NETBULA, LLC, a Delaware limited
21 liability company,

22 Plaintiff,

23 v.

24 BINDVIEW DEVELOPMENT
25 CORPORATION, a Texas corporation;
26 SYMANTEC CORPORATION, a Delaware
27 corporation; ERIC J. PULASKI, an
28 individual; and DOES 1-10, inclusive,

Defendants.

) Case No. C-06-0711-MJJ-WDB

) **PLAINTIFF'S OPPOSITION TO**
) **DEFENDANTS' MOTION TO EXCLUDE**
) **TESTIMONY OF GREGORY T. KOVECSES**

) Date: September 25, 2007

) Time: 9:30 a.m.

) Dept.: Courtroom 11

) Judge: The Honorable Martin J. Jenkins

29 **INTRODUCTION**

30 Plaintiff's expert Greg Kovecses made two math errors in his expert report that he did not
31 catch until they were pointed out by Defendants at deposition -- he should not have made those
32 errors and his credibility suffers as a result. In addition, Mr. Kovecses relied upon his experience
33 and familiarity as a damage expert with the communications limitations inherent in networks. The
34 Defendants assert that Mr. Kovecses' math errors and his experience are grounds to exclude his

1 testimony. Defendants claim that Mr. Kovecses' analysis is "patently inaccurate,"¹ "utterly
 2 divorced from the facts of this case," "untethered to legal or factual support" with "methodological
 3 flaws too numerous to fully capture in a 25 page brief" and numbers that are "nonsensical" and
 4 "utterly implausible." Certainly if Defendants are correct, Defendants should have no difficulty
 5 destroying Mr. Kovecses' credibility before the trier of fact. Mr. Kovecses, an experienced
 6 damage expert with experience in evaluating damages in intellectual property matters, relied upon
 7 his extensive training to apply a methodology to estimate a reasonable royalty *where the infringing*
 8 *Defendants freely gave away Plaintiff's copyrighted software and authorized some of their largest*
 9 *customers to make as many copies of Plaintiff's copyrighted software as they wanted.* At the end
 10 of the day, Defendants do not like the result of their conduct and its economic implications. But
 11 the answer is not to exclude Plaintiff's damage expert. Notwithstanding Mr. Kovecses'
 12 mathematical errors, his experience will assist the trier of fact with the difficult question of
 13 determining a reasonable royalty in the absence of accurate record keeping by Defendants of the
 14 number of copies of Plaintiff's copyrighted software they allowed to be used by their customers.

15 **I. Mr. Kovecses' Report Sets Forth the Factual Basis and Methodology Relied**
 16 **Upon to Determine a Reasonable Royalty**

17 Plaintiff, as the proponent of Mr. Kovecses' testimony, bears the burden of establishing its
 18 admissibility. *Bourjaily v. United States*, 483 U.S. 171, 176-76 (1988). Mr. Kovecses in his report
 19 cites the well known 15 step *Georgia Pacific* methodology he used in arriving at a reasonable
 20 royalty.² Defendants assert that the *Georgia Pacific* methodology applies to analyzing a monopoly
 21 under patent law rather than an expression of an idea under copyright law.³ However, as the Ninth
 22 Circuit has recognized, there are circumstances where it is appropriate to look at patent law
 23 "because of the historic kinship between patent law and copyright law". *Harris v. Emus Records*

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 25 ¹ Defendants' Notice of Motion and Motion to Exclude Testimony of Gregory T. Kovecses
 ("Motion") p. 1:19-21; p. 2:12; p. 2:28; p. 3:1-2; p. 20:18-19.

26 ² Exhibit 3, Declaration of Jedediah Wakefield in Support of Defendants' Motion to
 Exclude Testimony of Gregory T. Kovecses ("Kovecses Report") at ¶40-62. *Georgia Pacific v.*
 27 *United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

28 ³ Motion at p. 15:15-24.

1 Corporation, 734 F.2d 1329, 1333 (9th Cir. 1984) (dealing with a case of first impression in the
2 circuit and the lack of copyright precedent). Here, Mr. Kovecses was faced with the unusual
3 factual pattern where Defendants sold unlimited licenses so that its customers could make as many
4 copies of Plaintiff's software as they wanted.⁴ Instead, Defendants kept track of how many devices
5 a customer could use Plaintiff's software on.⁵ Under these circumstances, it is not surprising that
6 there is not another example of applying a valuation methodology to determine a reasonable
7 royalty. Where it is highly unlikely that other experts have had to face such an esoteric set of facts,
8 experts have been allowed some latitude. See *Smith v. Borden*, 188 F.R.D. 257, 261 (M.D. La.
9 1999) (highly unlikely that peers would have tested expert's theories on aerosol cans and battery
10 protection systems). Under these circumstances, borrowing from the time tested *Georgia Pacific*
11 methodology was a reasonable approach.

12 There is evidence that supports Mr. Kovecses' analysis under the *Georgia Pacific*
13 methodology for limitations upon the number of devices that could be reasonably scanned for
14 security vulnerabilities. Mr. Kovecses testified based upon his experience there were such
15 limitations based upon bandwidth, various security needs of different industries, as well as
16 geographic distribution.⁶ Dr. Yue also testified about his experience testing the Bindview product
17 and the time it took to scan three computers.⁷ Mr. Kovecses' experience and Dr. Yue's
18 examination of the product is consistent with internal Bindview documents describing the
19 performance of the Hackershield product.⁸

20 Mr. Stephenson, Bindview's witness, is very careful in his declaration to describe ways of
21 not running the program or timing the program's use to avoid the limitations of Bindview's
22

23 ⁴ Kovecses Report ¶25.

24 ⁵ *Id.* at ¶24.

25 ⁶ Ex. 3, 4, and 15 to Declaration Of Gary S. Fergus In Support Of Plaintiff's Opposition To
26 Defendants' Motion To Exclude Testimony Of Gregory T. Kovecses ("Fergus Decl.") p. 107:13-
108:11; p. 110:8-23; p. 210:23-211:24.

27 ⁷ Ex. 18 Fergus Decl. p. 198:10-202:24.

28 ⁸ Ex. 1 and 2, Fergus Decl. BV8637; BV48969.

1 product but he does not dispute that there are real limitations.⁹ Mr. Stephenson asserts that he is
 2 familiar with the Bindview product but even he does not state how many copies of Plaintiff's
 3 software were actually copied by Bindview customers with site licenses.¹⁰ If Defendants had kept
 4 track of this information, the expert's task would have been greatly simplified. Moreover,
 5 Bindview's own sales records establish that a number of customers that are not listed as having
 6 purchased a site license by Bindview nevertheless purchased 5 or 10 times or more than the
 7 number of individual copies of Plaintiffs' software described by Mr. Stephenson as typical.¹¹

8 The combination of this evidence provides a basis for Mr. Kovecses to use the information
 9 Bindview did collect with respect to licensing devices to estimate the reasonable royalty for
 10 licensing Plaintiff's software for use by Bindview customers. Mr. Stephenson and Defendants
 11 claim that he got the ratio wrong and that his adjustments are "ludicrous" and "utterly
 12 implausible."¹² But that is a question of fact for the jury to decide based upon the evidence.¹³ For
 13 example, in *Walker v. Soo Line Railroad*, 208 F.3d 581 (7th Cir. 2000), the court recognized the
 14 confidence in the jury system:

15 The Supreme Court in *Daubert* explained the factual underpinnings of expert testimony
 16 may be subject to counter attack.... "Vigorous cross-examination, presentation of contrary
 17 evidence, and careful instruction on the burden of proof are the traditional and appropriate
 18 means of attacking shaky but admissible evidence."

19 *Id.* at 586-567 quoting *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 596 (1998).

20 The Supreme Court in *Daubert* recognized that:

21 The enquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching
 22 subject is the scientific validity and thus the evidentiary relevance and reliability of the
 23 principles that underlie a proposed submission. The focus, of course, must be solely on
 24 principles and methodology, not on the conclusions that they generate.

25 *Daubert* at 594-95.

26 ⁹ Declaration of Bill Stephenson in Support of Defendants' Motion to Exclude Testimony
 27 of Gregory T. Kovecses ("Stephenson Decl.") at ¶10.

28 ¹⁰ Stephenson Decl. ¶12.

¹¹ Stephenson Decl. ¶10; Ex. 19 Fergus Decl. at BV00023; BV00024, BV00027; BV00028;
 BV00029; BV00031; BV00040; BV00042; BV00043; and BV00045

¹² Stephenson Decl. ¶10; Motion p. 1:22 to 2:5; p. 20:14-19.

¹³ Ex. 5, 6 and 7, Fergus Decl. p.115:19-116:12; p. 128:4-21; p. 139:1-7.

1 Mr. Kovecses testified at deposition that he relied upon the licensing information captured
 2 by Bindview with respect to the number of licensed devices and then determined the relationship
 3 between the number of such licenses and a reasonable license royalty.¹⁴ He then relied upon the
 4 last offer from Plaintiff as the price term to apply to the estimated number of licenses.¹⁵ In *Polar*
 5 *Bear Productions Inc. v. Timex Corp.*, 384 F.2d 700 (9th Cir. 2004), the court found that relying
 6 upon the last offer made by the plaintiff was an appropriate measure of damages:

7 Timex argues that Polar Bear cannot recover the amount of Sepp's estimate because Polar
 8 Bear never charged that rate. This argument is curious. The \$37,500 price tag reflects the
 9 amount Polar Bear actually quoted to Timex. Instead of paying the fee, Timex used Polar
 10 Bear's copyrighted footage without authorization. Having taken the copyrighted material,
 11 Timex is in no better position to haggle over the license fee than an ordinary thief . . .
 12 *Id.* at 709. Here, Mr. Kovecses reduced the amount of the final offer and was conservative.¹⁶

13 Defendants also challenge the application of the *Georgia Pacific* methodology because Mr.
 14 Kovecses did not address the profitability of the Netbula LLC product as compared to his
 15 reasonable royalty calculation.¹⁷ The fact that Defendants had as their customers some of the
 16 largest corporations in the world and offered unlimited use of Plaintiffs' product to those
 17 corporations is not Plaintiff's fault.¹⁸ Again, this is a factor that Defendants can assert at trial that
 18 can undermine Mr. Kovecses' credibility. But it does not disqualify his testimony.

19 Because Defendants did not keep records of how many copies of Plaintiff's software its
 20 customers used, the jury would be assisted by Mr. Kovecses in determining how a reasonable
 21 royalty should be calculated. Mr. Kovecses has substantial experience in calculating damages in
 22 intellectual property matters.¹⁹ Mr. Kovecses has a Masters in Business Administration with a
 23 concentration in accounting and finance from the University of Pittsburgh (Katz Graduate School

24 ¹⁴ Ex. 17, Fergus Decl. p. 261:14-262:13.

25 ¹⁵ Ex. 14 and 15, Fergus Decl. p. 206:12-207:12; p. 210:23-211:24.

26 ¹⁶ Kovecses Report, ¶60 and ¶62.

27 ¹⁷ Motion at p. 16:3-27.

28 ¹⁸ See Ex. 19 Fergus Decl. BV00028-46.

¹⁹ Kovecses Report, ¶1-3, Attachment A.

1 of Business). In addition, he has provided opinions on damages involving intellectual property
2 matters while at Tucker Alan, Inc. and Coopers & Lybrand.

3 **II. Mr. Kovecses' Calculation of Gross Revenue Attempts to Account for Discounted**
4 **Sales in the Absence of Detailed Records in the Control of the Defendants.**

5 The Defendants are in the best position to introduce satisfactory evidence of the gross sales
6 of the infringing product. In *Fournier v. Erickson*, 242 F.Supp.2d 318 (S.D.N.Y. 2003), the court
7 was faced with a motion in limine to exclude plaintiff's evidence of gross profits. The court found
8 that:

9 Defendants did not supply direct evidence of Microsoft's sales or
10 net profits from its sales of Windows 2000....the Second Circuit
11 explained that the defendant's failure and refusal to produce the
12 most satisfactory evidence of sales-or absence of sales- leaves his
13 cause exposed to indirect and less definite and certain means of
14 proof... And where, as here, the defendant controls the most
satisfactory evidence of sales the plaintiff need only establish a
basis for a reasoned conclusion as to the extent of injury caused by
the deliberate and wrongful infringement.

15 *Id.* at 327-328 *citations omitted*. Here Mr. Kovecses found that the information provided by
16 Defendants was not satisfactory.²⁰ Because no satisfactory detailed accounting records were
17 provided but only summary level reports, Mr. Kovecses applied his experience to estimate
18 Defendants' gross revenues by less precise means.²¹

19 **CONCLUSION**

20 The imprecision of Mr. Kovecses' estimates of the reasonable royalty and Bindview's
21 gross revenues are directly attributable to Defendants' failure to keep satisfactory records of its
22 infringing activities. If Mr. Kovecses' conclusions are as outlandish as Defendants' claim, the
23 appropriate remedy is "vigorous cross examination". Plaintiff requests that Defendants' motion be
24 denied.

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26
27 ²⁰ Kovecses Report ¶¶18, 19, 20, 26, 27 and 28.

28 ²¹ Ex. 10, 11 and 12 to Fergus Decl. p.167:11-169:19; p. 176:7-19; p. 177:4-178:6.

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Dated: September 4, 2007

Fergus, A Law Firm

By 

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CERTIFICATE OF SERVICE

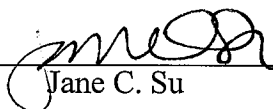
I, Jane C. Su, declare:

I am and was at the time of the service mentioned in this declaration, employed in the County of San Francisco, California. I am over the age of 18 years and not a party to the within action. My business address is Fergus, a law firm, 595 Market Street, Suite 2430, San Francisco, California 94105.

On September 4, 2007, I served a copy(ies) of **Plaintiff's Opposition to Defendants' Motion to Exclude Testimony of Gregory T. Kovescses** on the parties to this action by electronic mail as follows:

Vonnah Brillet	brilletlaw@yahoo.com
Albert Sieber	asieber@fenwick.com
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct, and that this declaration was executed on the 4th of September at San Francisco, California.


Jane C. Su