

EXHIBIT 5

For Opinion See [191 F.Supp.2d 1087](#) , [2001 Copr.L.Dec. P 28213](#) , [114 F.Supp.2d 896](#) , [2000 WL 1170106](#) ,
[2000 WL 35727155](#) , [2000 WL 1009483](#) , [2000 Copr.L.Dec. P 28072](#)

United States District Court, N.D. California,
San Francisco Division.
A&M RECORDS, INC., a corporation, et al., Plaintiffs,
v.
NAPSTER, INC., a corporation, and Does 1 through 100, Defendant;
Jerry Leiber, individually and doing business as Jerry Leiber Music, et al., Plaintiffs,
v.
Napster, Inc., Defendant.
Case Nos. C 99-5183 MHP (ADR), C-00-0074 MHP (ADR).
July 20, 2000.

Defendant Napster, Inc.'s Consolidated Response to Plaintiffs' Evidentiary Objections and Request to Exclude
Expert Reports of Tygar, Hall, Fader and Lessig

Hon. [Marilyn H. Patel](#).

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by the trier of fact, not by exclusion in toto. *Kennedy v. Collagen Corporation*, 161 F.3d 1226, 1230-1231 (9th Cir. 1998) (dispute as to faults in expert's use of a particular methodology goes to weight, not admissibility of the testimony, and is a matter for the fact finder to assess, based on all the evidence). This is especially true where the underlying facts are disputed, and where the import of any alleged error or omission can be evaluated through cross-examination. *Ruiz-Troche v. Pepsi-Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1998) (expert's conclusions "should be tested by the adversary process -- competing expert testimony and active cross-examination -- rather than excluded from [the fact finder] for fear [it] will not grasp its complexities or satisfactorily weigh its [alleged] inadequacies").

Third, although Plaintiffs have requested that entire expert reports be "excluded,"^[FN2] Plaintiffs have ignored major portions of these reports as to which they have no criticism. But while a single fundamental defect may undermine a single quantitative survey (*e.g.*, the statistics submitted by Dr. Jay or Mr. Fine), the reports challenged by Plaintiffs each address multiple independent issues, and each include qualitative judgments based on skill and experience, not merely flawed data calculations. *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 564 (11th Cir. 1998) (error to exclude expert's data and testimony in its entirety where only part of the expert's data was criticized).

FN2. See Lessig Obj. at 8:5-6, Hall Obj. at 13:19-22, Fader Obj. at 8:4-5. In the Tygar Objections, Plaintiffs request that the court exclude from evidence conclusions 1, 2, 3, and other unnumbered parts

of Tygar's report.

Plaintiffs' treatment of the impact of Napster use on the nascent digital download market is illustrative. While Plaintiffs (incorrectly) claim that Dr. Hall "misanalyzed" the impact of Napster on Plaintiffs' sale of CDs, even Plaintiffs do not allege any basis for the inadmissibility of Dr. Hall's analysis of the impact of Napster on *the market for digital downloads* (where he concludes that Napster is seeding the market and building infrastructure that Plaintiffs can utilize to their advantage).^[FN3] See Expert Report of Robert E. Hall ("Hall Report") at 12-19. Dr. Hall's discussion of these points rebuts in detail the conclusory views expressed by Plaintiffs' expert, Dr. David J. Teece. *Id.* Ironically, it is Dr. Teece who conceded that he considered virtually no facts in reaching his opinion that injury would occur in the digital download market. In writing his report, Dr. Teece knew none of Plaintiffs' plans for the digital download market; reviewed no data regarding actual use or impact of Napster on the marketplace; and was unaware of Plaintiffs' plans for pricing, encryption, standards-setting, download charges, or profiling users as a marketing tool in the download market. Deposition of David J. Teece, ("Teece Dep.") at 70:5-10, 78:15-19, 79:4-13; 80:24-81:6; 92:13-16; 85:12-17; 88:18-21; 89:21-25 (attached as Exhibit A to Declaration of Jennifer M. Lloyd Volume 1 ("Lloyd Decl. Vol. 1"). Further, Dr. Teece acknowledged that he never even considered the positive impact of Napster on assisting Plaintiffs by building a user base for digital downloading. *Id.* at 150:18-151:23. Plaintiffs contend that Dr. Teece's analysis -- untethered to any facts -- is admissible and should be believed, while Dr. Hall's critique -- based on myriad facts as well as economic theory -- should be excluded.

FN3. Plaintiffs do not attack Dr. Hall's critique of Dr. Teece as inadmissible, although in one footnote they claim Dr. Hall exaggerated Dr. Teece's position. Hall Obj. at 11, n.6.

In the end, Plaintiffs' attacks on Napster's experts honor the maxim that the best defense is a good offense. Plaintiffs hope that the defects in their proof maybe buried under myriad "objections" that are nothing more than lawyers' arguments going to weight, not admissibility. Certainly Plaintiffs have not stated any basis to exclude Napster's expert reports.^[FN4]

FN4. Indeed, before any exclusion order could occur, the Court should hold, and Napster hereby reaffirms its request, for an evidentiary hearing on the *Daubert* factors for all experts on both sides. *Daubert* (9th Cir.) (hearing required).

II. RESPONSE TO EVIDENTIARY OBJECTIONS AND REQUEST TO "EXCLUDE" PORTIONS OF TYGAR REPORT

Response to Plaintiffs' Preliminary Statement

Plaintiffs' "objections" to Dr. Tygar's Report are nothing more than an attempt to keep from the record pertinent evidence that Plaintiffs would rather the Court not hear. Their objections are unfounded and should be disregarded for the numerous reasons discussed below.

First, Plaintiffs engage in a series of misrepresentations concerning Dr. Tygar's deposition testimony and the contents of his report, repeatedly misquoting or omitting key portions. In addition, Plaintiffs misapply the legal standard for admissibility of expert testimony, paying mere lip service to the standards set forth in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150-53 (1999), and the principle that the Rule 702 inquiry is a flexible one that must be tied to the facts of a particular case and the kind of expert opinion offered. Plaintiffs criticize Dr. Tygar's opinions because he did not subject them to peer review, although peer review is neither required nor necessary for expert opinion based on the knowledge and experience of the expert. Plaintiffs also criticize

Dr. Tygar for allegedly failing to conduct any empirical analysis, but the analysis they claim is lacking relates to issues that are irrelevant to the case. Meanwhile, Plaintiffs disregard Dr. Tygar's actual empirical analysis, conveniently omitting any discussion of his conclusions whenever they conflict with Plaintiffs' theory of the case. Relying on bare attorney argument, unsupported by law or facts, Plaintiffs accuse Dr. Tygar of "bad science," yet apparently are unable to submit any expert testimony of their own to rebut most of the conclusions they dispute.

Response to Plaintiffs' Specific Objections

A. Dr. Tygar Properly Concluded That Napster Is Comparable To Other Consumer Products That Allow Users To Share Music.

Plaintiffs' objection that Dr. Tygar's first conclusion is not based on his expertise in computer science is unfounded. It is *because* Dr. Tygar is an expert in computer science that he can analyze Napster's Internet directory service, understand its structure and function, and explain to the Court how it is used by consumers. This is precisely the kind of expert testimony contemplated by Rule 702. The mere fact that Dr. Tygar explains this information by analogy to other commonly used devices does not, as Plaintiffs claim, impose on him an obligation to opine on the inner workings of these devices. Dr. Tygar does not state that these technologies are identical to Napster's, merely that they are comparable in use.^[FN5]

FN5. Plaintiffs' complaint that Dr. Tygar could not explain how these other devices allow users to search for content is irrelevant to Dr. Tygar's opinion and the issues in this case and, in any event, misrepresents Dr. Tygar's testimony. When asked if any of the technologies listed on page fifteen of his report allow users to search for content, Dr. Tygar immediately identified Tivo and Replay digital hard disk recorders. Dr. Tygar then discussed a technology called RDS that allows a user to search radio broadcasts for particular genres of music. Dr. Tygar then discussed multidisk CD players that allow a user to search for particular pieces of music. Plaintiffs' counsel did not pursue this line of questioning beyond that point. Tygar Dep., 148:16-152:25 (attached as Exhibit B to Lloyd Decl.) Thus, Plaintiffs' contention that Dr. Tygar could only point to certain technologies misrepresents his testimony.

Plaintiffs' contention that Dr. Tygar conceded at his deposition that his conclusions are limited to Napster's software is a gross misrepresentation of the record. Tygar Obj. at 2, 4. Dr. Tygar was asked such questions only in connection with a three-page section in his report called Summary of Conclusions. Dr. Tygar specifically qualified his testimony as limited to *portions of that section* and testified that the same does not apply to the remainder of his fifty-eight page report:

Q: Would it be fair to say that all of your conclusions with the exception of Conclusion No. 6 refer to the computer programs and not the company?

Mr. Woo: Objection; compound, overbroad.

A: *No.*

Q. Tell me what other conclusions refer to the company.

A. First, I want to make it clear that we're only talking about the material that I identified in my report as *the summary of the conclusions*. I use the word "Napster" elsewhere in the report as well. As I think I mentioned, for Conclusion 5 there is also an aspect for which that is reasonable to interpret that as referring to both the company and the computer programs. And you are correct in stating that the same duality exists for Conclusion 6.

Q. With the exception, then, of Conclusions Nos. 5 and 6 is it fair to say that all of your conclusions summarized here refer to the computer programs and not the company?

Mr. Woo: Same objections. *You're referring to only the summary section, not the other conclusions* he has come to throughout the rest of the report?

Mr. Synott: Those words were expressly in the question I asked.

...

A. Yes.

Tygar Dep., 87:21-89:8 (emphasis added). Plaintiffs' claims to the contrary, repeated throughout their papers, are disingenuous.

B. Dr. Tygar Properly Concluded That Napster Allows Users To Share MP3 Files.

Plaintiffs' objection to Dr. Tygar's second conclusion is limited to one paragraph in his report concerning section 512(a) of the Copyright Act. However, Dr. Tygar's second conclusion does not depend in any way on that paragraph. Thus, there is no basis for excluding Dr. Tygar's second conclusion, even if the Court were to accept Plaintiffs' arguments.

With respect to that paragraph, Plaintiffs again misrepresent Dr. Tygar's deposition testimony and mischaracterize the content of his report. Plaintiffs claim that Dr. Tygar's conclusion is “born of [his] disagreement with this Court's ruling” which he “deemed immaterial” in offering his opinion. Tygar Obj. at 5. In fact, Dr. Tygar testified that he had not read the Court's Order and so could not disagree with it, and, far from deeming the Court's opinion immaterial, believed only that his expert report was supposed to reflect his own opinion.^[FN6] Tygar Dep., 113:24-119:14. Plaintiffs further claim that Dr. Tygar's opinion, as expressed in that one paragraph, is a legal conclusion. In fact, Dr. Tygar specifically states that his comparison of Napster's functions against the stated prerequisites for the safe harbor is a “lay reading” of the terms of those prerequisites; indeed, it clearly is so, and merely provides context for Dr. Tygar's discussion of the Napster technology.

FN6. Plaintiffs also falsely claim that Dr. Tygar testified that he included this paragraph because “Napster's lawyer urged him to do so.” Tygar Obj. at 5. In fact, Dr. Tygar testified only that a lawyer asked him to read section 512(a) to see if he thought Napster would qualify under it. Tygar Dep., 113:24-114:20.

C. Dr. Tygar Properly Concluded That Napster Does Not Have Access To Information About Copyrights And Cannot Check Authorizations.

In their objections (D), (E), and (H), Plaintiffs again falsely state that Dr. Tygar testified in deposition that his opinions relate solely to Napster's software. Tygar Obj. at 6. As discussed above, Dr. Tygar specifically limited this testimony to portions of his three-page Summary of Conclusions. Elsewhere in his report, and in his deposition, Dr. Tygar made clear that his opinions encompass not only the technical difficulty of software determining the copyright status of a particular file, but also the practical obstacles to doing so for a company such as Napster. Tygar Report at 28-34; Tygar Dep. 164:23-165:2. Dr. Tygar noted that it would be a “Herculean task” for a company to create a database of all file names of copyrighted recorded music, and that having a person check recordings to see if they appear on an approved list would be virtually impossible. Tygar Report at 28-34; Tygar Dep. 170:7-172:5. Thus, Plaintiffs' claim that the Tygar Report is limited to Napster's software has no basis. But even if his report were so limited, Plaintiffs are incorrect in asserting that the capabilities of the Napster software are “irrelevant.” Whether or not a computerized solution is available to determine the copyright and authorization status of millions of files on the Internet is obviously relevant, *inter alia*, to Napster's “knowledge” of the status of these computer files and “ability to control or supervise” its users. This case cannot be decided in

a vacuum, free from the practical operation of computers, software, and the Internet. Indeed, searchable copyright databases do not even exist. *See* Deposition of Charles J. Sanders (“Sanders Dep.”), 28:15-30:12 (attached as Exhibit 1 to Declaration of Jennifer M. Lloyd (Volume 2) (“Lloyd Decl. Vol. 2”)).

Plaintiffs' other arguments are similarly unsupported. Plaintiffs complain that Dr. Tygar did no empirical analysis, but the analysis they claim is lacking is irrelevant to any issue in this case. For example, Plaintiffs' make a straw man argument concerning copyright clearance of radio stations and television networks. Dr. Tygar's opinion concerns the technical and practical feasibility of an Internet directory service determining authorizations from copyright holders for millions of different, user-chosen file names each day. His opinion is based on his expertise in computer science, electronic communications, and computer security systems, and his empirical analysis of the structure and function of Napster's Internet directory service. The way radio or television stations license airplay for individual, identifiable titles has no relevance to these subject matters. Having determined, from a practical and technological standpoint, the infeasibility of copyright verification in Napster's case, analysis of how other entities operate under completely different circumstances would add no value. Tygar Dep., 171:8-172:5.

In an effort to buttress their suggestion that Dr. Tygar's opinions are not based on his expertise in computer science, Plaintiffs consistently mischaracterize the bases for his opinions. In one glaring example, Plaintiffs falsely claim that Dr. Tygar's concerns about using “checksums” are not related to technological feasibility. Tygar Obj. at 7. In fact, Dr. Tygar devotes almost three pages of his report to describing the technical difficulties inherent in such a system and also testified about them in deposition. Tygar Report at 30-32; Tygar Dep., 178:6-183:20.

Finally, Plaintiffs complain that Dr. Tygar did not subject his opinions to peer review and that they do not reflect “good science.” Tygar Obj. at 2-3. Plaintiffs cite no legal authority for their contention that peer review is a prerequisite for admissibility for all expert testimony. The law is to the contrary. Where an expert's opinion is based on years of education, training, and experience, as is the case here, peer review is not required. *See, e.g., United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000) (*Daubert* factors such as peer review, publication, and potential error rate simply are not applicable to testimony whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it, citing *Kumho Tire*). Plaintiffs' narrow view of the Court's gatekeeping role -- arguing that *only* tests applicable to the kind of scientific testimony at issue in *Daubert* (can qualify for admission - - is directly contrary to the principles set forth in *Kumho Tire*. *Kumho Tire*, 526 U.S. at 150 (there are many different kinds of experts and expertise; in some cases, relevant reliability concerns focus upon personal knowledge or experience rather than scientific method). It is also directly contrary to their submission of Dr. Teece's report, which is entirely non-scientific, non-quantitative, non-peer-tested, and founded on purported economic intuition. *See, e.g., Teece Report* at 18.

D. Dr. Tygar Properly Concluded That Requiring Pre-Authorization Would Change The Web From A Decentralized Network, To A Centralized Utility.

In their objection (F), Plaintiffs reiterate their unsupported argument that Dr. Tygar's opinions are “not based on science.” Disregarding Dr. Tygar's years of education and experience in the computer science field, including numerous publications and awards, Plaintiffs baldly assert, without any evidence to rebut his opinions, that Dr. Tygar is simply wrong in his conclusion that requiring pre-authorization would change the nature of the World Wide Web. Plaintiffs' feeble attempt to substantiate this argument consists of an assertion that certain unidentified Web sites “have no trouble operate (sic) lawfully” (Tygar Obj. at 8), without any further explanation or supporting evidence. Plaintiffs do not even attempt to explain how a search engine such as Yahoo could possibly

operate if required to obtain pre-approval from all rights holders before linking to published, available materials.

Remarkably, Plaintiffs also argue that changing the nature of the Web is irrelevant, as though this Court should have no concern in turning back the clock on the information flow the Internet has enabled. However, the impact on the public is a factor the Court should carefully consider in balancing the hardships and the public interest to determine whether an injunction should issue. Def.'s Opp. to Motion for Preliminary Injunction at 30-32. The impact of a court's ruling on new technology is also plainly relevant in determining whether or not this Court should “defer to Congress when major technological innovations alter the market for copyrighted materials.” *Sony*, 464 U.S. at 431.

E. Dr. Tygar Properly Concluded That Watermarking Could Carry Rights Information With A Recording To Protect Plaintiffs.

Plaintiffs object to Dr. Tygar's conclusion that Plaintiffs have had the ability to put in place watermarking that could carry rights information and thereby prevent unauthorized copying. On the one hand, Plaintiffs state that this conclusion is not in dispute and should therefore be stricken (Tygar Obj. at 9:4); on the other, Plaintiffs introduce a declaration of Daniel Farmer -- albeit an utterly conclusory one -- claiming watermarking will not work. Farmer Decl., ¶ 5. Plaintiffs cannot have it both ways. The fact that Plaintiffs for decades chose not to implement watermarking -- and, according to their testimony, have now finally done so -- is plainly relevant to (1) whether Plaintiffs will suffer harm due to Napster after the watermarking they are implementing; (2) the equitable balancing of hardships relevant to issuing an injunction; and (3) Napster's equitable defenses that Plaintiffs are improperly seeking to control the distribution of all music, rather than merely their copyrighted works (which could have been controlled by watermarking all along).^[FN7]

FN7. Plaintiffs' argument that watermarking will not help *music publishers* is, like so much of Plaintiffs' objections, just argument on the merits having nothing to do with evidentiary objections. It is also wrong. While it is true that compositions cannot be “locked in a box,” the manifestations of those compositions at issue here are computerized music files. A watermark in a file will, by preventing use of copies, protect the publisher of the composition just as much as the holder of sound recording rights.

In sum, Dr. Tygar is highly qualified in the field of computer science and his conclusions are based on his knowledge and experience and his analysis of the Napster Internet directory system. To the extent that Plaintiffs disagree with Dr. Tygar's opinions, their arguments go to weight, not admissibility. This Court is sufficiently sophisticated to assess the weight of Dr. Tygar's opinions; Plaintiffs have completely failed to show that the opinions are inadmissible under Rule 702.

III. RESPONSE TO EVIDENTIARY OBJECTIONS AND REQUEST TO EXCLUDE HALL REPORT

Response to Plaintiffs' Preliminary Statement

Plaintiffs' assault on Dr. Hall takes up where their attack of Tygar left off-- with arguments on the merits cloaked as “objections” and one-sided mischaracterizations of the record. Dr. Hall, and this Court, deserve better.

Dr. Hall is a noted Stanford economist and co-author of the “Reference Guide on Estimation of Economic Losses in Damages Awards” in the Federal Judicial Center's *Reference Manual on Scientific Evidence*. He opined on three issues in his report: (1) the validity of the opinions expressed by Plaintiffs' economics expert,

Dr. Teece; (2) the degree to which Napster might cause economic harm to Plaintiffs pending trial in the absence of a preliminary injunction; and (3) the harm that Plaintiffs' proposed preliminary injunction would cause to Napster if issued by the Court.

As an initial matter, Plaintiffs' attack on Dr. Hall's report appears to relate almost exclusively to the bases for Dr. Hall's conclusions that Napster will not cause economic harm to Plaintiffs in the absence of a preliminary injunction. Consequently, Plaintiffs do *not* appear to contest Dr. Hall's dismantling of Dr. Teece's "path dependence" argument nor, with one minor exception (discussed below) Dr. Hall's determination of the massive injury Napster would suffer if shut down by a preliminary injunction.

Plaintiffs' argument against the remaining substance of Dr. Hall's report rests upon a shameful technique of pulling isolated sentences from Dr. Hall's deposition testimony and presenting them to the Court out of context and sandwiched in lawyers' rhetoric. This appalling technique is perhaps best exemplified by analyzing Plaintiffs' opening salvo, at paragraph 3 of their objections to the Hall Report.

In the first half of paragraph 3 in their objections, Plaintiffs misrepresent to the Court that "Dr. Hall admitted that he had failed to consider evidence that was inconsistent with his conclusions on more than one occasion." Hall Obj., ¶3. The Court might expect such a dicey accusation to be supported by at least one citation to the record. Of course, the reason Plaintiffs do not direct the Court to page and line numbers for any such purported "admissions" is because no such "admissions" were ever made. It is worth noting that for each and every piece of information that Plaintiffs claim Dr. Hall "failed to consider," there is ample evidence that Dr. Hall did in fact consider them, although he ultimately disagreed with Plaintiffs' opinion as to whether the information was relevant or probative.

Thus, for example, although it is abundantly clear on the record that Dr. Hall *considered* the report of Plaintiffs' expert E. Deborah Jay (the "Jay Report") (*see* Attachment 3 to the Hall Report; Hall Dep. 95:18-21 (attached as Exhibit C to Lloyd Decl. Vol. 1)), Dr. Hall testified that he didn't *discuss* the Jay Report in his own report because it didn't influence his opinion "one way or the other." Hall Dep. 294:2 - 294:21. Plaintiffs fabricate an alleged "admission" that Dr. Hall never considered the Jay Report from this disagreement over the value of the Jay Report, notwithstanding the fact that Dr. Hall stated in his report that he reviewed the Jay Report in formulating his opinion, and notwithstanding the fact that Dr. Hall answered every question Plaintiffs asked about it during over nine hours of deposition examination. *See* Hall Dep. 41:20-43:4; 104:8 - 11; 294:14- 295:1.

The remaining half of Paragraph 3 to Plaintiffs' objections similarly rests upon an intellectually dishonest foundation. Plaintiffs would have the Court believe that Dr. Hall "admitted that as a result of the methodology he employed, the Hall Report 'was not completely fair.'" *See* Hall Obj., ¶3. Dr. Hall *never* testified that there was a problem with the "methodology" he employed. Rather, in a remarkable display of intellectual integrity, Dr. Hall candidly agreed during his deposition that *based upon new information now available to him*, he would have included additional information in the *presentation* of his report to make the presentation fairer. Hall Dep. 331:18 - 336:10. Dr. Hall never suggested that the additional information would change his opinion or that the methodology by which he arrived at his opinion was in any way unfair. In any event, none of Plaintiffs' assertions, even if true, bear on admissibility, but rather, go only to weight.

Response to Plaintiffs' Specific Objections

A. Legal Framework

The parties agree that *Daubert* and *Kumho Tire* compel the Court to act as a gatekeeper to exclude from the record expert reports that lack appropriate reliability and relevance. However, Plaintiffs confuse this “gatekeeper” role -- which does, indeed, require the Court to exclude quantitative studies premised upon methodologically flawed analysis, such as Plaintiffs' reports of Dr. Jay and Mr. Fine -- from the fact finder's ability to consider reasonable differences of expert opinion.

The distinction between the “gatekeeper” question of admissibility and the fact finder's ability to weigh conflicting opinions was discussed in depth in *Cayuga Indian Nation of New York v. Pataki*, 83 F.Supp.2d 318 (N.D. NY 2000). There as here, the court considered admissibility of numerous experts. The *Cayuga Indian* court found that one expert report was fundamentally flawed because it fell “outside the range where experts might reasonably differ.” *Cayuga Indian Nation*, 83 F.Supp.2d at 326 (citing *Kumho Tire*). With respect to the other two experts before the court -- experts with diametrically opposing opinions, derived using differing methodologies, the *Cayuga Indian Nation* court noted “the grounds for the experts' opinions do not have to be perfect; they ‘merely have to be good’ ... Having found that the testimony of these two appraisers is both reliable and relevant, the court notes, as did the Supreme Court in *Daubert*, that ‘vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means’ ” for challenging expert opinions. *Cayuga Indian Nation*, 83 F.Supp.2d at 328.

There is simply no credible argument that Dr. Hall's analysis is methodologically flawed. As to Plaintiffs' disagreement with the weight or relevance Dr. Hall assigned to the information he considered, Plaintiffs have been free to present any contrary evidence and to vigorously cross examine Dr. Hall. Their failure to present such evidence or even a rebuttal by Dr. Teece should compel the conclusion that Dr. Hall's judgment, not Plaintiffs' counsel's hyperbole, is sound and proper.

B. Dr. Hall Considered All Relevant Facts Concerning Any Alleged Harm To Plaintiffs.

Plaintiffs' diatribe against the Hall Report seeks to create the illusion that Dr. Hall failed to consider important information pointing to several pieces of information that Dr. Hall did not *discuss* in his report, which Plaintiffs magically transform into a failure to *consider* the information. To the contrary, all of the information was listed in Attachment 3 to Dr. Hall's report (“Documents Considered by Robert E. Hall”) and each was in fact considered by Dr. Hall.

1. The Jay Report.

Plaintiffs' efforts to obfuscate begin with the misrepresentation of Dr. Hall's deposition testimony. At Paragraph 19 of the Hall Objections, Plaintiffs claim that Dr. Hall testified he hadn't *read* the Jay Report -- a survey that Napster has asked the Court to exclude because it is methodologically flawed and meaningless -- until after Dr. Hall signed his own report. However, Dr. Hall never gave the testimony Plaintiffs suggest. To create their illusion, Plaintiffs quote for the Court a small portion of Dr. Hall's deposition testimony in which he testified that he read Dr. Jay's report “subsequently.” Craftily, Plaintiffs refrain from quoting the preceding text of Dr. Hall's testimony, which makes clear that Dr. Hall was testifying that he had read Dr. Jay's report “subsequent” to *a meeting with Cornerstone Research personnel that occurred well before Dr. Hall signed his report*. Hall Dep. 21:1 - 22:5; 33:12 - 34:1; 35:22 - 36:5; 41:10 - 43:4.

Notwithstanding Plaintiffs' attempts to portray the record as “unclear,” the record is consistent. When asked directly, Dr. Hall testified that he read the Jay Report before signing his own. Hall Dep. 95:18 - 21. Moreover, Dr. Hall included as Attachment 3 to his report a list of all of the documents he considered in preparing the report,

including the "Report of E. Deborah Jay, Ph.D., June 10, 2000." Attachment 3 to Hall Report at 1.

Plaintiffs' true concern appears to be that the Hall Report did not discuss or credit the Jay Report. However, Dr. Hall had no reason to do so. As Plaintiffs correctly point out at Paragraph 20 of their brief, Dr. Hall testified that he did not credit the Jay Report within his own opinion because "[He] didn't see it as helping [him] understand it one way or the other." Noticeably, during the nine hours of examination, Plaintiffs *never directly asked* Dr. Hall *why* he didn't see the Jay Report as helpful. But the record is replete with discussions about Jay's improper focus only on college students, its utterly subjective and partisan nature (see Hall Dep., 42:12-18), and its fundamentally false assumption that anyone who likes "free" music would have purchased the same CD if Napster were unavailable.

2. The USC Study.

In his report, Dr. Hall described the number of CDs that students surveyed at the University of Southern California reported they had *actually* purchased in the past year, in support of his opinion that the presence of Napster has not adversely affected the sale of CDs to college students. Hall Report, ¶34. Plaintiffs quibble because Dr. Hall's writeup did not also include data concerning the same students' response that they *subjectively believed* they were buying "more," "less," or "the same" since using Napster. It is eminently reasonable for Dr. Hall to have relied upon the actual *quantity* of CDs students report recently purchasing rather than their *subjective belief about* the effect of Napster on those quantities.

Subsequent to writing his report, Dr. Hall read the report of Dr. Fader, which apparently caused Dr. Hall to conclude that his report would have been fairer if he *had* also included in his write up the data concerning the USC students' subjective beliefs. Hall Dep. 332:18 - 336:10. Yet, there is no dispute that Dr. Hall considered the USC study in its entirety, and no suggestion that including both sets of data in his report would or must have changed his opinion.

3. The Rolling Stone Survey.

Plaintiffs misleadingly assert that Dr. Hall "ignored" facts concerning an article in Rolling Stone. Hall Obj., ¶28. In actuality, Dr. Hall relied upon the Rolling Stone article as confirming evidence for a specific portion of his expert opinion -- that people who download music from the Internet have not purchased, in total, less music from the Plaintiffs. Hall Report, ¶34; Greer Reply Decl. Exh. 7 REH00081 (38% buy more CDs, only 8% buy less; "half have fewer than 10 MP3s stored on their hard drives suggesting that MP3 devotees download files for short term listening as opposed to long term storage."). This Rolling Stone data related specifically to the demonstrable positive effect that file sharing has already had on purchasing habits. *Id.*

Plaintiffs point to a separate piece of information (the fact that many respondents predicted they would in the future not purchase *downloadable* music) suggesting Dr. Hall's failure to recollect how he reacted to information meant Dr. Hall must have "ignored" negative data. Dr. Hall, however, did not rely on the study to assess consumers' subjective anticipation of their future activities in the digital download market. He simply used the Rolling Stone data as confirmation of other evidence concerning existing record sales. Hall Report, ¶34; Hall Dep. 340:19 - 341:6. Dr. Hall's failure in a deposition, at 9:00 at night, to remember how he reacted to such subjective data does *not* render any of his report inadmissible.

4. The Fine Report.

Dr. Hall relied upon the national sales estimates of Mr. Fine, as well as other information, to conclude that overall retail sales of CDs, even excluding on line CD sales, have been increasing steadily over the past several years, and continued to increase at 6.7% from IQ1999 to IQ2000. Hall Report, ¶24. As Plaintiffs correctly point out, Dr. Hall was keenly aware that the data presented in the Fine Report were likely to be flawed. The specific flaw in Fine's national sales number related to the fact that Fine excluded all online sales of CDs, which were growing strongly, and therefore necessarily *underestimated* the total increase in sales of CDs. Hall Report, ¶24. As such, Dr. Hall's reliance on the total national sales number was conservative. Plaintiffs then take issue with Dr. Hall's criticism of other aspects of Mr. Fine's report. Hall Obj., ¶30. Plaintiffs' argument defies logic. There is absolutely nothing wrong with Dr. Hall critically evaluating Fine's report, and rejecting Mr. Fine's speculative causation arguments, while accepting his understated rationale.

C. Information About The Relief Sought.

Finally, having found nothing significant to attack in Dr. Hall's economic analysis, Plaintiffs seek to erect a straw man legal argument and knock it down. But it is Plaintiffs who fall flat.

Plaintiffs make a scurrilous attempt to insinuate that Dr. Hall was denied access to Plaintiffs' "Proposed Order" in order to force him to falsely assume that Plaintiffs had requested a shutdown of Napster. The argument is absurd. Dr. Hall reviewed Plaintiffs' Motion for Preliminary Injunction (Hall Dep. at 113:12-114:18) -- which spells out *verbatim* the exact relief also requested in the Proposed Order - requesting the Court to block Napster from allowing any files of any artist to be shared by users absent advanced authorization delivered to Napster.

Dr. Hall is a noted economist, but not a lawyer. Dr. Hall relied upon a description by counsel of the practical impact of the requested injunctive relief, as well as his own investigation of same. Hall Dep. 110:6 - 116:20. Hall learned and therefore assumed that "as a practical matter, the outcome [of the specific relief Plaintiffs requested] would be a shutdown of Napster." Hall Dep., 116:19-20; *see also* 125:13-20 ("it's not necessarily the court would say Napster you shut down, but rather ... Napster would have no choice, given their limited ability to detect and to determine who owns what music"). Dr. Hall's assumption is a completely valid one, confirmed by numerous witnesses including Mr. Kessler and Dr. Tygar. Dr. Hall's "dramatic" testimony that such an order would destroy Napster's business is a valid assessment of the dramatic relief Plaintiffs have demanded.^[FN8]

FN8. In *Concorde Boat*, Dr. Hall was called upon to develop a computerized economics model to assess the antitrust injury caused to certain plaintiff boat builders by a pricing policy through which defendant Brunswick "incentivized" volume purchasing of its engines. The jury awarded Plaintiffs the exact amount of injury described by Hall's study. The Court of Appeals reversed, concluding that the damage calculation erred because (1) it assumed that Brunswick would not, but for the anticompetitive conduct, have had greater than a 50% market share, and accordingly assessed damages for all sales over a 50% market share -- even though Brunswick had a 75% market share in the 1980s, before starting the incentive program; and (2) the model failed to account for a 10% increase in sales Brunswick "inherited" when a competitor had to implement a recall program. 207 F. 2d at 1056, 1057. Those factors could have been included in the model, but Dr. Hall had taken a broader view without "numerically attributing" a formula to those factors. *Id.* The Court found that the model should not have been presented to the jury as a mathematical device to calculate damages where it did not mathematically distinguish between lawful and unlawful market share acquisition.

By contrast, in this case, Hall -- like Teece, Jay and Fine -- has not attempted at the preliminary injunction stage to create any mathematical model to calculate numerically lost or gained sales. Indeed,

Plaintiffs refused to provide the Soundscan data from which such a quantitative calculation might be performed. Rather, Dr. Hall and Dr. Teece both have presented qualitative analyses that rely on general economic theory rather than formulaic precision --albeit Dr. Hall at least considered the nature of the marketplace, whereas Dr. Teece did not even attempt to learn about it.

IV. RESPONSES TO EVIDENTIARY OBJECTIONS AND REQUEST TO EXCLUDE FADER REPORT

Response to Plaintiffs' Preliminary Statement

Before turning to their "Argument" against Dr. Fader (Fader Obj. at 3:5), Plaintiffs' "Preliminary Statement" juxtaposes Dr. Fader's Report against Dr. Jay's survey. Fader Obj. at 2. The conclusion from that comparison could hardly be more clear.

The extraordinary facts here are that, while the Defendant's expert, Dr. Fader, testified that his survey *is* projectable to evaluate the conduct of the relevant universe at issue, the Plaintiffs' expert, Dr. Jay, *refused to project hers to the universe at issue*. Declaration of Heather N. Mewes (hereinafter "Mewes Decl.") ¶ 2, Exh. A (Jay Dep., 24:15-25:9). Further, Dr. Jay testified that she had no idea what percentage of Napster users were college students and had no idea of the median age of a Napster user. *Id.* at 17:17-18:1. Dr. Jay testified that she "did not do any analysis of non-college Napster users who downloaded songs." *Id.* at 25:1-2. She testified, "I don't know the extent to which Napster is used outside of colleges." *Id.* at 17:1-11. ^[FN9]

FN9. Dr. Jay several times noted that this choice had been vetted by Plaintiffs' counsel, who had authorized her use of the sub-sample. Mewes Decl. ¶ 2 (Jay Dep., 15:11-16:1 (sub-sample chosen on basis of materials sent to Dr. Jay by plaintiffs' counsel), 22:17-23:4 (use of sub-sample "authoriz[ed] by plaintiffs' counsel)).

Dr. Jay thus presents a very different case than the ordinary, where an expert insists that his or her sampling universe is projectable to the universe at issue, and the Court must decide whether the inadequacy of the sub-sample goes to weight or admissibility. *Here the expert herself refuses to project her limited sub-sample to the sample at issue*, rendering it utterly meaningless as a predictor of lost sales in the overall market and, under *Southland Sod*, inadmissible. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1143, n. 8 (9th Cir. 1997) (even if in the ordinary case survey inadequacies affect only the weight afforded the studies, certain methodological inadequacies of surveys render the surveys inadmissible).

Plaintiffs' lawyers have tried two types of subsequent repair on the Jay Survey. First, they handed Dr. Jay three snippets of depositions taken after her survey was deployed, and Dr. Jay now implies (without committing herself) that the snippets might have supported her limited sub-sample. (Jay Reply Decl., para. 5) Nonsense. Dr. Jay herself had testified that the projectability of her survey was an "empirical question" that could have been tested (but which Dr. Jay did not test). Jay Dep., 23:14-25; 24:15-21 (attached as Exhibit E to Lloyd Decl. Vol. 1). Those snippets are no substitute for the statistical test of projectability that simply never was done. Further, in those snippets three Napster employees were asked briefly about Napster's demographics, and none of them suggested any factual basis to conclude that college users were the predominant -- much less the sole -- users of the Napster system.

In the very passages which Plaintiffs would now offer as support for an expert's study, those executives testified: (1) that their knowledge of Napster's demographics was "anecdotal," (Brooks Dep., 145:5-16); (2) that "I have no basis on which to believe" that college students are a majority of Napster users and don't recall any effort to study that issue (Shawn Fanning Dep., 303: 4-24); and (3) that no "formal or informal" studies were done on

demographics and that it was only “ a guess” that college kids were “a popular age group of Napster” (Eileen Richardson Dep., 246: 5-25). Dr. Jay, the Ph.D. survey expert, now suggests that her exclusion of all Napster users other than college students can be rationalized not upon the empirical testing she failed to conduct but rather upon “guesses” and “anecdotes” that college students are “a popular” age group using Napster.

The second effort at subsequent repair is a string citation to random Internet news reports suggesting that some college kids use Napster. (Jay Reply Decl., para. 4) Of course, such news stories do not constitute the “empirical testing” that Dr. Jay herself said was necessary before her sub-sample survey could be projected to the universe at issue. Nor do those stories -- each dated in March, 2000, some four months ago -- purport to analyze whether college students made up any particular percentage of Napster users at that time, much less the present. No survey expert can rely on random news clippings to narrow her universe.

This is particularly so where that definition defies all common sense. Napster has some 20 million registered users today. Dr. Jay's own survey states that only one in five (20%) college students has ever used Napster. (Jay Report, p. 1). Dr. Jay's own working papers prove that there are only 14 million students in higher education. (Jay Dep., Exh. 479 (Doc. “Jay 0010”)). That means that, at best, just 2.8 million college students (20% of 14 million) could be Napster users. Hence by Dr. Jay's own numbers, those 2.8 million students represent only 14% of total Napster users -- a minority percentage that proves beyond any doubt that Dr. Jay's survey is not projectable to the population at issue.

Hence, on the one hand we are left with Dr. Jay's original -- and extraordinary - testimony that she cannot and will not project her limited sub-sample to the universe at issue in the case. Under *Southland Sod*, that renders her study inadmissible. See *Winning Ways v. Holloway Sportswear, Inc.*, 913 F. Supp. 1454, 1467 (D. Kan. 1996) (college-only sub-sample survey inadmissible under *Daubert*).

On the other hand, Plaintiffs' attack on Dr. Fader's work at best amounts to a challenge to the weight of a portion of his testimony. Plaintiffs' attack on the Fader Survey, while based on half-truths and distortions, at most fall within the rule Plaintiffs acknowledge - that “a jury [or judge] should be able to determine whether asserted technical deficiencies undermine a survey's probative value.” Fader Obj. at 2:18-19 (quoting *Southland Sod*, 108 F.3d at 1143 n.8). Plaintiffs' attack on Dr. Fader's critique of Dr. Jay is even less persuasive, as it merely (but deceptively) characterizes a dispute of facts between them. Finally, Plaintiffs do not even attempt to claim that Dr. Fader's detailed debunking of the Fine report is inadmissible. Nor could they, given the Fine Report's fundamental infirmity acknowledged by Fine himself.^[FN10]

FN10. Fine, who testified that close to 75% of his company's revenue derive from contracts with the record companies (Fine Dep., 34:24-35:1 (attached as Exhibit D to Lloyd Decl. Vol. 1)), also had to acknowledge the fundamental inability of his report to demonstrate a causal relationship between Napster usage and a decrease in sales:

Q: Do you have any evidence or other data to show what, if any, impact that Napster as opposed to MP3 files has had on sales activity among colleges?

A: Isolating Napster from everything else?

Q: From everything else.

A: No. (Fine Dep., 64:16-21)

Plaintiffs' attorneys now scramble to argue that Fine was proffered for the proposition that “the ‘data strongly suggests that on line file sharing’ -- not just Napster” has resulted in a decline in college store sales. Reply to Motion to Exclude at 7:1 (quoting Fine Report at 10). Once this concession is extracted,

the Fine Report, even on its own terms, becomes completely meaningless as purported statistical “proof” under *Daubert* of Napster's impact. Further, this conclusion merely reconfirms that enjoining Napster, as opposed to all MP3 use, cannot be shown to benefit Plaintiffs by protecting them from any identifiable harm.

Responses To Plaintiffs' Specific Objections

A. Dr. Fader's Study is Sound.

Plaintiffs allege that the Fader Survey was not based on an Internet-representative probability sample and that it relied on paid volunteers. Fader Obj. at 3-6. These allegations are simply false. As we will show, contrary to Plaintiffs' claims, the Fader Survey relies on a probability sample of 35,000 individuals that is a representative sample of U.S. Internet users. (Fader Reply Decl., ¶¶ 8, 12-17.) Moreover, the Fader respondents received no compensation for participating in the Fader Survey. *Id.* ¶ 16.

Among the steps Dr. Fader took to ensure that his survey would be representative of the Internet population was to choose a reputable survey firm to conduct the survey. *Id.* ¶¶ 8-11. Greenfield Online is widely regarded as one of the leaders in Internet-based marketing research, making them a natural choice for this type of project. *Id.* Greenfield is highly experienced at creating representative samples and, throughout the engagement, Dr. Fader and Greenfield discussed this important requirement of Dr. Fader's study. *Id.*

At the same time, however, Dr. Fader did not merely take Greenfield at its word about its reputation, but had multiple sources of information that confirmed the prudence of his choice. *Id.* The bases on which Dr. Fader originally chose Greenfield Online - its outstanding reputation -- included conversations with academic colleagues and market research professionals from competing firms, as well as seeing numerous citations to (and discussions of) their studies in mainstream business publications and marketing research industry reports. *Id.* ¶ 9.

In addition, when Dr. Fader first approached Greenfield Online, he had detailed discussions with personnel at various levels of the organization about their general practices and methodologies. *Id.* ¶ 10. Those discussions reassured Dr. Fader that they were knowledgeable, capable, and fully prepared to implement the survey in accordance with the high standards demanded by the academic peer review process. In particular, Dr. Fader had detailed conversations with Mr. Stephen J. Cook, Senior Vice President, to discuss the context surrounding this survey and to ensure Greenfield's extreme care and objectivity. *Id.* Mr. Cook has experience with the design and implementation of surveys for litigation purposes. *Id.* ¶ 10.

The sample of 35,000 used for the study was drawn from Greenfield Online's panel of 500,000 members, about which Greenfield has collected demographic as well as personal identifying information. *Id.* ¶¶ 12-17. The 35,000 requested to participate in this study were identified using standard and well accepted methods to ensure accurate representation of the Internet population as a whole. *Id.* ¶ 13. Greenfield Online carried out Dr. Fader's request for an Internet-representative sample by using baseline data from a well established Benchmark Study of Internet use by Forrester Research. *Id.* ¶ 14.

Greenfield Online used data from the Forrester Research 2000 Benchmark Study of Internet users to determine the proportion of the sample that would come from each of twelve different categories describing age and gender. *Id.* ¶ 14. Because Greenfield's panel closely matches the Forrester benchmark on income distribution, the sample did not need to be stratified along this dimension. *Id.* After assigning these proportions, Greenfield can randomly select from its panel a representative probability sample with demographic characteristics that match the Forrester Technographics 2000 Benchmark Study. *Id.* Forrester's Benchmark Study uses a variety of

sampling techniques to measure the demographic characteristics of the Internet population. *Id.*

B. The Fader Study Was Conducted With Sound Procedures.

Contrary to Plaintiffs' claim,^[FN11] Greenfield Online and Dr. Fader took numerous steps to ensure that his study was conducted according to accepted survey methods.

FN11. Fader Obj. at 3-4.

Greenfield Online ensured that invited panel members were blind to the survey's purpose and intended use. *Id.* ¶ 19. The letter of invitation asked Plaintiffs, via email, to respond to a survey on "Music and Technology." *Id.* Attached as Exhibit D is a copy of the invitation letter. Indeed, Plaintiffs make no suggestion that anything about the survey actually revealed its purpose or sponsor to participants. Further, the study *was* double-blind. *Id.* ¶ 20.

Plaintiffs further allege that respondents to a QuickTake survey separately conducted by a different part of Greenfield, but which addressed downloading of MP3 files, were not excluded from the Fader Survey. *Id.* ¶ 21. In fact, the QuickTake survey did not utilize the Greenfield panel or Benchmark process at all. *Id.* Instead, QuickTake respondents are recruited independent of the panel from banner ads placed on the Engage advertising network of various Internet sites. *Id.*

Greenfield also has proper procedures and checks in place to help ensure that the survey was answered by the household member to which it was addressed. *Id.* ¶¶ 22-23. A panel member is an individual who may, on occasion, provide information on other members of her household, and in some studies, another household member, than the panel member, might be asked to respond to a survey. *Id.* However, in the Fader Survey, *only panel members were invited and allowed to participate* and the invitations were sent addressed to the panel member at the panel member's e-mail address. *Id.* ¶ 22. Greenfield collected demographic information as a part of Dr. Fader's survey (*Id.* ¶ 23) which were checked against the demographic information of the invited respondent to ensure that correct respondent was filling out the survey. *Id.* ¶ 23. As a reputable, experienced survey firm, Greenfield had, as Dr. Fader thought, procedures in place to ensure representativeness. *Id.* ¶ 23.

C. The Fader Survey Provides Valid Evidence On The Impact Of Napster Use.

Plaintiffs further alleged that the "Fader questionnaire is not well designed."^[FN12] Again, the Plaintiffs' allegations are false. Plaintiffs erroneously criticize the wording of Fader Study question #17 which reads "How has your purchasing of music changed since you started using Napster?" as being unable to establish causal links between Napster use and changes in music purchases. Because Dr. Fader believed that no single question can conclusively demonstrate causality, he used the entire survey to determine whether a link between Napster usage and music purchasing existed. *Id.* ¶ 24. For instance, Dr. Fader asked other questions such as question #19, "How many albums/CDs/tapes have you purchased as a result of online sampling via Napster?" that also speak directly to the issue at hand. *Id.* ¶ 24. He analyzed the results of questions #17 and #19 together to gain a more complete understanding of the nature of the correlational patterns observed in his dataset. *Id.*

FN12. Jay Reply Decl., ¶ 47.

Plaintiffs further allege^[FN13] that Dr. Fader did not advise respondents that their answers would be confidential. In fact, the Greenfield Online website clearly states Greenfield's policy that all information collected by Greenfield is kept confidential and used only for market research purposes. *See* Greenfield Online Privacy State-

ment (attached as Exhibit B to Fader Reply Decl.).

FN13. Jay Reply Decl., ¶ 47.

In contrast to Dr. Jay's allegation that “none of the items in the Fader survey included a ‘don't know’ or ‘no opinion’ response category,” (page 28), the structure of Fader's survey clearly accommodated such response options. Several of the questions (2, 7, 8, 20) had explicit “none of the above” options, and others (question 16) let respondents choose any number of suitable alternatives from a given set - or to select none if the respondent chose to do so. Other questions (9, 18) could be skipped entirely by respondents who did not wish to provide answers.

In accordance with standard survey practice, Fader utilized rotated responses for every question that utilized a nominal scale (i.e., whenever there was no natural ordering to the responses). *Id.* ¶ 27. This includes questions 7, 8, 9, 16, and 20. *Id.* For the questions with ordered scales, Jay's stated concerns about “primacy effects” don't ring true. *Id.* First of all, even the reference she cites acknowledges that the presence of primacy effects is rarely assured (*e.g.*, its mere existence varies across different modes of survey administration), and even when this bias does exist, according to the source, “these effects are typically small.”^[FN14] *Id.* Furthermore, it is clear that the design of Fader's survey is not slanted to capitalize on any alleged primacy effects; several questions (most notably question 19) put the least favorable answer in the first position. *Id.* In cross-tabulating the answers from these (and other) ordered questions, there was no evidence that any primacy effects were skewing the survey results. *Id.* So, for example, alleged primacy effects might have resulted in respondents indicating in their answer to question 17 that they have increased purchasing of music since using Napster and in their response to question 19 that they have not purchased any albums as a result of online sampling. *Id.*

FN14. Federal Judicial Center, “Reference Manual for Scientific Evidence,” 1994, p. 294

Finally, Plaintiffs mischaracterize Dr. Fader's testimony about open-ended questions. (*Id.* ¶ 29.) He did not testify that it was improper, as a general matter, for Dr. Jay to use open-ended questions. *Id.* His criticism centered on how she used and interpreted the responses to her open-ended questions. *Id.* As Fader clearly stated in deposition, open-ended questions are best used for open ended information gathering but are not probative for the hypothesis testing required in this situation. *Id.* Moreover, the wording of Jay's open-ended questions and her biased coding and interpretation of the respondents' verbatim answers render her results invalid and lead her to reach erroneous conclusions. *Id.*

In sum, Plaintiffs' critique of Fader's methodology is worse than “nitpicking.” *See* Opp. to Motion to Exclude at 5:9. Plaintiffs are flatly wrong in their assumption that Plaintiffs' contractors have a monopoly on survey methodology.

D. Dr. Fader Made Proper Uses Of The Third Party Surveys.

The third-party surveys summarized in the Fader Report serve as valuable corroborating evidence on the findings in the his survey. *Id.* ¶¶ 30-31. Dr. Fader relied upon the findings for several reasons. *Id.* First, the process by which Dr. Fader gathered the third-party evidence was completely impartial. *Id.* Dr. Fader collected, reviewed, and cited all the relevant studies, not just those that might present results favorable to Napster, and Dr. Fader reported all the results of those studies, not just those most favorable to Napster.^[FN15] *Id.*

FN15. Further, at Dr. Fader's direction, Cornerstone Research attempted to contact each and every sur-

vey author to collect as much additional information on the survey methodology and results as the author was willing to provide. All the materials received from these third-party researchers were produced to the Plaintiffs along with the Fader Report.

Second, the practice of comparing and combining the results of similar studies in order to validate a particular theory is well-accepted -- and highly desirable - in the field of marketing research. *Id.* Researchers refer to the notion of “convergent validity,” defined as “the ability of a measurement instrument to correlate or ‘converge’ with other supposed measures of the same variable or construct,” and strive to achieve it as a necessary condition in making causal inferences. *Id.* ¶¶ 30-31, and notes 25-26 (referencing standard texts in the field). It is difficult to overlook the fact that so many independent studies - using different samples, formats, and methods -- have reached such a consistent conclusion. *Id.* The weight of this collective evidence is quite substantial, and *overshadows* any of the vague concerns voiced by Plaintiffs. Fader Obj., ¶3

As a matter of law, an expert may make reference to outside materials not prepared by the expert directly, if they are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” [Federal Rule of Evidence 703](#). This type of testimony is routinely permitted. *See, Lewis v. Rego Co.*, 757 F.2d 66, 74 (3d Cir. 1985) (error not to allow one expert witness to testify as to conversation with another expert when expected testimony would have shown that there was no divergent opinion as to cause explosion); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988) (expert testimony based on well known treatise dealing with the subject and on statements of other academic colleague specializing in the field was admissible). In the *Live Canary* case, the court noted that “although the statements standing alone may not have been admissible, the court finds that they constituted information of the ‘type reasonably relied upon by experts in the particular field informing opinions or inferences upon the subject.’ ” *Id.* *See also, Gregory v. South Hills Movers, Inc.*, 477 F. Supp. 484 (W.D. Pa. 1979) (expert medical witness who specialized in field of rehabilitation could reasonably rely on professional discussions of public accounts of other knee injuries, subsequent surgery and resumption of activity). Similarly, in *United States v. Golden*, 532 F.2d 1244, 1247-48 (9th Cir. 1976), the Ninth Circuit held that an undercover narcotics agent, testifying as an expert witness has to the market value of heroine, could base his opinion in part on information obtained from other undercover narcotic agents familiar with the markets involved, as such information is of the type reasonably relied upon by experts determining prevailing prices in markets.

Here, both Dr. Fader's reply declaration and the standard texts he cites establish that the convergent validity study he conducted is of the type reasonably relied upon by experts in his field. That convergent validity study is relevant because it demonstrates that out of eight studies on the topic, Dr. Jay's conclusions are far, far afield of the consensus reached by the other studies (although Dr. Jay's, fairly analyzed, actually support Dr. Fader and the other studies).

V. RESPONSE TO EVIDENTIARY OBJECTIONS AND REQUEST TO EXCLUDE LESSIG REPORT

Response to Plaintiffs' Preliminary Statement

Plaintiffs have no legitimate basis for objecting to Lawrence Lessig's expert report regarding the practical effects on the Internet of an injunction banning Napster-like technology (the “Lessig Report”). Instead, Plaintiffs rely entirely on mischaracterizations and unsupported, unsupportable lawyers' arguments attacking his analysis. Plaintiffs' reasons for seeking to exclude Lessig's factual analysis are obvious: Plaintiffs correctly fear that in the context provided by Lessig, the injunction requested by Plaintiffs must be recognized as both unworkable and

widely destructive. The mere fact that Plaintiffs would prefer the Court not to consider the full context of the “relief” Plaintiffs seek is not a legitimate ground for seeking to exclude Lessig's testimony.

In characterizing Lessig's testimony, Plaintiffs assert that it consists of nothing more than “legal opinion.” *See* Lessig Obj., ¶¶1-4. Specifically, Plaintiffs criticize the Lessig Report for offering testimony as to whether: (1) Napster has a potential for substantial, non-infringing uses; (2) Plaintiffs could take reasonable steps to minimize any harm to them caused by this technology, and (3) eliminating the particular technology utilized by Napster is likely to have any substantial effect in reducing any harm that plaintiffs suffer. Lessig Obj., ¶3. Aside from the fact that each of these areas of inquiry plainly constitutes a factual issue (arguably, the ultimate factual issues)^[FN16] -- but no less a proper subject for testimony -- Plaintiffs completely mischaracterize the nature of the Lessig Report, and the issues it addresses.

FN16. An expert witness is not precluded from offering an opinion embracing the ultimate issues in the case. *Fed. R. Evid. 704*. *See also* Advisory Committee Notes re *Fed. R. Evid. 704*.

The Lessig Report speaks to the *interplay* between technologies of the Internet and the law, and in particular, the feasibility and effectiveness of regulating the Internet through the type of relief sought by Plaintiffs in this action. Lessig assesses the *impact* an injunction would have on the technologies of the Internet, based not only upon his knowledge of the law, but also his extensive studies and recognized expertise in Cyberspace. *See* Lessig Report, ¶11.

The Lessig Report deals with specialized facts, not legal conclusions. For example, as part of his analysis, Lessig provides, among other things, information regarding how Cyberspace is regulated (through social norms, the market, the law, and the Internet's architecture); a description of the architecture, or design, of the Internet; and a discussion of how innovations in technology relating to the Internet have effected changes in the law (*e.g.*, in the areas of speech regulation, privacy, copyright and fraud). As Lessig states, he discusses the relevant legal principles to supply the necessary framework for his analysis, and to demonstrate how, consistent with the values of the Internet and the values identified by the Supreme Court for assessing regulations on the Internet, law interacts with Internet technology. *See* Lessig Report, ¶9.

Lessig brings to the table extensive experience in the field of Internet regulation. His primary focus is on the interplay between technology and the various codes that regulate the Internet, whether they be legal codes, social codes, or codes dictated by the technical architecture. His experience stems, among other things, from his close observance of the Internet and its culture for the past seven years, attendance at over eighty conferences relating to the regulation of “Cyberspace,” extensive consultation with policy makers regarding the regulation of Cyberspace, and involvement in a number of Internet-related law suits and policy determinations. *See* Lessig Report, ¶¶4-5. In addition, he is a regular columnist for the *Industry Standard*, the leading monthly magazine on Internet-related issue. He has authored a book entitled, *Code and Other Laws of Cyberspace* (Basic Books 1999), which deeply probes the interplay among several types of codes, *e.g.*, technical, social, as well as legal, that affect Cyberspace. Indeed, Lessig's book was approvingly referenced by Senator Charles Schumer at the July 11, 2000 Senate hearings, who recognized it for the principle that aside from law, such codes, more than anything else, regulate behavior on the Internet. *See* Transcript of Senate Hearings at 64 (attached as Exhibit H to Declaration of Laurence F. Pulgram (“Pulgram Decl.”)).

Despite the fact that the Lessig Report provides information this Court may find extremely useful -- even necessary, perhaps -- to assist it in determining the impact the injunction sought by Plaintiffs likely would have on the

Internet and the public, Plaintiffs arrogantly insist that none of these impacts can be considered.^[FN17] Yet it is Plaintiffs, not Napster, who have made the legality of peer-to-peer file sharing an issue; who have asked this Court to issue broad injunctive “relief” precluding exchange of *any* copyrighted materials -not merely those Plaintiffs claim are their own - without prior authorization; and who have proclaimed their intent to force Napster to shut down completely. Now, Plaintiffs recoil at the realization that the Court will, of course, consider factors directly relevant to the impact of such an injunction.

FN17. At the same time, Plaintiffs themselves introduced into evidence a statement from Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America, that “[i]f the courts allow Napster and services like it to continue to facilitate massive copyright infringement, there is a grave risk that the public will begin to perceive and believe that they have a right to obtain copyrighted materials for free.” Declaration of Jack Valenti, ¶7. Plaintiffs thus appear to concede the relevance of these issues only when it is to their benefit.

Response to Plaintiffs' Specific Objections

A. Lessig's Testimony Does Not Constitute Legal Opinion.

Plaintiffs argue that Lessig's Report is inadmissible because it testifies about what the law holds, from the perspective of a lawyer. That simply is not the case. In the first place, Lessig is neither testifying about the applicable law nor offering a legal opinion per se, but is testifying about the interplay between law and technology and the impact of the injunction sought by Plaintiffs. The cases cited by Plaintiffs thus are inapplicable. Each and every one of those cases involved an expert witness (only one of whom was a lawyer) offering testimony which plainly constituted a legal conclusion.^[FN18] Here, by contrast, Lessig offers testimony as to the interplay between law and the technologies of the Internet. As *only part* of his analysis, he discusses the relevant legal authorities to demonstrate that the Supreme Court traditionally has followed a consistent approach when faced with new technologies. He provides this discussion not as part of a legal analysis or opinion, but rather, to underscore the importance, in his view, of considering the practical effect of a regulation upon the technologies of the Internet before directly applying that regulation through the use of injunctive power. See Lessig Report, ¶¶9-11.

FN18. See *Aguilar v. International Longshoreman's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (expert witness opined that circumstances justified finding of promissory estoppel); *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986) (witness offered testimony regarding the complexity and unsettled state of certain tax laws); *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (SEC investigator offered testimony regarding whether defendants violated Section 10(b) of the Securities Exchange Act of 1934); *United States v. McKenna*, 1992 WL 95933 (E.D. La Apr. 28, 1992) (excluding declaration of expert witness containing testimony as to the legal issues relating to motion for a new trial).

Even if Plaintiffs' characterizations of his testimony as “legal” were accepted, Plaintiffs are incorrect in their assertion that a lawyer may not testify about the law. See Weinstein on Federal Evidence §702.04[12] (“[a]ttorneys have been permitted to testify as experts when they have specialized knowledge or experience that would assist the jury in evaluating or understanding the evidence in a case”); *Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997) (affirming admission of expert testimony of attorney concerning the legal requirements of the Randolph-Sheppard Act); *Honeywell v. American Standards Testing Bureau*, 851 F.2d 652, 656-657 (3rd Cir. 1989) (in negligence action, attorney permitted to testify that manufacturer's defense would have been successful had ex-

pert witness been provided).

Moreover, an expert witness certainly may discuss and refer to the law to express an opinion, as Lessig does, without rendering that opinion inadmissible. *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988) (“an expert’s testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function”). Lessig has not attempted to dictate the result in this matter but to provide useful expert insight. The Court will find the facts, and will be free to use those insights to the extent the Court sees fit.^[FN19]

FN19. Remarkably, Plaintiffs try to turn deference into defect, attacking the Lessig Report for acknowledging that the Court will be the ultimate decision maker as to the applicable legal standards - standards Lessig does *not* presume to dictate. Lessig Obj., ¶4.

B. Lessig Is Qualified To Testify As An Expert.

Plaintiffs next object to the Lessig Report to the extent that it proffers testimony concerning the “nature of the Internet community” and the “character of the Internet”. Plaintiffs, of course, cannot claim this is a “legal brief,” and so instead resort to claims that: (1) Lessig is not qualified as an expert in this area, (2) his conclusions are not based upon “scientific method” sufficient to satisfy *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and (3) his testimony is irrelevant. *See* Lessig Obj. ¶¶18-21.

1. Lessig Is An Expert On The Various Factors That Regulate Cyberspace, Including But Not Limited To Law.

Plaintiffs make the astonishing claim that because Lessig merely has vast experience in Cyberspace but no formal training in computer science or programming, he is not qualified to discuss the effects of law upon Internet technology. *See* Lessig Obj. ¶18. Plaintiffs fail to explain why formal computer training is necessary for such an analysis. Lessig’s experience and credentials should satisfy this Court that he is an expert in the field -and, indeed, probably the preeminent authority in this area -- upon which his report is based. *See* Lessig Report, Appendix; Declaration of Lawrence Lessig (“Lessig Decl.”) ¶2, Exhibit A; Pulgram Decl., Exhibit H, at 64.

A witness can be qualified as an expert by “knowledge, skill, experience, training or education.” *Fed. R. Evid. 702. Rule 702* “contemplates a broad conception of expert qualifications.” *See Thomas v. Newton Int’l Enters.*, 42 F.3d 1266, 1269 (9th Cir. 1997) (exclusion of expert testimony of longshore worker regarding workplace safety held an “abuse of discretion”); *see also Scott v. Ross*, 140 F.3d 1275, 1286 (9th Cir. 1998) (professor of sociology upheld as an expert based on his extensive study of anti-cult movements, despite lack of study of particular cult at issue).

While his “formal” *training* and *education* is in the field of law, Lessig is indisputably *knowledgeable* and *experienced* in the areas of technology and the social aspects of Cyberspace as well. The District of Columbia Circuit has addressed the qualifications of an expert when more than one field of knowledge was required. In *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207 (D.C. Cir. 1997), the trial court had allowed a police officer to testify as an expert in the area of the Americans with Disabilities Act, despite the fact that the expert had no prior work experience involving the ADA and had only reviewed the training requirements under that law. *See 112 F.3d at 1211*. Though the expert admitted that he was not an expert on the ADA, he stated that he was an expert as to “how the ADA and Rehabilitation Act impact on police practices, procedures and training,” *Id.* The D.C. Circuit upheld the trial court’s admission of the expert testimony with respect to police practices, as they concern [the ADA].” *Id.* Like the expert in *Burkhart*, Lessig’s interdisciplinary knowledge and experience qualify him as capable of providing analysis and conclusions regarding the *impact* of par-

ticular legal frameworks on the technology of the Internet.

2. Lessig's Methodology Satisfies The Standards For Reliability.

Plaintiffs could not be more wrong in suggesting that Lessig used improper or unscientific methodology. While *Kumho Tire* does extend *Daubert's* gatekeeping function to include all expert testimony and not merely scientific testimony, see *Kumho Tire*, 526 U.S. 137, 138, 119 S. Ct. 1167, 1169 (1999), the *Daubert* factors for admissibility in nonscientific testimony “do not constitute a definitive checklist or test, and the gatekeeping inquiry must be tied to the particular facts.”^[FN20] See *id.* (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593, (1993)).

FN20. Prior to the Court's ruling in *Kumho Tire*, it was settled law in the Ninth Circuit that *Daubert* applied only to scientific testimony. See *United States v. Bighead*, 128 F.3d 1329, 1330 (9th Cir. 1997); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806 (9th Cir. 1997). “These cases are [still] good law to the extent that they permit the admission of expert testimony on the basis of the expert's ‘knowledge, skill, experience, training or education,’ which is consistent with *Kumho Tire*.” *United States v. Hankey*, 203 F.3d 1160, 1169 n7 (9th Cir. 2000)

The gatekeeping function “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.*

There are numerous circumstances under which expert testimony can be reliable despite the fact that the expert's findings are not “derived from the scientific method” and do not necessarily reflect “scientific knowledge.” Plaintiffs ignored, for example, the Ninth Circuit's acceptance of expert testimony of a police officer based on his extensive knowledge of street gangs, based solely on the officer's years of experience and undercover work. See *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000). In the words of the Ninth Circuit, “[h]ow else can one obtain this encyclopedic knowledge of identifiable gangs?” *Id.*

In preparing a report that analyzes the interaction between the law and Internet technology and structure, it necessarily follows that a primary inquiry must focus on knowledge and experience, not statistical analysis or scientific method. Moreover, to the extent any methodology could be imposed on Lessig's analysis, the proper framework would be the procedures dictated by the Supreme Court in cases where regulation of a new technology has been proposed. The Lessig Report lays a factual foundation by discussing these cases, upon which Lessig is able to apply his own analysis based upon his extensive experience and knowledge in the legal technology field.^[FN21]

FN21. Indeed, Lessig expressly used the very methodology called for by the Supreme Court in *Reno v. ACLU*, 521 U.S. 844 (1997), *Sony Corporation v. Universal City Studios*, 464 U.S. 417 (1984), and *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000). Specifically, Lessig undertook to consider the following: (1) the interaction between the injunction sought by Plaintiffs and the architecture of the Internet, to determine whether the injunction would interfere with the Internet's development (as mandated by *Reno*); (2) the impact of the injunction on the public's interest in access to Napster's technology (as mandated by *Sony*); and (3) the extent to which the injunction would burden the technologies of the Internet (as mandated by *Playboy*). See Lessig Report, ¶¶16-32.

Finally, that the parties have not requested a jury trial is significant. Under these circumstances, the Court acts as

the fact finder as well the gatekeeper, and its discretion extends beyond admissibility determinations and includes the weight to be accorded to the evidence. Weinstein's, §702.05[2][b]. In light of the fact that Plaintiffs have submitted multiple declarations regarding the purported impact of the broad injunction they seek on private non-parties (*e.g.*, Declarations of Valenti, Kohn, Robertson, Hessinger), they request that the Court ignore the evidence of record on the impact on the Internet and the public is, in a word, outrageous.

Indeed, courts can, and frequently do, use expert testimony to assess the impact of a law or practice on a particular group or industry. See *Black Law Enforcement Officers Association v. City of Akron*, 824 F.2d 475, 477 (6th Cir. 1987) (expert testimony on both sides used to determine impact of police promotional procedures upon minorities); see also *Prus v. City of Chicago*, 711 F.Supp. 469 (N. D. Ill. 1989) (expert witness testifying as to effect of outdoor advertising ban on traffic safety).

C. Napster Made Lessig Available For Deposition.

Plaintiffs' contention that Napster refused to make Lessig available for deposition is flat-out wrong. To the contrary, Napster offered Lessig for deposition in a location to which Plaintiffs agreed to travel, on a date that easily allowed Plaintiffs sufficient time to incorporate their response to his deposition testimony, if any, into their reply papers.

More than two weeks before Plaintiffs' reply papers were due (and before Napster had even filed its opposition papers and expert reports), Napster notified Plaintiffs that, because Lessig would be in Berlin, Germany, until mid-July (where he had been residing for the past academic year), and on vacation in a remote hill town in Italy until July 9, 2000, he would be available for deposition in Berlin on July 11, 2000. Pulgram Decl., ¶¶ 2, 4. Plaintiffs agreed to the location, and objected only to the date. Pulgram Decl., ¶ 3. In response, Napster offered two other alternatives: (1) Plaintiffs could also depose Lessig during his vacation in Italy if they could make the necessary arrangements; or (2) Plaintiffs could depose Lessig in California following his return to the United States. Pulgram Decl., ¶ 4. Plaintiffs flatly refused both offers.^[FN22] *Id.*, ¶¶ 6, 8.

FN22. Instead, Plaintiffs persisted in arguing the original date offered for Lessig's deposition in Berlin was unacceptable, despite the fact that the deposition would have been completed, and a "rough" transcript available -- three full business days prior to Plaintiffs' deadline for filing their reply papers. Pulgram Decl., ¶ 5. That this would have given Plaintiffs sufficient time to incorporate a response to Lessig's testimony is demonstrated by the fact that Plaintiffs noticed and took the deposition of another one of Napster's expert witnesses, Dr. Hall, three business prior to filing their reply papers. Pulgram Decl., ¶2.

Indeed, Plaintiffs as recently as July 18 noticed another witness' deposition for July 25 - the very day before the preliminary injunction hearing. *Id.*, ¶ 9.

Plaintiffs' contention that Napster failed to make Lessig available is merely makeweight.

VI. CONCLUSION

For the foregoing reasons, Napster respectfully requests that the Court overrule Plaintiffs' evidentiary objections to the Tygar Report, Hall Report, Fader Report and Lessig Report, and deny Plaintiffs' request to exclude in their entirety the Hall Report, Fader Report and Lessig Reports, and to exclude portions of the Tygar Report.

A&M RECORDS, INC., a corporation, et al., Plaintiffs, v. NAPSTER, INC., a corporation, and Does 1 through 100, Defendant; Jerry Leiber, individually and doing business as Jerry Leiber Music, et al., Plaintiffs, v. Napster, Inc., Defendant.

2000 WL 34634859 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)

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