UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING
CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.;
ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE
RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD
COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG
MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.;
VIRGIN RECORDS AMERICA, INC.; and
WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME WIRE LLC; LIME GROUP LLC; MARK GORTON;
GREG BILDSON; and M.J.G. LIME WIRE FAMILY
LIMITED PARTNERSHIP,

Defendants.

06 Civ. 5936 (GEL)
ECF CASE

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE
PLAINTIFFS' PROFFERED EXPERT SUMMARY JUDGMENT EVIDENCE FROM
THE DEPOSITIONS AND REPORTS OF ELLIS HOROWITZ, Ph.D, AND RICHARD P.
WATERMAN, Ph.D

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Records LLC; Elektra Entertainment Group Inc.;
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Record Company, L.P.; Priority Records LLC; Sony
BMG Music Entertainment; UMG Recordings, Inc.;
Virgin Records America, Inc.; and Warner Bros.
Records Inc.*

November 7, 2008

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Statutes & Rules

Plaintiffs respectfully submit this memorandum in opposition to defendants' motion to exclude summary judgment evidence from the expert testimony and reports of Dr. Richard Waterman and Dr. Ellis Horowitz.

PRELIMINARY STATEMENT

Lacking a defense on the merits, defendants Lime Wire LLC, Lime Group LLC, Mark Gorton and M.J.G. Lime Wire Family Limited Partnership's ("Lime Wire" or "defendants")[1] have made three motions to exclude much of the evidence plaintiffs have offered in support of their motion for partial summary judgment.[2] All of these motions are without merit.[3]

In *this* motion, defendants attempt to exclude summary judgment evidence from plaintiffs' two experts: Dr. Richard Waterman and Dr. Ellis Horowitz. Dr. Waterman is a Wharton School statistics professor who conducted an analysis based on a largely similar methodology to that used and approved in *Grokster*. His study concluded that the LimeWire network is populated almost exclusively by copyrighted files and that, unsurprisingly, users of the LimeWire application are searching almost exclusively for copyrighted files. Dr. Horowitz, an

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[1] "Lime Wire LLC" refers to the defendant company, "LimeWire" refers to LimeWire LLC's software application and unless stated otherwise, "Lime Wire" includes Lime Wire LLC, Gorton and Lime Group LLC.

[2] The other two motions are Defendants' Objections to Plaintiffs' Exhibits and Depositions Excerpts to Their Motion for Partial Summary Judgment and Defendants' Motion to Strike Plaintiffs' Exhibits and Deposition Excerpts ("Mot. to Strike") and Defendants' Settlement Related and Pre-August 2003 Objections To Plaintiffs' Exhibits To Their Motion For Partial Summary Judgment ("Pre-2003/*Grokster* Mot.").

[3] Plaintiffs' 56.1 Statement was supported by Volumes I to VII to the Declaration of Katherine B. Forrest, dated July 18, 2008 ("Forrest 7/18/08 Decl."). Plaintiffs' oppositions to defendants' two 56.1 Statements, as well as the additional facts thereto, were supported by Volumes VIII to X to the Declaration of Katherine B. Forrest, dated September 26, 2008 ("Forrest 9/26/08 Decl."). Documents (or excerpts) cited herein ("Ex. __"), deposition testimony ("____ Tr. __"), reports of the parties' experts ("___ Report ___"), declarations ("____ Decl. __"), and affidavits ("__Aff.__") are consecutively numbered the Volumes referenced above, or are contained in Volume XII and Volume XIII to the Declaration of Katherine B. Forrest, dated November 7, 2008 ("Forrest 11/7/08 Decl."), submitted herewith.

expert in computer software functionality and architecture, shows that the LimeWire application has a design that directly contributes to and induces massive infringement.

Lime Wire argues that Dr. Waterman has undertaken the undoable, using an untested, unreliable and new methodology. This is flatly untrue. Statistical studies like Dr. Waterman's have routinely been used to demonstrate the breadth of copyright infringement facilitated by a variety of peer-to-peer ("P2P") services similar to LimeWire. Most notably, the Supreme Court in *Grokster* relied on a similar statistical study when it found "evidence of infringement on a gigantic scale", *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 922-23, 940 (2005), as did the district court there on remand. *See* 454 F. Supp. 2d 966, 985 (C.D. Cal. 2006). In *Napster*, the court directly relied on a study demonstrating that 87 percent of the files available on the service were likely to be infringing. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902-03, 911 (N.D. Cal. 2000), *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). In fact, defendants' own expert, Steven Gribble, has found such an analysis "doable" and has published the results of his own statistical studies concluding that the file types stored on the old Napster network and on the Gnutella network that LimeWire utilizes were the same: MP3 (or audio) files.[4] (*See* Gribble Tr. 139:5-142:16; *see also* Ex. 64.)

Dr. Waterman is simply the most recent statistical expert to confirm scientifically what is widely accepted as true: LimeWire, like certain predecessor P2P services, is used almost exclusively to commit massive amounts of copyright infringement on a daily basis.

As for Dr. Horowitz, Lime Wire focuses on a few references in his report that Lime Wire contends amount to inappropriate opinions about Lime Wire and its users' "intent" (Defs.'

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[4] Dr. Gribble also found that 94 percent of the data transferred over the Gnutella network are audio or video files, and testified that he is unaware of any substantial non-infringing use of the LimeWire network. (*Id.* at 144:4-145:5, 156:19-157:5.)

Br. at 22) and filtering methods that LimeWire could have implemented to curb infringement (Defs.' Br. at 24). As a matter of law and fact, these conclusions are perfectly proper, but even if they were not, they would, at most, affect only four statements in plaintiffs' 56.1 Statement. (Pls. 7/18/08 SOF ¶¶ 324, 325, 382, 498.)[5]

Faced with Dr. Waterman and Dr. Horowitz's conclusions, Lime Wire argues not that they are wrong, but that the Court should not consider them. Lime Wire's ploy -- and it is nothing more than that -- must be rejected and this motion denied.

ARGUMENT

I.   DR. WATERMAN'S REPORT IS ADMISSIBLE UNDER DAUBERT AND FEDERAL RULE OF EVIDENCE 702

Dr. Waterman's study provides clear evidence of the massive scope of the infringement defendants have induced and facilitated -- demonstrating that 92.7% of files offered are likely to be unauthorized and that almost 99% of download requests by users are likely to be for infringing content. (Waterman Report at 2-3, 7-8.) Defendants now attempt to ward off this evidence by attacking the reliability and relevance of Dr. Waterman's methodology and analysis. At the same time, defendants argue that it is simply *impossible* for a statistician to design a valid study in this context. (*See, e.g.* Defs. Br. at 16; Defs.' Resp. to Pls. 7/18/08 SOF ¶¶ 109, 112, 135.) Defendants' arguments are entirely without merit.

A.   Dr. Waterman's Qualifications and Report

Dr. Waterman is a statistician at one of the preeminent statistics departments in the country (Wharton). He was retained to design a study that would -- and did -- determine two

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[5] In its Motion To Strike, and here (*see infra* § III), Lime Wire improperly attempts to preclude *all* of Dr. Horowitz's report and testimony on the basis that it was not sworn or verified. *See* Defs.' Resp. to Pls. 7/18/08 SOF ¶¶ 51, 53, 62, 70, 73, 74, 86, 327, 328, 337-39, 341, 342, 348-49, 356-57, 359-61, 365, 384, 463-65, 467-72, 477-80, 482, 487, 497, 517, 519, 523, 525, 594 (defendants' objections based on general "admissibility of the Horowitz Report"). That argument is wrong. *See infra* § III; Pls. Mot. to Strike Opp'n Br. § V.

things: (i) the authorization status of files offered for download to LimeWire users, and (ii) the

authorization status of files that LimeWire users affirmatively seek to download. (Waterman

Report at 2.) As shown below, the methodology Dr. Waterman utilized here is very similar to the

methodology used in studies conducted by Dr. Ingram Olkin in both *Grokster* and *Napster*,[6] and

by Dr. Waterman in prior cases. *See, e.g., Grokster*, 545 U.S. at 922-23, 940; *Napster, Inc.*, 114 F.

Supp. 2d at 902-03; Waterman Tr. 18:6-20:8, 37:3-37:23; Waterman Report at 1.[7]

        Dr. Waterman developed a protocol utilizing a content-neutral LimeWire search

feature to collect over six million file hashes; from this population, over 5,000 of the files

associated with each hash were randomly selected and downloaded from the Gnutella network.[8]

Cf. Grokster, 454 F. Supp. 2d at 985 (describing study using random search terms using Morpheus

to collect files, followed by random selection of files for downloading); *cf.* Olkin 2002 Decl. ¶¶ 7-

15 (describing sampling method used to collect 4000 files, from which smaller downloaded

sample was taken). Dr. Waterman's study utilized ten computers synched to networks in five

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    [6] Dr. Olkin performed two statistical studies for *Grokster*, one in 2002 and one in 2006 when
the case was remanded. Each was very similar to the one performed here. *See* Decl. of Ingram
Olkin ("Olkin 2002 Decl."), 2002 WL 32993822 (C.D. Cal. Oct. 14, 2002); Decl. of Ingram Olkin
("Olkin 2006 Decl."), 2006 WL 5400907 (C.D. Cal. Feb. 14, 2006). He also performed a similar
statistical study in *Napster*. *Napster*, 114 F. Supp. 2d at 902-03 & n.6.

    [7] Dr. Waterman has designed statistical sampling protocols for organizations in the public and
private sector, formulated market research studies and national multi-stage samples for large
corporations, and constructed sampling protocols involving file-sharing technologies similar to
LimeWire. (*See* Waterman Rep. at 1 & Ex. A.)

    [8] A "hash" is a numeric representation of a file. (Pls. 7/18/08 SOF ¶¶ 478-79.) The hashes
were collected using a LimeWire search feature called "What's New"; each search ran for 90
seconds and randomly selected one file from the results returned by the search. (Waterman Report
at 4.) A "browse host" command was issued on the selected file, which ran for 90 seconds. (*Id.*)
An inventory of all data received was copied into a Master Hash Library. (*Id.*) This process was
repeated ten times for each "What's New" search. (*Id.* at 4-5.) The software would then
disconnect from its Ultrapeer, reconnect to a different set of Ultrapeers, and the process would
begin again. (*Id.* at 5.)

different cities around the country -- again, similar to the methodology employed by Dr. Olkin in

Grokster. (*Cf.* Olkin 2006 Decl. ¶ 17.) The computers ran this search process, 24 hours a day, for

seven days straight.[9] (Bogle Tr. 117:13-118:4.) Information was ultimately gathered from about

40,000 hosts. (*See* Waterman Tr. 154:7-156:18, 166:10-167:22.) The first 1800 files appearing in

this set were then meticulously reviewed to determine whether they were subject to copyright

protection and/or authorized for free use.[10] (*Cf.* Olkin 2002 Decl. ¶¶ 9, 15 (1600 files from a

sample of 4000 were downloaded for copyright analysis).) The files were categorized as follows:

- Files confirmed by their *owner* not to be authorized for free distribution through Lime Wire were classified as "Confirmed Infringing". (German 4/17/08 Decl. ("German Decl.") ¶ 13; *cf.* 2002 Olkin Decl. ¶¶ 6 & 16(a) (files classified as "infringing", *i.e.*, copyrighted works owned by plaintiffs in the case and not authorized for distribution).)

- Files for which it was highly likely that the files were not authorized for free distribution (*e.g.*, because they were subject to copyright protection, the basis of a copyright registration, commercially marketed), were classified as "Highly Likely Infringing". (German Tr. 119:5-120:12, German Decl. ¶ 13; *cf.* Olkin 2006 Decl. ¶¶ 24(a), 25(a) (files classified as both infringing and "highly likely infringing").)

- Files for which it was highly likely that the file was in the public domain or authorized for free distribution were categorized as "Highly Likely Noninfringing". (German Decl. ¶ 13; *cf.* Olkin 2006 Decl. ¶¶ 24(b), 25(b) (files classified as noninfringing or "highly likely noninfringing").)[11]

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[9] This phase of the study was implemented by Martin Bogle, a retired military officer with over 20 years of experience controlling "database management", "software testing" and managing "security levels" for the computers in his command. (Bogle Tr. 16:2-16, 17:11-21:5.)

[10] This phase of the study was conducted by Eric German, an attorney specializing in "entertainment, copyright, and trademark law" (German Tr. 14:22-15:3; German Decl. at 1). Each file was scanned using RepliCheck, "a copyright identification service", which reported the song title, performing artist and releasing label information; Mr. German's team then verified those results. (German Decl. ¶ 9.) Any files that could not be identified by Replicheck were analyzed manually to determine the identity of the file and its owners. (*Id.* ¶ 10.) This is very similar to what was done in *Grokster* and *Napster*. *Cf.* Olkin 2006 Decl. ¶ 23 (submitted in *Grokster*); *Napster*, 114 F. Supp. 2d at 902-03 & n.6.

[11] Additional categories of files utilized were "Unknowable", "Spam/Spoof", "Pornography" or "Parts of Lime Wire". (German Decl. ¶ 13.)

Almost half of the files (774) were confirmed by their copyright holders (plaintiffs in this case) to be copyrighted and unauthorized for free distribution; 870 of the files were determined to be "highly likely infringing" based on individual analysis; and 38 were determined to be "Highly Likely Noninfringing".[12] (German Decl. ¶¶ 13, 15-17; German Tr. 119:5-120:12.) Back-up records supporting categorization of each of these files were collected and produced, and secondary research was also done to confirm each categorization. (German Tr. 50:24-52:14.) Download requests for the sample files were then analyzed. (German Decl. ¶ 18.) It was determined that "1,082 requests (or 66.6%) were for files confirmed infringing . . . , 524 requests (or 32.2%) were for highly likely infringing files", and only 19 (or 1.2%) were for highly likely *non*infringing files. (*Id.*) Dr. Waterman concluded, based on his statistical expertise, that these results were representative of the general population of LimeWire users.[13]

B. Dr. Waterman's Opinions Are Reliable.

For expert testimony to be reliable, it must simply (i) be grounded on sufficient facts or data, (ii) be the product of reliable principles and methods, and (iii) the principles and methods must have been applied properly to the facts of the case. Fed. R. Evid. 702. In determining the reliability of an expert's methods, "[w]hat matters is that [the expert] has used *an objective method with a traceable analytical basis*". *Coleman v. Dydula*, 139 F. Supp. 2d 388, 395 (W.D.N.Y. 2001) (emphasis added). Thus, quibbles with methods and assumptions alone are

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[12] In addition, 26 files were classified as "Spam/Spoofs" (17) or "Pornography" (9) and were removed from the sample. (Waterman Report at 7.) 18 files were determined to be part of the LimeWire client itself and were considered "noninfringing". (*See* German Decl. ¶¶ 4-5.)

[13] Though devastating, Dr. Waterman's conclusions – that an estimated 92.7% of the files available for download using LimeWire are not authorized for free distribution on P2P networks -- should come as no surprise. Even defendants' expert, Matthew Mercurio, has expressed the view that at least 85% of music files offered on Gnutella are copyrighted. (Mercurio Tr. 146:14-148:9.)

not a basis for exclusion, and the exclusion of an expert opinion is the exception, not the rule. *See,*

e.g., Alfa Corp. v. OAO Alfa Bank, 475 F. Supp. 2d 357, 359-60 (S.D.N.Y. 2007).

1.   Dr. Waterman's Study Protocol Was Properly Developed.

Defendants protest that Dr. Waterman's protocol was impermissibly "developed in

a collaborative fashion" (Defs.' Br. at 6-7), rendering his methodology invalid (*id.* at 9). That is

ridiculous.

Experts routinely rely on and "collaborate" with others who have pertinent

knowledge or technical capability in forming their opinions. *See* Fed. R. Evid. 703 (experts may

form opinions based upon facts that are "perceived" directly or are "made known" to the expert

not within personal knowledge or observation).[14] Indeed, experts need not even rely on

admissible evidence, so long as it is "reasonably applied or relied upon by experts in the field for

their conclusions". *See Inline Connection Corp. v. AOL Time Warner Inc.,* 470 F. Supp. 2d 435,

442-43 (D. Del. 2007).

Dr. Waterman testified clearly, and repeatedly, that *he* devised the protocol, and he

repeatedly explained that while technological decisions were necessarily made in discussion with

others, the statistical decisions were made by him alone.[15] The record is also clear that no material

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[14] *See Doe v. Cutter Biological, Inc.,* 971 F.2d 375, 385 n.10 (9th Cir. 1992) (Rule 703 permits expert to base opinion on data "made known to the expert" and does not require personal knowledge); *Inline Connection Corp. v. AOL Time Warner Inc.,* 470 F. Supp. 2d 435, 443 (D. Del. 2007) (experts are free to rely upon "assumptions provided by the client, other experts, or counsel"); *see also Gussack Realty Co. v. Xerox Corp.,* 224 F.3d 85, 94-95 (2d Cir. 2000) (expert may properly rely on the data provided by other experts); *Walker v. Soo Line R.R. Co.,* 208 F.3d 581, 588 (7th Cir. 2000) ("courts frequently have pointed to an expert's reliance on the reports of others as an indication that their testimony is reliable").

[15] Waterman Tr. 44:19-22 (Waterman devised protocol and gave it to attorneys); *id.* at 45:8-45:11 ("the statistician's role is to design and analyze, and statisticians tend not to implement in the sense of writing code to do various things"); *id.* at 147:14-15 ("the implementation [of the sample] will always be within the technology team"); *see also id.* at 151:12-152:16; 198:10-15.

decisions were made by anyone other than Dr. Waterman during the technical implementation stage of the protocol.[16] Moreover, defendants' own purported expert, Dr. Mercurio, acknowledged that when designing sampling protocols, "that paradigm [of statisticians relying on the technical and legal expertise of others] is quite common", and admitted that his own prior expert reports have relied on protocols designed entirely by party employees in "some collaboration" with him "as to particular issues that related to the statistics", and implemented entirely by those employees. (Mercurio Tr. 252:12-254:10; Ex. 392 at ¶¶ 6, 11.)

Defendants' related argument that the "collaborative" development of the protocol was "led by Plaintiffs' attorneys" (Defs.' Br. at 7) is plainly not true. Dr. Waterman clearly testified that he "devised a protocol, and then gave it to [counsel]". (Waterman Tr. 44:19-22; *see also id.* at 45:4-9 ("there [are] always, you know, calls with counsel [about] process, timing and all these sorts of things, but the nature of this sort of work as the statistician's role is to design and analyze").) Again, such decisions were "collaborative" only as to logistics.[17] Indeed, Advisory Committee Note to Rule 26 states expressly that "Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed . . . this assistance may be needed". Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note (1993).

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[16] Bogle testified that he had no input in the design of the study and "did not know why" any of the decisions with respect to the drafting of the protocol were made (except for one technicality: after Bogle performed a practice run of the protocol, he determined that the searches should be set to time out after 90 seconds). (Bogle Tr. 98:10-99:10.)

[17] Defendants also contend that plaintiffs' counsel "drafted" the report (Br. at 8). In fact, Dr. Waterman testified that although plaintiffs' counsel *typed* the report, he directed counsel expressly and exactly as to what the content of the report would be. (Waterman Tr. 131:17-132:19) ("every word in that report is . . . my work"); (reports are "collaborative" in that "I say what I want to go into the report and then maybe a secretary or someone actually types that component of it")). Once the report was typed, Dr. Waterman went through the report and "ma[de] sure that it accurately reflected [his] opinions". (*Id.* at 132:18-19.)

2. Dr. Waterman's Analysis Was Not Developed Solely For This Case.

Defendants argue that Dr. Waterman's study was "prepared solely for purposes of this litigation". (Defs.' Br. at 8.) If defendants mean that Dr. Waterman was retained to perform this study for this case, that is, of course, true -- and the very nature of an expert report. If defendants mean to suggest the methodology utilized here is a methodology developed only for this case -- that is flatly wrong. Dr. Waterman's analysis did not require him to be on the cutting edge of statistics; his study utilized a basic sampling technique based on textbook principles of statistics that are utilized regularly to conduct censuses, polls and market studies in the real world. (*See* Waterman Tr. 85:10-86:25, 87:18-88:24, 113:20-115:11.) In fact, Dr. Waterman has designed and analyzed data from similar protocols in other P2P cases, with almost identical results. (*See* Waterman Tr. 183:3-184:8 (earlier studies found 90 and 91 percent infringement).) Similar protocols were relied on by the *Grokster* and *Napster* courts, also with similar results. *See, e.g. Grokster*, 454 F. Supp. 2d at 985; *Napster*, 114 F. Supp. 2d at 902-03, n.6. And, defendants' expert Steven Gribble conducted similar studies reported in several 2002 papers (also with similar results),[18] while defendants' expert Matthew Mercurio has also designed statistical sample studies analyzing copyrighted materials on P2P programs. (*See, e.g.* Ex. 392 at ¶¶ 6, 15.)

3. The File Classifications In the Study Were Properly Relied Upon By Dr. Waterman.

Defendants also argue that Dr. Waterman's conclusions are premised on classifications "made up" by a "nonexpert attorney hired by plaintiffs" and are therefore invalid. (Defs.' Br. at 6-7). That is nonsense. *First*, Eric German did not "make up" categories. Virtually identical categories were used to classify authorization status of the files in *Napster* and *Grokster*.

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[18] *See* Gribble Tr. 138:23-142:16, 144:4-145:11, 156:11-157:18; *see also* Gribble Report at Attach. A (C.V.) (Ex. 470).

Napster, 114 F. Supp. 2d at 903 n.6 (87% of files from sample were confirmed as copyrighted by plaintiffs or other copyright holders, 3.2 % classified as "likely to be copyrighted"); *Grokster*, 545 U.S. at 952 (75% of files on P2P service are "infringing" and 15% are "likely infringing"). As Dr. Waterman noted, "[t]he categories that are used in the study are very typical of categories that have been used in other studies that I have been involved with". (Waterman Tr. 59:11-14.)

Second, Mr. German explained at his deposition exactly how the team determined what went into each category. Indeed:

- 43.6% of the files in the study were *confirmed* to be copyrighted and unauthorized for distribution *by their copyright owners*. (German Decl. ¶ 15.)

- The remaining files were individually reviewed and categorized based on manual research, with 49% classified as highly likely infringing and 3.2% as public domain material, material authorized for free distribution, or part of the LimeWire client. Unidentified files constituted 4.2%. (*Id.* ¶¶ 15-17.)

- Backup data was collected, examined and produced for every single file in the sample -- a fact that goes totally unmentioned by defendants. (German Tr. 50:24-52:18.)[19]

Third, defendants ignore that Mr. German made and confirmed these assessments with over 8,000 pages, plus CDs and hard drives, of files containing backup information for each classification -- including "screenshots of iTunes, properties screenshots of various files", "metadata", etc. (German Tr. 51:11-52:18; 96:7-97:24; 108:3-109:12.) All these backup documents were produced, but defendants do not even mention their existence.

Fourth, defendants deride the fact that Mr. German is an attorney. But Mr. German's legal expertise *qualifies* him to perform just such a categorization. (*See* German Tr. 14:1-15:16.) Indeed, in *Napster*, the data collected by the expert statistician was classified by

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[19] *See also*, German Tr. 119:5-120:12 ("highly likely infringing" files were categorized based on "research" as to, *inter alia*, whether it was "the subject of a copyright registration"); *id.* at 125:5-125:10 ("highly likely non-infringing" files were categories where it was "highly likely that the file was in the public domain or authorized for free distribution").

"anti-piracy counsel for the RIAA", and was simply accepted by the court. *Napster*, 114 F. Supp. 2d at 902-03, n.6.[20] Here, defendants contend that because Mr. German is an attorney, the categories relating to the infringement status of the data could be construed as communicating a "legal standard" to the factfinder. (Defs.' Br. at 9 n.8.) That is absurd, and defendants cite one pre-*Daubert* case in which the court noted the unremarkable proposition that an expert may not "merely tell the jury what result to reach" in support.[21] Neither Dr. Waterman nor Mr. German offers opinions on inducement or contribution to infringement.

Fifth, according to defendants, Mr. German should have attempted to contact every copyright holder for all 1800 files in the sample to confirm that the use was unauthorized. (Defs.' Br. at 12.) But confirmation by all copyright holders was never required in the previous studies relied on by other courts. *Grokster*, 545 U.S. at 922-23; *Napster*, 114 F. Supp. 2d at 903, n.6. Notably, defendants have not produced even one copyright holder that says that any of the categorizations were incorrect.[22]

Sixth, added to their litany of baseless objections here are defendants' arguments that some files in the "highly likely" category were various types of software that they claim are freely available for downloading (Defs.' Br. at 11), and that "numerous" files categorized as

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[20] Also, in *Grokster*, Dr. Olkin also relied on the work of others to perform the copyright classification aspect of the study. The results of those samples were sent to persons "at, and/or engaged by", the plaintiff motion picture companies and record companies to assess the copyright ownership status of files. (Olkin 2006 Decl. ¶ 23.) Dr. Olkin made clear that he "did not independently perform" these analyses. (*Id.*) *See Inline Connection Corp.*, 470 F. Supp. 2d at 443 (acceptable for experts to rely on others).

[21] In *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992), the issue was whether a policeman had used a proper amount of force. The expert testified that the officer's conduct "was not 'justified under the circumstances,' not 'warranted under the circumstances,' and 'totally improper'". *Id.* at 364-65.

[22] Moreover, the evidence shows that German was "very conservative" in his categorizations. (German Tr. 105:11-106:2).

highly likely infringing were "blank white screens". (*Id.*) *First*, the relevant issue is not whether this software was "free", but whether it was *authorized for redistribution over a P2P network*, the relevant question for a determination of infringement. (German Tr. 335:4-335:23 ("[F]ree isn't the issue. It's authorization status.").) Neither one of the two "free" software defendants found -- Kodak EasyShare and Google Earth -- is licensed for re-distribution. (*See* Exs. 49, 471.)[23] *Second*, the files defendants refer to were not simply "blank" or "white" nor were they "numerous" (defendants found only five or six examples). (*See* German Tr. 143:18-146:13, 187:5-192:17; 231:7-237:16.) And for each of these files, Mr. German explained why they were categorized as highly likely infringing.[24]

Finally, defendants complain that Mr. German classified some "sliver" files -- *i.e.*, individual files that were clearly part of larger copyrighted programs -- as "Highly Likely Infringing". (Defs.' Br. at 11.) This is disingenuous. These files are small slices of larger copyrighted programs; therefore, after individually analyzing each file, some of them -- though not all -- were categorized as "highly likely" to be infringing. (*See, e.g.,* German Tr. 151:23-153:13, 224:24-225:12.)[25] It is an uncontestable legal proposition that portions of copyrighted works are protectible under copyright law. *See, e.g. Harper & Row Publ., Inc. v. Nation Enter.*, 471 U.S.

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[23] Indeed, defendants' expert identified EasyShare in his report as an example of erroneous categorization by German, but then acknowledged in his deposition that he would agree with Mr. German's categorization. (Mercurio Tr. 232:17-233:24.)

[24] *See, e.g.,* German Tr. 146:11-13 ("Somebody, clearly Sonic Solutions is clearly claiming copyright on that particular file, [and] this looks to me like a fragment from a larger piece of software"); *see also id.* 191:8-10 (exhibit "comes from a larger piece of software" in which copyrights are claimed"); *id.* 232:17-234:3 (image is copyrighted by yahoo.com).

[25] Defendants' focus on the visual characteristics of many of these files elides the fact that they are comprised of technical code forming pieces of larger copyrighted works. *See, e.g. German Tr. 190:1-191:16, 198:5-200:18; *id.* at 146:17-24; 148:9-25; 150:9-151:6.

539, 547-48 (1985). Alternatively, these files could have been excluded as irrelevant -- since nobody goes searching for these slivers.[26]

4. Spam, Spoofs and Pornography Were Properly Excluded.

Defendants suggest that the study "discard[ed] unfavorable results" by not including viruses, spoofs, spam and pornography.[27] (Defs.' Br. at 13.) But, Dr. Waterman's protocol properly called for the exclusion of these files.

First, no viruses were found or removed from the sample. Defendants learned this at Mr. Bogle's deposition (Bogle Tr. 163:6-164:5)[28], but make this argument nevertheless. *Second*, it defies common sense to argue that anyone has ever affirmatively used LimeWire to search for viruses, spoof and spam. People want to *avoid* viruses, spoofs and spam. (*E.g.*, Waterman Tr. 217:5-218:10; *see also id.* at 218:20-21 ("[N]o one goes searching for viruses" or "intentionally tries to find a virus".).) Accordingly, their exclusion is consistent with defining a *relevant* sample population. *Third*, the total of spam/spoof and porn files excluded was 26 (17 spam/spoof and 9 pornography files) out of 1800 -- a number so inconsequential that even if they had not been removed from the study, the results would have been essentially the same. (Waterman Tr. 229:2-231:23.) *Fourth*, Dr. Waterman testified in detail about the specific reasons

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[26] Defendants also argue that Mr. German did not open all of the 1800 files, citing testimony saying he could not swear he had "doubleclicked" and "experienced" every single file. (Defs.' Br. at 11). That is misleading. Mr. German and his team examined each of the 1800 files, each file was supported by backup materials, and German testified that while he "can't say that [he] double clicked on every single file, . . . [he] certainly may have" and affirmed repeatedly that "each of the 1800 files" were categorized by him. (German Tr. 46:24-47:22, 50:12-52:14, 75:20-22.)

[27] "Spam" refers to files that are essentially advertisements; "spoofs" are trick files (usually spam/advertising) "masquerading" as something they are not; and "viruses" are malicious files intended to damage the user's computer. (*See* Waterman Tr. 218:11-220:4, 230:16-231:8.)

[28] The *LeClercq v. Lockformer Co.* case cited by Defendants is inapposite. In that case, the expert ignored "clearly" material data that "would be relevant to [the expert's] conclusions". *LeClercq*, 2005 WL 1162979, at *4 (N.D. Ill. Apr. 28, 2005).

his protocol called for exclusion of these three categories of files.[29] Defendants suggest that the study "discard[ed] unfavorable results" by not including these files (Defs.' Br. at 13), but as shown above, the excluded files were *irrelevant* to the sample; the relevant framework is one of "substantial noninfringing use" and spoofs/spam cannot be considered substantial use.[30]

5. Dr. Waterman's Protocol Was Correctly Implemented and His Oversight Was Proper.

Defendants complain that Dr. Waterman "had no involvement in implementing the protocol, and had no contact with the persons implementing his protocol until after it had been completed". (Defs.' Br. at 14; *see also id.* at 6.) This is a red herring. Defendants -- who deposed Mr. Bogle at length -- offer no evidence that the study was not implemented according to the protocol, and do not identify a single problem with the implementation. To the extent defendants are really arguing that Dr. Waterman should have physically conducted the study himself (Waterman Tr. 50:7-53:8 (suggesting he should have watched them set up the computers and watched them install LimeWire)), that is nonsensical and not legally required. (*See supra* § I.B.1.) Indeed, Dr. Waterman's protocol was transmitted to Mr. Bogle in writing to ensure it was followed to the letter, Mr. Bogle maintained careful control, and Dr. Waterman verified that, step

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[29] *See, e.g.*, Waterman Tr. 236:23-239:24 (pornography was filtered out by default user settings, which were left on to replicate client's use of the application, and likely would have been infringing at any rate); *id.* at 216:8-18, 217:5-218:10 (viruses would disable or destroy the computers implementing the protocol, are not relevant to population and pose classification issues); *id.* at 230:16-232:23, 235:3-236:22 ("It's very definitionally difficult for a spoof to make an infringing/non-infringing judgment: Is it the user who thought it was infringing content, or the fact that the content that it turns out point to is infringing or not infringing right. Certainly the user thought one thing.").

[30] Defendants also argue that this reduced the "denominator" of the study -- but any file that "could have been a denominator" *could have been a numerator as well.* That is, it could have been infringing, and, if so, would have actually increased the number of infringing files. (Waterman Tr. 220:22-221:4, 239:25-240:23.) Mercurio admitted that he had only guessed that the exclusion of porn reduced, rather than increased, the infringing files found. (Mercurio Tr. 227:19-22.)

by step, Bogle had implemented the protocol as designed. (Bogle Tr. 41:4-7; 118:5-120:9; 120:16-121:14; Waterman Tr. 54:3-22.) Defendants fail to cite any case law requiring more.

Defendants also attack "inconsistencies between Bogle and Waterman's data", claiming that the numbers in the report were erroneous, and the numbers cited by Bogle were right. (Defs.' Br. at 15.) That is just another red herring. These discrepancies were the result of simple clerical errors in Dr. Waterman's report. Defendants already know that: the data were corrected in errata to Dr. Waterman's deposition filed months ago that were never challenged by defendants, and is now part of the official transcript. (*See* Waterman 8/8/08 Errata.)[31]

6.   Waterman's Sampling Frame Was Valid.

Dr. Waterman used the "What's New" search feature to crawl through all new files in the system, irrespective of content or location, ensuring a broad representation that could include any host on the network. Nevertheless, defendants erroneously contend that Dr. Waterman's analysis is invalid because it was based on "nonrepresentative cluster sampling" leading to a "biased" sample from which reliable conclusions cannot be drawn. (Defs.' Br. at 16-17; *see also* Defs. 9/26/08 SOF Response ¶ 111).

First, defendants argue that "no valid sampling frame corresponding to the population at issue exists" since the entire population of LimeWire users is not known (*i.e.*, we have no list of every computer on the internet using the service). (*Id.* at 16-17.) That has no

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[31] Defendants also claim that Mr. Bogle did not know at his deposition precisely what an "Ultra Peer" was (Defs.' Br. at 15), but he does not need to; Bogle did precisely what he was supposed to do. The protocol required that each "client" in the study be configured to disconnect from its UltraPeers after a "What's New" query, and then connect to a different set of UltraPeers and initiate another search, while ensuring that controls "prevented any of the Clients from connecting to the same Ultra Peer more than once". (Waterman Report at 5.) Mr. Bogle testified that (i) he implemented the protocol such that the study computers could not reconnect to an IP address any other study computer was connected before and (ii) if an ultrapeer is another client sitting on another computer (which it is), than the study computers could not reconnect to the same ultrapeer twice. (Bogle Tr. 124:14-22; 125:16-126:7; 192:9-18.)

bearing on the validity of a sample -- as Dr. Waterman pointed out, "there are many circumstances in which a sampling frame will not correspond exactly to the population". (Waterman Tr. 86:18-25, 88:17-24).[32] Indeed, a sample "can lack representation [of the population] in *many different*" and "*irrelevant*" ways.[33] (*See id.* at 107 (emphasis added).) Any statistician would confirm that it is possible to create sampling frames from which valid inferences for the population can be made where the sample frame was not generated from the entire population. (Waterman Tr. at 108, 112; *cf.* Cochran § 11.11 (Ex. 472).) Of course, the statistical inferences are a matter of expert judgment.[34] (*Id.* 118:8-119:4.)

Second, studies utilizing a similar sampling method were relied upon by the Court in *Grokster*. *See, e.g., Grokster*, 454 F. Supp. 2d at 985; Olkin 2004 Decl. ¶¶ 9, 11-15; Olkin 2006 Decl. ¶¶ 11-14, 22. Although that sample method would have clearly sufficed here, Dr. Waterman actually *improved* on that study's method of data collection (which used random key words to do searches and collect a master group, and thus had limitations imposed by the dictionary (*i.e.*, no

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[32] *See* Waterman Tr. 171:5-8 ("I totally disagree" that you cannot extrapolate data about the entire population based on a cluster sample.); *id.* at 114:15-21 ("Every country has a census. Do you think a census has ever been enumerated that got it exactly right? My guess is it has never ever happened. Does that meant that people feel censuses are not valid, valid in the sense of providing useful information? No."); *see also* William G. Cochran, *Sampling Techniques* § 10.5 (3rd ed. 1977) ("Cochran") (Ex. 472); *Grokster*, 545 U.S. at 923 ("no one can say precisely how often P2P software is used to obtain noninfringing material, but the statistical study "gives reason to think that the vast majority of users' downloads are acts of infringement").

[33] For example, if a sample protocol called for every name in the phone book, and for some reason every fifth name in the phone book were missing, a statistician would view that deficiency in representation as immaterial and irrelevant. (Waterman Tr. 116:10-117:3.)

[34] Notably, Dr. Mercurio, who provided Defendants with practically all of their arguments in this regard (*see* Defs.' Br. at 16-20), is *not* an expert statistician, has not taken any courses on sampling, was not presented by FTI (his employer) as an expert on sampling, is not a member of the National Association of Statisticians, and was not presented by FTI as an expert witness. (*See* Mercurio Tr. 39:12-41:20 & Ex. 490; *id.* at 45:16-47:7; 51:4-51:12; 55:4-59:2; 75:20-76:13; Ex. 473.) Nonetheless, even Mercurio recognized that there are situations where samples may not be representative and still yield valid results. (Mercurio Tr. 82:11-17, 119:19-120:19.)

foreign languages, no slang or non-dictionary words, etc.)) by enabling a broader sample frame. (Waterman Tr. 277:21-278:21.)

Third, defendants claim that the master hash library was "biased and does not provide a fair representative image of all the possible files available for download", (Defs.' Br. at 17), because for each of the about 40,000 hosts that were captured by the "What's New" search and selected for copying, the file hashes *for all files* in that user's shared folder were copied, (Defs.' Br. at 17). According to defendants, different hosts may have specific "genre" preferences (*e.g.,* opera or rap), making the hash library an unrepresentative sample of the entire population of users. (Defs.' Br. at 18-19 n.16.) Even if defendants were correct that the preferences of some hosts were represented more than others in the LimeWire universe -- which is unlikely given the enormous size of the Master Hash Library (*see supra* § I.A) -- it would not affect the validity of the sample. That is because the purpose of the study was to assess *percentages of infringing content* offered, not varieties of musical genres available. (Waterman Tr. 165:11-167:22.) Thus, even if the large number of different hosts used in the study just happened to all have *identical* tastes in genres of music (all rap or all country music), that would not impose any relevant "bias". (*Id.* at 165:11-167:22.)

Fourth, although the initial collection of data from hosts rather than the entire universe of LimeWire files could be termed a "cluster" sample, the data collection for the Master Hash Library came from close to *40,000 different hosts* (*Id.* at 156:9-159:17 (emphasis added).) Therefore, the 1800 files that were ultimately analyzed resulted from a simple random sample performed on files originating from *hundreds* of different hosts. (*Id.* at 155:25-156:18, 158:5-159:17, 165:3-167:2 ("[B]y the time I've got 45,000 [hosts] and pool them together, that's going to be a very heterogeneous collection of files there.").) More importantly, the mere fact of using a cluster sample has absolutely no effect on the *validity* of the sample data and does not make it

somehow "unrepresentative" of the population, as defendants suggest. (Waterman Tr. 165:3-167:2 ("If I have . . . 45,000 of these different users out there, I am going to get such a broad variation in those files that are coming in that I think it will be representative of all the files in the population."). Indeed, cluster samples are routinely utilized as an efficient manner of assessing characteristics of large populations. (*See* Waterman Tr. 168:4-11, 168:24-170:5.)

Fifth, even defendants' expert Matthew Mercurio acknowledged that many imperfections that defendants now claim to be fatal are *not* problematic:

- He recognized that there are situations where samples may not be representative and still yield valid results and that cluster samples are ubiquitous. (Mercurio Tr. 82:11-17, 119:19-120:19, 148:25-149:5.)

- He stated that a sampling frame would have to be representative so that discrepancies would be "small . . . and nonsystematic", and defendants offer no theory as to why 45,000 clusters would create a "systematic" error. (*Id.* at 101:14-20.)

- He agreed that if many clusters are chosen, it is likely that end results would be accurate – even if some properties of the population would still "look" somewhat different from the overall population. (*Id.* at 170:16-171:12.)

- He admitted that he has no evidence whatsoever to show homogeneity within users or heterogeneity between different users that would support his theory of bias. (*Id.* at 164:15-165:4.)

- He admitted his critique of Dr. Waterman's method of selecting hosts was "imprecise" and based simply on speculation. (*Id.* at 200:1-10; 208:6-14.)

Indeed, though Mercurio now argues that he has never seen and there is probably no way to create a representative sample of any subpopulation of files on the Gnutella network, (*id.* at 97:22-98:14, 105:5-10), he purported to do almost precisely that for Streamcast in *Grokster*. (*Id.* at 106:12-108-24; *see also* Ex. 392 at ¶ 15 (Mercurio Decl. submitted in *Grokster*).)

Sixth, defendants' argument that Dr. Waterman's weighting technique biased the results by only including hosts that have "popular" files (Defs.' Br. at 19) is a red herring. The "What's New" search returned files most recently added to users' collections (*i.e.*, "here is a file that was not here last week"), which were then used as gateways to accessing the underlying *host*;

the entire contents of the shared file collection on that host were indexed, not just the "popular" gateway file. (Waterman Report at 4-5.)

Finally, it was not material or relevant that downloads from the Master Hash Library came only from nonfirewalled hosts, because the magnet link used to find downloads identifies *content* that is not tied to a specific IP address. (Waterman Tr. 211:13-212:9.) That is, if a link was blocked by a firewalled IP address, the program continued to search for the same file from other hosts not behind the firewalled addresses until the file was found. (*Id.*) It is irrelevant whether the file came from a particular host; the only question is whether the content is unauthorized. (*Id.* at 212:18-213:7.) Thus, the study went to other hosts to get the same content that is not behind the firewall; there is no reason to believe that people behind firewalls have more or less infringing content than others. (*Id.* at 213:22-214:3.) Tellingly, Mercurio agreed that his critique about bias due to firewalls *would not apply* if Lime Wire attempted to get the selected file from other users, and admitted that he has no evidence whatsoever to backup his claim of bias due to failure to use magnet links behind firewalls. (Mercurio Tr. at 214:8-25; 212:1-8.)

II.   DR. HOROWITZ'S REPORT IS ADMISSIBLE UNDER DAUBERT AND FEDERAL RULE OF EVIDENCE 702

The four pages of defendants' motion that relate to Dr. Horowitz do not challenge any of his conclusions as to LimeWire's functionality, its control over features and users, and the existence of controls that would make it more difficult to infringe. Defendants instead complain about his analysis establishing that LimeWire incorporated software elements that made infringement easy to do and hard to detect, and refused to implement simple filtering methods that could have reduced trafficking in pirated music files. (Defs.' Br. at 21-25.) Thus, defendants' motion questions only two discrete aspects of Dr. Horowitz's study: opinions purportedly bearing on the "intent" of Lime Wire software designers and users, and opinions concerning feasibility of installing filtering mechanisms. Those complaints only tangentially relate to just 4 out of the 48

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facts in plaintiffs' 56.1 Statement that cite to Dr. Horowitz's report. Defendants also ignore, and

therefore concede, Dr. Horowitz's impressive qualifications; he is eminently qualified to conduct

the software analysis he conducted in this case[35] -- including opining on the feasibility of installing

filtering mechanisms. At any rate, defendants' arguments for exclusion are without merit.[36]

A. Dr. Horowitz's Qualifications and Report.

Dr. Horowitz was retained to explain the functioning of P2P file sharing and the

Gnutella P2P file-sharing application utilized by LimeWire; to determine whether any elements of

LimeWire's design and function promote trafficking in unauthorized copyrighted files; to analyze

whether Lime Wire has the ability to use tools, such as filtering, to reduce the use of the LimeWire

system for trafficking in unauthorized copyrighted files; and to analyze whether Lime Wire LLC

exercises control over installed clients. (Horowitz Report ¶ 2.)

Dr. Horowitz downloaded the LimeWire software and reviewed its features,

performed searches, reviewed the source code, examined Gnutella's specifications and "the

various protocols that Gnutella has gone through over the years", and read documents relating to

the technologies. (Horowitz Tr. at 43:18-44:1; 49:22-51:6.) His report summarized his analysis

and concluded:

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[35] Dr. Horowitz is a professor of Computer Science and Electrical Engineering at the University of Southern California, was the Chairman of the Computer Science Department, has extensive experience in software engineering, including "writing code" for software applications, and has focused his research on internet software development. (Horowitz Report ¶¶ 4-6, 8; Horowitz Tr. 57:14-58:3.) He has also authored or co-authored "over ten books and over eighty journal articles . . . on computer science subjects including data structures, algorithms and software design". (Horowitz Report ¶ 10.)

[36] Notably, the same type of evidence that defendants now seek to exclude was relied on by the Supreme Court in *Grokster*. *See Grokster*, 545 U.S. at 939 ("[E]vidence of unlawful objective is given added significance by [plaintiff's] showing that neither [defendant] attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software."); *id.* at 926-27 ("[T]here is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted files.").

- LimeWire can be used to download and offer for download on the Gnutella network files that are unauthorized for distribution. (Horowitz Report ¶¶ 12-13.)

- Lime Wire LLC optimized the system for downloading popular music files, and implemented features that encourage users to download and offer content unauthorized for distribution on Gnutella. (*Id.* ¶¶ 14-15.) Lime Wire did not implement features that would have reduced traffic in unauthorized media, such as combining audio fingerprinting, keyword and hash-based filtering. (*Id.* ¶ 16.)

- Lime Wire implemented mechanisms that it uses to exercise control over certain aspects of LimeWire clients operating on Gnutella, and could expand the type of control it exercises. LimeWire also controls the design of the client, controls the primary means of distribution and could inform users of the availability of a new version. (*Id.* ¶¶ 17-18.)

Lime Wire's limited arguments to preclude Dr. Horowitz report and testimony are without merit.

B. Dr. Horowitz's Challenged Opinions Are Admissible.

1. Dr. Horowitz's Opinions On Design Features and Likely User Interaction With Those Features Are Reliable.

Defendants argue that Dr. Horowitz's opinions regarding whether certain features of LimeWire were designed to enable downloading of unauthorized files, and regarding the likely use of these features by users, are opinions on "state of mind" based on Dr. Horowitz' speculative "feelings". (Defs.' Br. at 22, 23 (citing Horowitz Report ¶¶ 56, 57, 66, 69, 70 & 81).) These are, however, not opinions on "state of mind" -- they are conclusions of a highly experienced software expert, specializing in internet software function and design, as to the likely use of software based on its observed design. Nor are Dr. Horowitz's conclusions based on his "feelings" -- they are based on both his direct analysis and his extensive experience -- *i.e.*, methodically utilizing the software as outlined in his report, and using his experience to draw conclusions about the way in which software has been optimized to allow someone to utilize the software, and about the way in

which users are likely to interact with the software. As *Daubert* made clear, experts may make inferences based on their experience and unique understanding of their field.[37]

Defendants strain to fit their arguments into the *Daubert* rubric by arguing that Dr. Horowitz's *conclusions* are excludable because they cannot be "tested" and based on "speculation". (Defs.' Br. at 22 ("Horowitz's thoughts on LW's and LimeWire users' intent have not and are incapable of being tested . . . .").) Defendants' arguments are misplaced. It is Dr. Horowitz's *methodology*, which consisted of utilizing the LimeWire software in the methodological manner outlined in his report, that must be -- and is -- capable of being tested and capable of being replicated. *Daubert*, 509 U.S. at 593 (key reliability question is whether methods can be tested or challenged in some objective sense). (Tellingly, defendants did not attempt to have their own expert test Dr. Horowitz's methodology and draw his own conclusions.) *Daubert* does not enable defendants to conflate the analytical process with the *conclusions* that Dr. Horowitz drew based on that methodology, which he is entitled as an expert to draw.[38] Moreover, defendants have provided no basis for the argument that Dr. Horowitz's testimony is "speculative"; and indeed, expert testimony is not "speculation and conjecture" where an expert's

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[37] *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 283-84 (E.D.N.Y. 2007) ("'[U]nlike an ordinary witness . . . , an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge . . . . The exception . . . 'is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'" (quoting *Daubert v. Merrell Down Pharms.*, 509 U.S. 579, 590 (1993))); *Miller v. Astucci U.S. Ltd.*, No. 04 Civ. 2201, 2007 WL 102092, at *14 (S.D.N.Y. Jan. 16, 2007) ("[A]lthough [the expert] based his opinions solely upon his investigation and 'years of experience', '[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.'" (quoting Fed. R. Evid. 702 advisory committee's note (2000)).

[38] *Daubert*, 509 U.S. at 595 (focus must be on principles and methodology, not on conclusions they generate); *In re Zyprexa*, 489 F. Supp. 2d at 284-85 (expert conclusions admissible where they reasonably follow from facts and reliable methodology).

"report adequately articulates both how, and why, he arrived at his opinions in this matter and his opinions appear to be sufficiently reliable".[39]

2. Dr. Horowitz's Opinions Are Within the Scope of Expert Testimony.

Defendants argue that Dr. Horowitz's conclusions that LimeWire's features were optimized for downloading files and supporting searches for unauthorized work are "ultimate legal conclusions" about defendants' and LimeWire users' intent. (Defs.' Br. at 24.) (Defendants do not cite any specific paragraphs in Dr. Horowitz's report in connection with this point.) Again, defendants ignore the fact that opinions on software design fall squarely within Dr. Horowitz's area of technical expertise. Moreover, defendants are factually and legally incorrect. *First*, none of the sections of his report that defendants challenge actually say anything about the "intent" of Lime Wire LLC or LimeWire's users. (Defs.' Br. at 22.) *Second*, experts may offer testimony that "[bears] on the issue of intent". *United States v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001). And expert testimony and conclusions embracing, and providing evidence that may contribute to the court's judgment on "ultimate issues" is starkly different from testimony directly opining on such issues.[40]

3. Dr. Horowitz is Entitled To Opine About Filtering Methods.

Finally, defendants contend that Dr. Horowitz impermissibly "speculated" about the effectiveness of filtering methods utilized by other companies because he has not tested those

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[39] *Giladi v. Strauch*, No. 94 Civ. 3976 2007 WL 415365, at *10 (S.D.N.Y. Feb. 6, 2007).

[40] *See* Fed. R. Evid. 704(a); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (noting distinction between "factual conclusions that may be included in an expert's testimony -- though they embrace an ultimate issue to be decided by the jury -- and opinions embodying legal conclusions"); *see also U.S. Info. Sys. Inc. v. Int'l Brotherhood of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 240-41 (S.D.N.Y. 2004).

methods himself.[41] (Defs.' Br. at 24-25.) Once again, defendants ignore Dr. Horowitz's expertise

in the area of internet computer software, which enables him to draw conclusions based on

observation, or assumptions and information provided by others. *See* Fed. R. Evid. 703 (experts

may form opinions based upon facts or data that are either "perceived" directly or are "made

known" to the expert not within personal knowledge or observation); *see, e.g. Miller*, 2007

WL 102092, at *14. Moreover, the *Grokster* court cited precisely this type of evidence in

determining that defendants had acted with an unlawful objective. (*See supra* n.36.)[42]

III. THE EXPERT REPORTS MAY PROPERLY BE CONSIDERED ON SUMMARY JUDGMENT

Defendants contend that Dr. Waterman and Dr. Horowitz's expert reports are

neither sworn nor verified, and are therefore not "competent" summary judgment evidence, and

inadmissible. (Defs.' Br. at 1.) On this basis, they object to Plaintiffs' 56.1 statements citing

Horowitz or Waterman. (*See supra* n.5 for Horowitz statements; *see* Defs.' Resp. to Pls. 7/18/08

SOF ¶¶ 104-110, 544-545 (Waterman).) Defendants' argument is simply wrong. (*See* Pls. Opp.

to Defs.' Mot. to Strike § V.) In any event, an unsworn expert report submitted in connection with

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[41] Though they contest admissibility, Lime Wire LLC can have no real dispute regarding
Dr. Horowitz's conclusions on the feasibility of installing filtering solutions. Even Lime Wire
LLC's former Chief Technical Officer and Chief Financial Officer authored documents or
communicated about this technical feasibility. (*See* Pls. 7/18/08 SOF ¶¶ 493-96, 499-500.)

[42] Defendants' argument that *Grokster* "held there was an issue of fact as to" the effectiveness
of different filtering technologies (Defs.' Br. at 25) is irrelevant. Defendants cite to the district
court's determination, *after* it had granted plaintiffs' motion for summary judgment and in the
context of determining which type of injunction to grant as a remedy, that "requiring [defendants]
to institute a perfect filter is not technologically feasible, and would be equivalent to a ban on
Morpheus's distribution". *Grokster*, 518 F. Supp. 2d 1197, 1235-36 (C.D. Cal. 2007).
Dr. Horowitz has not opined that any of the filtering mechanisms available are "perfect"; rather,
that they are available to reduce infringing traffic and yet remain unutilized by defendants. In
Grokster, the Supreme Court expressly cited the failure to *attempt* to install such filters as
evidence of defendants' "unlawful objective" in granting summary judgment to plaintiffs. *See
Grokster*, 545 U.S. at 939.

a summary judgment motion is "curable through the submission of an affidavit or a declaration verifying the report's contents". *See Cornell Research Found., Inc. v. Hewlett-Packard Co.,* No. 5:01-CV-1974, 2007 WL 4349135, at *19 (N.D.N.Y. 2007). Objections that an unsworn report constitutes inadmissible hearsay are also mooted by such declarations. *See Gache v. Town of Harrison,* 813 F. Supp. 1037, 1052 (S.D.N.Y. 1993). To eliminate all such arguments entirely, plaintiffs submit herewith affidavits of both Dr. Horowitz and Dr. Waterman verifying the contents of their reports. (Horowitz 10/31/08 Aff.; Waterman 11/4/08 Aff. (attached behind Reports).)
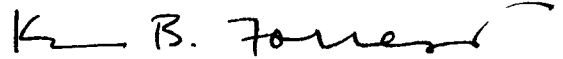
CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny defendants' motion to exclude the reports and testimony of Ellis Horowitz, Ph.D. and Richard P. Waterman, Ph.D.

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Respectfully submitted,

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