

EXHIBIT 3

ARISTA RECORDS LLC, et al. v. LIME GROUP LLC, et al.

EXPERT REPORT OF ARAM SINNREICH

demonstrates in his book *The Long Tail*, 45 percent of sales revenue at digital music seller Rhapsody can be accounted for by "products not available in [the] largest offline retail stores."⁴⁵ We can also see hints of this market's size by looking at individual aggregators of independent music. CD Baby, a decade-old and rapidly growing company which sells over 3 million songs by hundreds of thousands of independent artists, reports on its web site that it has paid out a total of over \$157 million to its artists to date, (one-third of which was paid in the past 18 months),⁴⁶ suggesting a retail value in the range of \$200 million. Similarly, independent digital music distributor TuneCore, founded in 2005, reported generating over \$32 million in sales for 2009 alone.⁴⁷ While these are only pinpoints of data, they indicate a large and rapidly growing market for independently distributed market, off the IFPI/RIAA radar and in competition with major label music sales.

iv. To the Extent That Freely Available Online Music Has Affected Music Sales, LimeWire's Role is Minimal.

Although the plaintiffs represent LimeWire as one of the primary conduits for free, unpermissioned distribution of music in an otherwise tightly controlled marketplace, nothing could be further from the truth. In fact, the major labels have both willfully ignored and actively promoted numerous other channels for free music distribution online, which collectively account for tens or hundreds of millions of users accessing billions of song files without direct permission or payment. And record labels and recording artists have often encouraged or allowed free online redistribution and/or unremunerated remixing of their copyrighted work, for promotional, commercial and pro-social purposes. In fact, the plaintiffs' own web sites frequently link to many of these freely available assets in the course of their promotional messaging.

a. *Video Streaming, Download and Conversion to MP3.*

The plaintiffs both freely share artist videos via their "official" YouTube channels, and allow third parties to post unpermissioned copies of artist videos on sites like YouTube and Vimeo. Music fans can stream these videos without payment (and, in some cases, without even viewing

⁴⁵ Chris Anderson, *The Long Tail*, 2008 (revised edition).

⁴⁶ CD Baby, "About CD Baby," <http://www.cdbaby.com/about>.

⁴⁷ Tunecore, "How People Use Nielsen to Hurt Musicians," <http://blog.tunecore.com/2010/01/how-people-use-neilsen-to-hurt-musicians.html>, January 21, 2010.

advertising), and can set up play lists consisting of their favorite artists' work. This essentially creates permanent, free, on-demand access to music for anyone with Internet access. Even more relevant to the case at hand, consumers can freely and easily download artist videos from YouTube, and convert them to MP3s with a single click. This is possible through a number of freely accessible and easily found resources, including browser plug-in software like Video DownloadHelper and Easy YouTube Video Downloader and at web sites like KeepVid.com and Zamzar.com.⁴⁸ Collectively, these software tools have been downloaded hundreds of millions of times, and these web sites garner over a million monthly viewers.⁴⁹ This functionality is not limited to personal computers; it is increasingly available for mobile customers, as well. For instance, MiTube, an application that saves YouTube videos to consumers' iPhones, was available for a time in Apple's iTunes Store, and is still popular among the millions of music fans who have "jailbroken" their phones.

b. *Music Blogs and Search Engines.*

At the time of writing, there are thousands of active music blogs, collectively garnering millions of monthly users. A great many of these blogs regularly post MP3s, albums and/or play lists available for free streaming and download. While some blogs focus on sharing out-of-print, orphaned or independent music, many more emphasize major label artists, as well as remixes and mashups of major label music. These blogs can be easily searched for MP3s at sites like elbo.ws and Hype Machine (hypem.com). Hype Machine offers additional functionality, including the ability to stream the MP3s hosted at listed blog sites directly from the search interface (much in the same way that Google offers previews directly from its image search results), and an alphabetized archive of bands and albums with direct free MP3 download access. Not only do the plaintiffs allow these sites to distribute their music openly and broadly, in some cases the labels' marketing and promotion departments

⁴⁸ Quantcast.com estimates that Keepvid.com and Zamzar.com receive about 463,000 and 261,000 unique U.S. visitors per month respectively. See <http://quantcast.com/keepvid.com>; <http://quantcast.com/zamzar.com>.

⁴⁹ At the time of writing, the latest version of Video DownloadHelper has been downloaded over 80 million times. See <https://addons.mozilla.org/en-US/firefox/addon/3006/>. The latest version of Easy YouTube Video Downloader has been downloaded over 6 million times. See <https://addons.mozilla.org/en-US/firefox/addon/10137/>.

actively distribute music to bloggers with the understanding that it will be shared, presumably for the same reason they send free CDs and MP3s to radio DJs and music directors -- namely, to develop a wider fan base for the artist in question. As I mentioned above, many major label contracts actually deduct the costs of these "free goods" directly from the artists' royalties, by a factor of about 15 percent.

c. *Online Storage Services.*

There are several highly-trafficked sites, such as Rapidshare and MegaUpload (each receives millions of visitors each month),⁵⁰ that allow users to post files of any kind for free retrieval by third parties. Millions of MP3s and music videos are available on these sites, and the inventory is refreshed with every passing day. Downloaders discover unique retrieval URLs for individual songs, albums and videos via blogs, social media services, and email. They may also use specialized search engines like Filestube.com (which gets millions of unique visitors per month)⁵¹ to search for individual songs, artists and albums across a range of these remote storage sites.

d. *MP3 Download Services.*

Unsecured MP3 downloads, which can be easily shared via email, instant message, optical media, or any of the methods described above, are and have been available for years from a broad range of sites, some licensed by the major labels (e.g. eMusic, Amazon, iTunes) and others operating without their direct permission (e.g. allofmp3.com, against which the RIAA dropped its lawsuit in 2008). These sites operate with a range of revenue models, from 99-cent downloads to flat subscriptions to micropayments. At many of these sites (including Amazon and eMusic), full-length MP3 samples and sampler albums are available without any consumer payment at all, as promotional incentives for the artists and services.

⁵⁰ Quantcast.com estimates that Rapidshare and MegaUpload receive about three million and two million unique U.S. visitors per month respectively. See <http://quantcast.com/rapidshare.com>; <http://quantcast.com/megaupload.com>.

⁵¹ Quantcast.com estimates that Filestube.com generally receives about 8.2 million unique U.S. visitors per month. See <http://quantcast.com/filestube.com>.

e. *Other Unlicensed P2P File Sharing Networks.*

LimeWire is only one of dozens of popular peer-to-peer file sharing programs. Software like uTorrent, Frostwire, Vuze and Bearshare offer users access to the same "back end" sharing technologies, like BitTorrent and Gnutella, that LimeWire offered. In other words, LimeWire represented only one, minimally differentiated, avenue of entry into a global network of sharers who connect through dozens of highly-trafficked entry points. Although it was for a time the most popular P2P client, LimeWire's closure has little if any consequence in terms of the availability of the same files to the same users of the same back-end networks.

f. *A Capellas and Instrumental Versions.*

Across a broad range of musical genres, including pop, R&B, rock and hip-hop, it is common practice for record labels to release both a capella (vocal-only) and instrumental (vocals omitted) versions of hit songs to the public at large. One of the primary strategic reasons for doing this is to allow DJs at clubs and radio stations to remix the music, adapting it to the specific tastes of their audiences, and thus promoting the "official" version of the work in the process. However, a widely acknowledged second-order effect of this market strategy is to enable millions of fans worldwide to create and redistribute their own remixes and mashups of the work, without official permission and without paying royalties. At the time of writing, Google searches for the titles of each of the top three songs on the Billboard Hot 100, followed by the word "remix" in each case, yield 1.3 million, 53.8 million, and 7 million results, respectively.

g. *Creative Commons Licensing.*

Although it has existed for less than a decade, tens of thousands of artists have already licensed hundreds of thousands of tracks under a Creative Commons license, which reserves copyright while relaxing many of the constraints commonly associated with proprietary music, such as proactively allowing free redistribution and remixing. Although the bulk of these artists and songs are not major label-affiliated, several high-profile artists have released music under this license, including the Beastie Boys, Kristen Hersh, Nine Inch Nails, David Byrne, DJ Vadim, Radiohead,

V. OPINION: FREE DOWNLOADING WILL CONTINUE REGARDLESS OF DAMAGES ASSESSED AGAINST LIMEWIRE.

I consider it highly unlikely that any damages assessed against the defendant in this case will have a significant effect on the availability of, or demand for, freely available music over the Internet. As I have suggested throughout this testimony, the most rational and effective response the record labels can offer to any threat posed by digital music is to embrace it fully, rewarding innovators for their contributions, consumers for their enthusiasm, and artists for their work. From my earliest days as a music industry researcher, I have believed in a workable solution to this challenge, and I still believe that market-based "carrots" will always be more effective than legal "sticks" as a means to produce a functional digital music industry. Those carrots may include cloud-based consumer services, a more streamlined licensing marketplace for businesses, a more economy-sensitive pricing model for recordings and live events, and an emphasis on collaboration rather than enmity between artists, labels, fans and technologists.

As to the sticks: If the massive financial burdens levied against former targets of industry lawsuits, such as MP3.com, Napster and Grokster, as well as the consumer P2P defendants, have undermined neither the supply of nor the demand for free music online, it's extremely unlikely that a severe judgment in the present case will succeed where those have failed. Furthermore, even if a judgment against LimeWire were to permanently cease all future investment in innovative music distribution technologies, there is already such a wealth of open-source software, and such a large global community of coders ready to reverse-engineer any digital roadblock the industry can erect, that the availability of free music online will remain as great as it ever was, if not greater. Given the unabated proliferation of freely available music online and the recording industry's own overdue decision to stop suing infringing consumers,¹⁷⁶ the likelihood of either diminished availability or demand for unauthorized music as a result of an award in this case is negligible.

In summary, the award of damages on the scale requested by the plaintiffs in this case will have a minimal deterrent impact on the availability of free music or the willingness of third parties to pick up where LimeWire left off. Furthermore, the most likely effect will be further erosion of the plaintiffs' already tarnished reputation among consumers and the business community, undermining their ability to effectively counter any economic and organizational challenges they face.

¹⁷⁶

Sarah McBride & Ethan Smith, "Music Industry to Abandon Mass Suits," Wall Street Journal, http://online.wsj.com/article/SB122966038836021137.html?mod=rss_whats_news_technology, December 19, 2008.