



The Franchise Valuations Reporter

404 Park Avenue South, 16th Floor, NY, NY 10016
O: 212.689.0400 / Bruce@FranchiseValuations.com

Volume 2, Issue 4 – April 2010

Our areas of expertise in the franchise, distribution and dealership context are:
Finance, accounting and tax;
Damages, valuations and expert testimony; and
Cyber-security and E-discovery of ESI (Electronically Stored Information)
We offer a free initial consultation. If any readers have questions, you are welcome to email or phone us and we will provide our best answer as quickly as possible.

Bruce S. Schaeffer, Editor
Bruce@FTRM.biz

If you do not want to receive this email reporter you may unsubscribe below.

ESI and E-Discovery: What is Metadata?

Query: When a litigant in a franchise dispute receives an electronically created document in hard copy, is there a way to figure out if it's been backdated?

Another question: When a plaintiff makes a normal litigation request for "all computer records that are associated with" the cause of action, does that include metadata?

The production of a hard copy of a document or electronically in a form, such as a portable document file (.pdf) or tagged image file format (.tiff), limits the information provided to the actual text or superficial content of the document. Only

when an electronic document is produced in its native form can metadata be disclosed.

What is metadata? It is secondary information not apparent on the face of a document that describes its characteristics, origins, and usage, for example, its name, size, creation date, date of last data modification, date of last data access, and date of last metadata modification. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded from all but the technically adept.

Nearly every electronic document contains metadata from which tremendous amounts of discovery information can be gleaned or overlooked depending on counsel's familiarity with ESI (Electronically Stored Information).

Metadata can be altered intentionally or inadvertently and can be extracted when native files are converted to image files. In addition, metadata can come from a variety of sources; it can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document (See Berman and Beerman, New York State E-Discovery Law, On "Metadata," *Instant Messaging and Bates Stamping*, NYLJ, Aug. 31, 2007, at 3, col 1).

There are three types of metadata (Spiro and Mogul, NYLJ, at 3, col 1; *see Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354-355 [SD NY]):

Substantive metadata, or application metadata, is information created by the software used to create the document, reflecting editing changes or comments, and instructions concerning fonts and spacing.

System metadata reflects automatically generated information about the creation or revision of a document. System metadata is most relevant if a document's authenticity is at issue, or there are questions as to who received a document or when it was received.

Embedded metadata is data that is inputted into a file by its creators or users, but that cannot be seen in the document's display.

Embedded metadata is often critical to understanding complex spreadsheets which lack an explanation of the formulas underlying the output in each cell.

The issue of whether or not metadata is discoverable is still an open question. A recent NY appellate decision, (*Matter of Irwin v Onondaga County Resource Recovery Agency*, Decided February 11, 2010) holding that it should be available was limited as precedent because it only applied to a Freedom of Information Law request. The Court specifically noted, "we do not address the issue concerning whether and when metadata of any nature is subject to disclosure under the [rules of civil procedure]."

Best Practice:

To protect themselves and their clients, counsel must engage E-Discovery experts – like the Chan brothers of Franchise Technology Risk Management – to explain the nuances of metadata and ESI in general to counsel, how it is stored, to what degree it can be recovered, how imaging of hard drives and devices should be done to preserve a litigation hold and how such images can then be further copied and annotated to provide a searchable database for discovery and trial.

In the area of e-discovery FTRM offers the rare combination of legal experience and extraordinary computer forensics expertise. We invite you to call us at 212.689.0400 or e-mail: Henry@FTRM.biz or Henfree@FTRM.biz.

Daubert Decisions

Substituted Experts

In an interesting twist, in a contest between two sandwich shop franchisors – Subway and Quiznos – Subway was permitted to substitute a new expert for its originally disclosed expert witness; however, the court ruled that the substitute’s testimony at trial would be limited to establishing the veracity and integrity of the original expert witness and the conclusions reached in the original witness’ expert report. The substitute’s opinion, which sought additional damages, would not be permitted in evidence; therefore, Quiznos’ motion seeking costs and expenses incurred to rebut the damages analysis of Subway’s original damages expert was denied. *Doctor's Associates, Inc., v. QIP Holder LLC and IFILM Corp.*, U.S. District Court, D. Connecticut, ¶14,289, (Dec. 23, 2009).

Daubert Challenge - Technical Expertise Not Required

A Pennsylvania federal district court held that technical expertise in the field of the business venture at issue is not necessarily required of an expert opining as to damages.

Defendants made a *Daubert* challenge claiming three grounds for disqualification: that the expert (1) misapplied the legal standard; (2) was not a technical expert; and (3) failed to supply a proper foundation in his report. At issue was a patent and the defendant asserted that the expert had to have scientific expertise in the field to calculate damages for infringement. But the court totally disagreed saying, “Frankly, given the relative frequency with which accountants are permitted to offer lost profits testimony in infringement suits . . . the defendant’s arguments are anemic.” None of the grounds for disqualification were accepted and the expert testimony was admitted. *Arlington Industries v. Bridgeport Fittings*, 2009 WL 2973472 (DC PA September 10, 2009).

Damages Decisions

Damages Experts – Don’t Go to Trial Without One

In the case of *Water Craft Management v. Mercury Marine*, WL 219487 (Louisiana July 21, 2009) an appellate court declined to award lost profits specifically noting that plaintiff’s failure to produce an expert witness was their major shortfall in the case.

Damages Experts – Credentials Count

In a ruling supporting one expert’s superior credentials, an Indiana appellate court was confronted with a dispute over the value of

an H&R Block franchise. The trial court’s decision was upheld based on the fact that one expert had valuation credentials, visited the business and interviewed the owners while the other was a CPA with no valuation credentials who did not visit the business or interview the owners. *In re Marriage of Geyer*, WL 2179938 (July 22, 2009).

Damages Experts – Credentials Count, But There Must Be More

However, an Indiana federal district court ruled that credentials alone were not enough: the expert had to do her job. Even though the expert was a CPA and credentialed business appraiser with more than 20 years' experience, the Court noted that she relied on only the following in determining a fair market lease rate: (1) an e-mail from the defendants, proposing to reduce the rent to \$65,000 per month; (2) an e-mail from the lease assignee, offering annual rent between \$500,000 and \$600,000; and (3) a Medicaid calculation of fair rental value of \$57,388, as of the breach date. The expert then concluded that the fair market monthly value of the lease was \$55,000.

The Court noted that the expert's analysis neglected the traditional three approaches to valuation and further noted that "nothing in the record suggested that those two proposals represented fair market value for the lease." The court was further dismayed by the fact that the expert did not provide relevant source data and figures by which another expert could replicate her analysis. The court noted: "An expert must offer good reason to think that her approach produces an accurate estimate using professional methods, and this estimate must be testable. Nothing in the record suggests that the plaintiff's expert relied on generally accepted methods used for valuing property and her opinion cannot be tested for accuracy." (emphasis added). *Lock Realty v. US Health*, 2009 WL 2970330 (DC IN September 14, 2009).

Valuation Decisions

Rules of Thumb

In a divorce case a court-appointed valuation expert determined the value of a closely-held laser-rental business relying on a rule of thumb that businesses in that industry were valued at 1.03 times the revenue. *In re Marriage of Gardea*, WL 1900540 (July 2, 2009).

Value of Licensing Rights

A Tennessee case, *Estate of Harlan Perry Howard*, WL 2184538 (Tenn. July 22, 2009), provided a methodology for valuing the prospective royalty stream from a song catalog by the country and western songwriter Harlan Perry Howard. The court enumerated the factors that should be considered when estimating the prospective income stream to be derived from licensing:

1. Stature of the artist
2. Number of songs in the catalog
3. Number of "standards" in the catalog
4. Number of performers who recorded the songs
5. The market in the industry
6. Popularity of the songs
7. Comparable sales, if any
8. The state of the economy
9. Predictions about the economy in the future
10. The existence of administrative rights or the competence of the administrator

These are not terribly different from the standard considerations in valuing any IP.

Valuation Discounts

The Internal Revenue Service has lost another decision in the area of valuation

discounts. In *Keller v. US* 2009 WL 260611 (DC TX August 20, 2009) a taxpayer's expert's value was accepted which included a 47.5% discount. The IRS valuation was

rejected because it violated several tenets of the hypothetical willing-buyer/willing-seller valuation principle including consideration of the true identities of the buyer and seller.

CyberCrime

MORE REASONS TO BE FRIGHTENED! Links to Recent Articles on Cyber-Crime

Swiss Data Theft Hits 24,000 HSBC Clients

<http://online.wsj.com/article/SB10001424052748703625304575114980945314778.html>

EFF Posts Documents Detailing Law Enforcement Collection of Data From Social Media Sites

<http://www.eff.org/deeplinks/2010/03/eff-posts-documents-detailing-law-enforcement>

Omar Ramos-Lopez, Laid Off Employee, Remotely Disables 100 Cars

http://www.huffingtonpost.com/2010/03/17/omar-ramoslopez-car-hacke_n_503163.html

IRS security faults leave taxpayer information at risk

<http://www.networkworld.com/community/node/58763>

Data Theft Hits 3.3 Million Borrowers

http://online.wsj.com/article/SB10001424052702304434404575150024174102954.html?mod=W_SJ_hps_sections_news

If you would like to unsubscribe, Click [HERE](#) to remove yourself from the mailing list.

If this is SPAM, please click [HERE](#) to report it to us.

The information provided in this newsletter is for informational purposes only and should not be construed as legal or expert advice which can only be obtained from appropriate professionals. Franchise Valuations, Ltd. and Franchise Technology Risk Management provide such expert advice on the topics addressed herein and can be reached at 404 Park Avenue South, New York, NY 10016. 212.689-0400 or www.franchisevaluations.com and www.ftm.biz