

Exhibit Y

15:31:21 1 Figures 25 and 26 in the last paragraph on Page 3 of
15:31:24 2 your report?

15:31:25 3 A. On Figures 25 and 26 if you just do a cursory
15:31:28 4 examination, you would come to the conclusion that
15:31:30 5 they are very different, because one has a much higher
15:31:33 6 amplitude than the other. However, if you simply look
15:31:36 7 over at the left side of the page, at the Y axis, you
15:31:40 8 see they have just been placed on different scales.

15:31:43 9 The upper figure -- the Figure 25 -- appears
15:31:48 10 three times larger than the one in Figure 26, simply
15:31:51 11 because the scale has been made three times larger.

15:31:57 12 Q. And by that you are referring to -- the part
15:32:00 13 you are talking about looking three times larger would
15:32:03 14 be the main body of the pinkish color in each figure;
15:32:13 15 right?

15:32:13 16 A. That's correct.

15:32:13 17 Q. If we look all the way over to the left, then
15:32:17 18 we see kind of a tall spike of the pink color; right?

15:32:21 19 A. Correct.

15:32:22 20 Q. Now in that case there is a difference in the
15:32:25 21 amplitudes; right?

15:32:26 22 MR. CHIN: Objection.

15:32:28 23 THE WITNESS: Yes, but that is an artifact of
15:32:30 24 how auto correlation is conducted. It has no meaning.

15:32:35 25 MR. OLSON: Q. What do you mean by that?

15:32:38 1 A. Auto correlation is essentially a measure of
15:32:42 2 how similar a signal is to itself. At 0 seconds, it
15:32:49 3 is a measure of how similar a signal is to itself, and
15:32:53 4 it can come out with unpredictable amplitude. It is
15:32:57 5 not part of anything that can be used for comparison.

15:33:01 6 Q. It appears to me that Figure 25 and Figure 26
15:33:07 7 kind of choose their top value just above the top of
15:33:14 8 the left-most pink spike. Does that seem right to
15:33:19 9 you?

15:33:19 10 A. Yes, it does.

15:33:20 11 Q. And putting aside the confusion that might be
15:33:34 12 caused in just glancing at the two figures, because
15:33:38 13 the vertical scales are different -- I'm going to put
15:33:41 14 that aside for a moment; okay?

15:33:44 15 A. Yes.

15:33:45 16 Q. Because you did more than just glance at these
15:33:48 17 figures; right?

15:33:48 18 A. Yes.

15:33:49 19 Q. You looked at them carefully?

15:33:50 20 A. Yes.

15:33:51 21 Q. And you could see, for instance, that the
15:33:53 22 amplitude in the main body of the pink color in the
15:34:00 23 Figure 25 is not three times the amplitude of the main
15:34:05 24 body of the pink in Figure 26; right?

15:34:07 25 MR. CHIN: Objection.

15:34:08 1 THE WITNESS: Yes. By "amplitude," you mean
15:34:11 2 the actual amplitude of the signal, not just as it is
15:34:17 3 printed on the page.

15:34:17 4 MR. OLSON: Q. The real amplitude.

15:34:19 5 A. Yes.

15:34:19 6 Q. That's what you were referring to when you
15:34:21 7 said it looked misleading that the amplitudes were
15:34:24 8 different; correct?

15:34:25 9 A. Correct.

15:34:26 10 Q. But we can also see that even if you take into
15:34:29 11 account the differences in the scale, there are other
15:34:32 12 differences in Figure 25 and 26; correct?

15:34:35 13 A. Yes.

15:34:35 14 Q. For instance, there's information that appears
15:34:39 15 in Figure 25, kind of between .00060, and the end of
15:34:54 16 .00090 -- that does not appear in Figure 26; right?

15:35:01 17 A. That's correct.

15:35:02 18 Q. Likewise, to the right part of both figures,
15:35:07 19 there appears to be information in Figure 25 that's
15:35:09 20 not in Figure 26; correct?

15:35:11 21 A. That's correct.

15:35:12 22 Q. Did you read -- do you remember Dr. Boulanger
15:35:44 23 stating that, "There's more information in the
15:35:48 24 Aparthenonia track than in the Funky Drummer track"?

15:35:52 25 A. Yes.

17:05:39 1 understand the question. We are saying if we have
17:05:41 2 another complete, separate instrument, and we take the
17:05:43 3 many wave forms from that instrument, and we look at
17:05:47 4 those individual wave forms, and those wave forms are
17:05:49 5 essentially indistinguishable from FD-4 and FD-12 --
17:05:54 6 that would certainly affect my opinion.

17:05:56 7 MR. OLSON: Q. How would it affect your
17:05:57 8 opinion?

17:05:58 9 A. It would mean that two separate instruments
17:06:02 10 being played at different times by different drummers
17:06:05 11 could produce spectra which were very similar -- as
17:06:08 12 similar as FD-4 and FD-12 are from each other.

17:06:13 13 Q. And correspondingly, your confidence that
17:06:24 14 Aparthenonia is a copy of Funky Drummer would be
17:06:28 15 affected; right?

17:06:29 16 A. Yes.

17:06:30 17 Q. In fact, you wouldn't be able to say with
17:06:32 18 certainty at that point; correct?

17:06:34 19 MR. CHIN: Objection.

17:06:36 20 THE WITNESS: Yes, at the very least that
17:06:48 21 would extremely weaken my conclusions.

17:06:51 22 MR. OLSON: Q. And you didn't look at the
17:06:58 23 typical differences between the wave forms for any
17:07:02 24 drums as part of your analysis; right?

17:07:05 25 A. No other drums besides what was actually in

17:46:58 1 A. It has minor importance. It goes to the issue
17:47:04 2 of the amplitudes being different result in the
17:47:08 3 spectra being different brightnesses -- as we have
17:47:11 4 discussed the importance of that.

17:47:14 5 Q. New throughout Mr. Olson's questioning of you,
17:47:43 6 he presented you with many different hypotheticals.
17:47:57 7 He asked you if additional information was provided,
17:48:02 8 would your conclusions be different.

17:48:06 9 With respect to those questions, if there was
17:48:11 10 additional information that could more conclusively
17:48:17 11 prove the opinions represented by Dr. Boulanger in his
17:48:25 12 report, do you know of any reason why he would not
17:48:27 13 have included that additional information in his
17:48:30 14 report?

17:48:31 15 MR. OLSON: Objection to the form, and calls
17:48:35 16 for speculation.

17:48:35 17 THE WITNESS: I have no reason to know why he
17:48:38 18 would not include additional information.

17:48:40 19 MR. CHIN: Q. When you read Dr. Boulanger's
17:48:48 20 report, what, if any, opinion did you have with
17:48:52 21 respect to the information available to Dr. Boulanger
17:48:55 22 in order to conduct the analysis that he did in his
17:48:59 23 report?

17:49:00 24 MR. OLSON: Objection to the form.

17:49:02 25 THE WITNESS: It appeared to be sufficient.

18:17:14 1 MR. OLSON: Objection. Leading; compound.

18:17:16 2 THE WITNESS: That's correct.

18:17:17 3 MR. CHIN: Q. If Dr. Boulanger wanted to do a

18:17:29 4 fair and impartial analysis between Aparthenonia and

18:17:32 5 Funky Drummer, is there any reason for him not to use

18:17:36 6 scales of the same size?

18:17:38 7 MR. OLSON: Objection. Compound; leading;

18:17:42 8 calls for speculation.

18:17:43 9 THE WITNESS: No, there isn't.

18:17:45 10 MR. CHIN: Q. And if you had to do the

18:17:49 11 comparison between these two compositions, would you

18:17:54 12 use scales of the same size, or different size?

18:17:58 13 A. I would certainly use scales of the same size.

18:18:01 14 However, since we are referring to these figures

18:18:05 15 specifically, I would never do the analysis in this

18:18:09 16 manner.

18:18:10 17 Q. In your opinion, by using scales of different

18:18:17 18 sizes in his Figures 25 and 26, is the conclusion that

18:18:23 19 Dr. Boulanger arrives at false?

18:18:31 20 MR. OLSON: Objection. Leading; form.

18:18:34 21 THE WITNESS: I don't believe the single issue

18:18:36 22 of using different scales is an overwhelming problem.

18:18:41 23 It is simply problematic of the larger problems within

18:18:45 24 the report.

18:18:47 25 MR. CHIN: Q. Did Dr. Boulanger indicate in

18:19:17 1 his report that he took into consideration the
18:19:28 2 possible use of the de-noise program in comparing the
18:19:34 3 two compositions?

18:19:35 4 MR. OLSON: Objection.

18:19:36 5 THE WITNESS: No, he had no mention of
18:19:37 6 anything related to that.

18:19:56 7 MR. CHIN: Q. In your expert opinion, based
18:20:07 8 on the information that you have covered, what is your
18:20:14 9 conclusion as to whether or not Aparthenonia is
18:20:26 10 extremely similar to Bust Dat Groove?

18:20:32 11 MR. OLSON: Objection. Leading; compound.

18:20:35 12 THE WITNESS: In my opinion, the evidence is
18:20:38 13 extremely strong that Aparthenonia is extremely
18:20:42 14 similar to Funky Drummer.

18:20:46 15 MR. CHIN: No further questions.

18:20:52 16 FURTHER EXAMINATION BY MR. OLSON

18:20:52 17 MR. OLSON: Q. Dr. Smith, did Figures 25 and
18:20:56 18 26 from Dr. Boulanger's report have any effect on the
18:21:01 19 opinions you reached in your analysis of whether
18:21:11 20 Aparthenonia is a copy of Funky Drummer?

18:21:13 21 A. No, in my opinion these figures are fatally
18:21:17 22 flawed, and provide no conclusion whatsoever, either
18:21:20 23 way.

18:21:20 24 Q. So even if there were some mistake in the way
18:21:26 25 Dr. Boulanger prepared Figures 25 and 26 of his

18:36:16 1 correct?

18:36:17 2 A. That's correct.

18:36:17 3 Q. And Dr. Boulanger has 30 years of musical
18:36:22 4 experience, as reflected in his report; correct?

18:36:27 5 MR. CHIN: Objection.

18:36:28 6 THE WITNESS: That's my understanding.

18:36:32 7 MR. OLSON: Q. So after all that, is it your
18:36:37 8 testimony on the record that when you make your
18:36:40 9 conclusion that Aparthenonia is a copy of Bust Dat
18:36:48 10 Groove, that there's no subjective element to the
18:36:53 11 process that leads to your conclusion?

18:36:56 12 MR. CHIN: Objection.

18:36:57 13 THE WITNESS: I stated that my conclusion was
18:36:59 14 based on extremely strong evidence, and I stated what
18:37:02 15 that evidence was. And that included the assumption
18:37:04 16 now that different drums could not produce these kinds
18:37:09 17 of similar spectra.

18:37:12 18 If that assumption is wrong, of course my
18:37:14 19 conclusion would be wrong.

18:37:15 20 MR. OLSON: Q. And your assumption regarding
18:37:18 21 the spectra of drums is subjective; right?

18:37:23 22 MR. CHIN: Objection.

18:37:24 23 THE WITNESS: As I said, I don't believe it
18:37:31 24 would be classified as either subjective or objective.

18:37:33 25 It is an assumption.

CERTIFICATE OF REPORTER

I, George Schumer, a Certified Shorthand Reporter, hereby certify that the witness in the forgoing matter was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause;

That said proceeding was taken down in shorthand by me, a disinterested person, at the time and place therein stated, and that the testimony of the said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition, review of the transcript was ___ was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way vested in the outcome of this cause, and that I am not related to any of the parties thereto.

DATED: August 22, 2006



George Schumer, CSR 3326