UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; ARISTA MUSIC, fka BMG MUSIC; CAPITOL RECORDS, LLC fka CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT, fka 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; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP, Defendants.	06 Civ. 05936 (KMW) ECF CASE

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO PRECLUDE CERTAIN PURPORTED EXPERT TESTIMONY BY GEORGE STRONG

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Date: March 2, 2011

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I. INTRODUCTION

Plaintiffs move to preclude testimony by George Strong, who proposes to (1) critique the testimony of Plaintiffs' statistical expert, Dr. Richard Waterman, about the volume of infringement of Plaintiffs' Works through LimeWire; (2) testify about the music industry and technologies related to music; (3) testify about the extent to which factors other than LimeWire caused Plaintiffs' losses; and (4) assess the profits earned and expenses saved by LimeWire as a result of its infringement. Strong's proposed testimony exceeds the scope of his expertise, does not assist the jury, is the product of unreliable principles and methods, and does not "fit" the applicable legal standards. Strong's proposed testimony is inadmissible under Rules 702, 703, and 403 and should be excluded.[1]

Strong's critique of Waterman's statistical analysis should be excluded because it exceeds the scope of his expertise. Strong is a damages expert. He is not a statistician, he is not a consumer survey expert, and he is not a technology expert. That has not, however, stopped Strong from critiquing the results of a statistical methodology that he had never heard of or applied before, from questioning the reliability of survey and statistical weighting techniques used to produce the data on which Waterman relied, and from raising technical issues about whether a copy of a sound recording would be expected to be contained within a file that bears its name. Strong lacks the expertise required to offer this analysis, and his testimony about Waterman should be excluded.

Strong should also be precluded from offering testimony about the music industry or

[1] Unless otherwise noted, all referenced to "Rules" are to the Federal Rules of Evidence.

In addition to the matters addressed in this motion, Strong's testimony should be excluded for the reasons set forth in Plaintiffs' Memorandum of Law In Support Of Plaintiffs' Motion To Preclude Defendants' Argument That Other Illegal Services Would Have Induced Infringement Of Plaintiffs' Copyrights If LimeWire Had Not (Dkt. No. 550) and to the extent it is inconsistent with any motion *in limine* the Court may grant.

technologies related to music, because he has no expertise in these areas. Strong has no relevant experience in the music industry and is unfamiliar with the technologies at issue in this case. Despite this lack of expertise—and despite the fact that Defendants have a separate expert on the music industry—Strong purports to offer lengthy testimony about the history and structure of the music industry, about file sharing and other music technologies, and about challenges brought about by digital formats and how the music industry has responded to those challenges. This testimony should be excluded, and Strong should be confined to testifying within the limits of his area of expertise: damages.

Strong's causation testimony should also be excluded because it is unreliable and does not assist the jury. Strong's causation testimony does not "assist the trier of fact." Rule 702. Rather than offer opinions of his own about causation, Strong merely "summariz[es] what I have read and what others have said." (LeMoine Decl. Ex. 1 (George Strong Feb. 14 2011 Depo Tr. at 151:1-11) (hereafter "Depo")). Because Strong failed to apply his *own* specialized knowledge to reach his *own* conclusions, his testimony is inadmissible. Rule 702.

Strong also failed to control for the single most important variable—the existence of a massive illegal music market—in opining that factors other than file sharing are responsible for the tremendous and unabated declines in sales and revenues that Plaintiffs have experienced since the advent of file sharing in 1999. Strong further failed to consider and account for critical facts, like the effect of the illegal market on the price of legal music. And Strong did not test his theories of alternative causes against the facts to see if they had any explanatory power. Moreover, a number of Strong's factual assertions lack empirical support and are based only on speculation. His resulting conclusions are unreliable and, under *Daubert* and Rule 702, should be excluded.

<u>Strong should further be precluded from testifying that LimeWire's "expenses saved" must be limited to LimeWire's actual profits.</u> Purporting to rely on the patent law concept of a "hypothetical negotiation," Strong asserts that LimeWire's actual profits are a de facto cap on LimeWire's "expenses saved." In other words, Strong proposes to testify that in a hypothetical negotiation with LimeWire, Plaintiffs would have agreed to accept *no more* than $2-$6 million (representing the range of LimeWire profits Strong attributes to infringement) in exchange for allowing LimeWire to make millions upon millions of their works available for unlimited free download and redistribution to consumers all over the world. This assertion has no basis in law or reality. Nothing in patent law—or in copyright law, for that matter—provides that an infringer may cap his liability for "expenses saved" based on the profits the infringer actually earned, no matter how small. The "hypothetical negotiation" is not one-sided, and requires consideration of the property owner's perspective, which Strong completely ignores. Moreover, Strong offers no explanation for why a "hypothetical negotiation" should be used to approximate LimeWire's "expenses saved," when there are real-world models in which parties pay royalties to Plaintiffs for the privilege of offering their works for download. His analysis is inconsistent with the law, and leads to absurd results.

II. <u>BACKGROUND</u>

Strong is a professional testifying expert. He devotes 100% of his professional time to acting as an expert witness, and has testified at deposition or trial in over one hundred cases. (Depo at 48:10-49:5; LeMoine Decl. Ex. 2 (Jan. 14. 2011 Expert Report of George Strong, Ex. A) (hereafter "Report")). Strong may be an expert testifier, but an expert on statistical and survey techniques and on the music industry and technology he is not. Strong has never worked in or conducted relevant studies of the music industry, is unfamiliar with the technologies at issue in this case, and lacks technical expertise in statistical and survey methodologies. (Depo at 18:9-14; 17:11-16; 22:7-13; 22:23-23:13; 211:3-7).

Strong's proposed testimony, as set forth in his expert report, falls into four general subject areas. *First*, Strong critiques the analysis of Plaintiffs' statistical expert Richard Waterman regarding the volume of infringement of Plaintiffs' Works through LimeWire. (Report, Section V). *Second*, Strong opines on the music industry and technologies related to music. (Report, Section IV). *Third*, Strong testifies about causation—specifically, the extent to which declines in music sales and Plaintiffs' revenues can be attributed to file sharing in general and to LimeWire in particular. In discussing causation, Strong reviews and summarizes the academic and industry literature, news reports, and other sources to opine that (1) the "effect of file sharing on music sales is small," and "the effect of LimeWire was even smaller"; (2) Plaintiffs "have not established a causal link between infringement using LimeWire and any purported declines in revenues" because other factors explain the decline; and (3) Plaintiffs and the industry as a whole have "benefited from digital music distribution," such that any losses must be offset by gains attributable to LimeWire. (Report, Sections VI through X). *Fourth*, Strong conducts a damages analysis, calculating (1) the profits earned by LimeWire as a result of its infringement, and (2) the expenses LimeWire saved by infringing Plaintiffs' copyrights instead of securing a license. He finds that LimeWire's profits attributable to the infringement are between $2 million and $6 million, and caps LimeWire's "expenses saved" at the same amount. (Report, Section XI).

It is important to understand Strong's testimony in context. LimeWire had far and away the most market share of any peer-to-peer service, LeMoine Decl. Ex. 3, at 14-16, and amassed an enormous user base of millions of daily users. (Plaintiffs' Statement of Undisputed Material

Facts Pursuant to Local Civil Rule 56.1, dated July 18, 2008 ("SUF") ¶ 96). According to LimeWire itself, the LimeWire client application was downloaded millions upon millions of times, and the software was used to conduct billions upon billions of searches ***each month***. (SUF ¶¶ 95, 90).

During the period of LimeWire's existence (2000-2010), Plaintiffs' sales and revenues plummeted. Adjusting for inflation, revenues from sales of recorded music in the U.S. declined nearly 58% between 1999 and 2009—a decline of over $6.2 *billion* over the last decade. (LeMoine Decl. Ex. 4 (Feb. 14 2011 Expert Report of Stanley Liebowitz ¶ 13 and Table 1) (hereafter "Liebowitz Report")). Per capita unit album sales in the U.S. (including digital singles aggregated in album-equivalents) declined from a peak of over 5 in 1999 to just over 2 in 2009—lower than 1975 levels. (*Id.* Figure 1). Significant declines in revenues and sales since 1999 also occurred in every one of the ten largest music markets abroad. (*Id.* ¶ 13, Table 1).

These massive and unprecedented declines began at the precise moment that file sharing became wildly popular. Sales of recorded music in the U.S. had been going up in the decades prior to the advent of file sharing. But starting in 1999—the same year file sharing made its debut through Napster—they dropped into a sustained decline that continues today.

Notwithstanding these facts, Strong plans to testify that "there has been no demonstration that [file sharing] caused any impact" (Depo at 262:19-263:4), and that Plaintiffs in a hypothetical negotiation with Defendants would have agreed to accept no more than $6 million in royalties for the infringing use that LimeWire made of their copyrights.

III. ARGUMENT

A. Legal Standard

The admissibility of expert testimony is governed by Rule 702, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, the expert must be *qualified* in the subject areas on which he purports to testify, his testimony must be *reliable* and *based on sufficient facts*, not speculation, and his testimony must be *relevant* to the issues in dispute. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 597 (1993). Defendants bear the burden of establishing by a preponderance of proof that the expert testimony they seek to offer is admissible. *Zaremba v. GMC*, 360 F.3d 355, 358 (2d Cir. 2004). They cannot do so here.

B. <u>Strong Is Unqualified To Critique Waterman' Analysis Of The Number Of Times Plaintiffs' Works Were Downloaded Using LimeWire</u>

"[I]t would be absurd to conclude that one can become an expert simply by accumulating experience in testifying." *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799 (4th Cir. 1989). Strong may be an expert testifier *on damages*, but that does not make him qualified to offer opinions about a *statistical study* addressing *the number of downloads* that occurred using LimeWire.

By his own admission, Strong is not an expert on complex statistical techniques, yet he critiques the statistical methodologies from which Waterman derived his conclusions. As Strong also admits, "technology is not my issue" (Depo at 211:6), yet he faults Waterman for not confirming that Plaintiffs' sound recordings were actually embodied in files bearing their names. This testimony is outside Strong's specialized knowledge and should be excluded.

Only a "witness qualified as an expert by knowledge, skill, experience, training or education" may offer expert opinion testimony. Rule 702. "To determine whether a witness qualifies as an expert, courts compare the area in which the witness has superior knowledge, education, experience or skill with the subject matter of the proffered testimony." *United States v. Tin Yat Chin*, 371 F.3d 31, 40 (2d Cir. 2004). "An expert qualified in one subject matter does not thereby become an expert for all purposes. Testimony on subject matters unrelated to the witness's area of expertise is prohibited by Rule 702." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007). The court may also exclude the testimony of an expert whose "expertise is too general or too deficient," even if his or her proffered testimony is relevant to the case. *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d Cir. 1997). Additionally, the court should consider "whether other experts exist who are more specifically qualified and who are nonetheless not in the employ of the company or industry whose practices" are under review. *Id.*

Strong is not qualified to offer a critique of Waterman under these standards. For example, Strong purports to critique Waterman's application of a statistical technique called a smoothing spline, despite the fact that Strong by his own admission is not a "pure statistician who get[s] inside … the techniques," and had never used a smoothing spline technique or seen it before this case. (Report ¶ 30; Depo at 18:9-14;19:11-15).

Strong also critiques Waterman's reliance on NPD data on the ground that NPD's extrapolation from its sample to the total U.S. population "relied on the unproven assumption that the 10,000 households in the NPD sample are representative of the US population with respect to file-sharing activity once NPD applies weights for certain measured demographic characteristics…." (Report ¶ 27). Yet, Strong fails to explain why the weighting NPD applied would not yield representative results, nor is he qualified to opine on such "technical aspects" of

NPD's statistical methodology. (Depo at 17:20-18:14; *see also id.* 26:14-27:23).

Similarly, Strong faults the NPD study because the sample "only includes people who participate in Internet survey panels and who are willing to have NPD tracking software on their computer," (Report ¶ 27) but he could not provide an example of how to improve on the methodology used by NPD, and is not qualified to do so. (Depo at 64:24-65-22; 66:24-68:2). Strong is not an expert in the field of consumer behavior, has never conducted or designed a consumer survey, and admits he is unqualified to address "the technical definition of [a] survey." (Depo at 27:11-13).[2]

Nor is Strong qualified to fault Waterman for failing to state how "NPD confirmed that the downloaded files were actually copies of the songs at issue." (Report ¶ 28). Strong is not a technology expert, and was unable to explain why files that have matching names for song titles would not actually be a match. (Depo at 70:5-8). Defendants have a technical expert, Emin Gun Sirer, who purports to offer such testimony.[3] Strong merely duplicates Sirer's testimony, but without any technical expertise to support his conclusions. Moreover, Strong did not address—nor can he dispute—an earlier study by Waterman which concluded that artist titles of files downloaded from LimeWire are what they say they are in the overwhelming majority (99%) of cases, and which this Court admitted into evidence over Defendants' objections in connection with granting summary judgment to Plaintiffs. (Depo at 71:3-10; *Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 496-97; 507-08 (S.D.N.Y. 2010).

Strong's experience as a professional testifier does not make him qualified to testify

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[2] Notably, Defendants' music industry expert Aram Sinnreich, who *is* versed in survey methodologies, testified that "NPD is considered to be the premier provider of market figures," and considers NPD to be a "very" reliable source of data that he himself has used in his own research and analysis. (LeMoine Decl. Ex. 9 (Aram Sinnreich Feb. 11, 2011 Depo. Tr. at 142:14-143:3; 29:2-19). Even though Defendants designated multiple purported experts on multiple topics, they did not disclose any opinions from Sinnreich about NPD or Waterman's analysis.

[3] For the reasons discussed in Plaintiffs' separate Motion To Preclude Certain Purported Expert Testimony of Emin Gün Sirer, his testimony is inadmissible because it strays beyond his expertise and is unreliable.

about everything under the sun. *Kline*, 878 F.2d at 799. Given his lack of expertise on statistical and survey techniques and his meager knowledge of the relevant technologies, Strong should be precluded from offering the testimony described in Section V of his expert report.

C. **<u>Strong Is Unqualified To Testify About The Music Industry Or About Technologies Related To Music</u>**

For similar reasons, Strong should be precluded from testifying about the music industry or technologies related to music.

Strong is not an expert on the music industry. He has never worked in the music industry, he has never studied the music industry in his academic pursuits, he has never published anything on the music industry, he has never negotiated a license in the music industry, and he is unfamiliar with technologies related to music. (Depo at 22:7-13; 22:23-23:13; 211:3-7). The sum total of Strong's experience with the music industry is that he has testified as an expert in four matters regarding, respectively, a party's profits attributable to the alleged infringement of a single Garth Brooks track 10-15 years ago, below-cost pricing in a lawsuit between DMX and Musac in the mid-1990s, economic losses resulting from the alleged theft of a business idea to mix tracks of music in kiosks at malls, and the reasonable royalty rate due to sound recording performance rights holders from a provider who performed the works through digital cable channels. (Depo at 327:24-334:14; Report Ex. A). Strong has never done any analysis of the impact of file-sharing on the music industry prior to this case, and does not consider himself an expert in the music industry "per se." (Depo at 24:25-25:7; 24:14-16).

Notwithstanding this lack of expertise, Strong devotes entire sections of his expert report to describing the music industry in detail. He purports to provide "background" on the "Big Four Record Companies," on "LimeWire" and on other P2P file sharing applications and other forms of digital music distribution. (Report at 7-11). He purports to offer "A Brief History of Recorded Music Sales," (Report at 39-40) and to describe the "Growth in Digital Music Distribution" and the evolution of different formats and distribution channels for music. (*Id.* ¶¶ 13-24; 78-82; 87-92; 101-104). He discusses competitive challenges purportedly faced by the Plaintiffs in the area of music distribution, and from other forms of entertainment, and purports to describe strategic and technological "missteps" the industry has made. (*Id.* ¶¶ 83-85; 96-100; 105-108). Strong has no experience in the music industry or in music technologies and is not qualified to offer opinions on these subjects. His opinions are based entirely on news articles, stock analyst reports, studies conducted by other experts, and statements by various people in the industry collected by his team of researchers, not on any independent knowledge, experience or specialized expertise of his own.

Strong also lacks the expertise to opine on similarities and differences between LimeWire and other paid or free services offering music to consumers, as he purports to do at paragraphs 44-45 and 54-57 of his report. Strong is unfamiliar with these services and how they operate; indeed, he has never used LimeWire or the many other services he mentions in his report to listen to music. (Depo at 178:25-179:14). Strong concededly had no basis for comparing LimeWire's performance relative to other illegal and legal music services, including how much time it took to locate files, the quality of the sound recording files that were downloaded, the amount of "spoofed" files (files that appear to contain a sound recording but do not) a user would get, the risk that a user's computer would get a virus, the extent to which the service is used to access music, and whether the services automatically place downloads in a shared drive where they can be immediately accessed and downloaded by other users. (Depo at 144:23-146:21; 147:13-148:2; 149:10-17; 170:13-172:2; 179:15-181:2). Defendants have an expert on the music industry, Aram Sinnreich, who purports to offer testimony that duplicates Strong's.[4] Strong is not qualified to testify about the music industry.

In *Loussier v. Universal Music Group, Inc.*, 2005 WL 5644422, at *3-4 (S.D.N.Y 2005), this Court excluded the testimony of a copyright damages witness under similar circumstances. The Plaintiff in *Loussier* proffered the testimony of a damages expert on the portion of the Defendants' sales "attributable to" the infringement. The expert had litigation consulting experience in "various types of cases and industries" but no "relevant experience in the music industry." *Id.* at *3-4. Because the expert lacked knowledge of "sufficient pertinent facts relating to the production and sale of music," and because another more "specifically qualified" expert was willing to testify on the Plaintiff's behalf, the Court excluded the expert's testimony. *Id.* The same result should obtain here.

D. <u>Strong's Causation Testimony Should Be Excluded</u>

Strong devotes the bulk of his expert report to discussing causation, and particularly the extent to which Plaintiffs' losses are attributable to LimeWire or to other factors. Strong's causation testimony should be excluded because (1) it is unreliable; (2) it is based on speculation; and (3) it impermissibly summarizes the conclusions of other analysts without offering independent opinions or analysis.

1. Strong's Causation Testimony is Unreliable

Strong's causation testimony should be excluded because it is not "the product of reliable principles and methods." Rule 702. Strong's analysis (1) fails to control for file sharing as a

[4] Plaintiffs separately move to exclude portions of the testimony proffered by Sinnreich. Like Strong, Sinnreich purports to offer testimony that goes beyond the scope of his expertise and is inadmissible in other respects.

likely explanation of Plaintiffs' losses; (2) ignores relevant factors like the magnitude of the harm to Plaintiffs, LimeWire's market share, and the effect of file sharing on music prices; and (3) does not test his theories against the facts. The analytical gaps in Strong's testimony render it unreliable and inadmissible.

An expert must apply appropriate reasoning in a reliable manner to reach the conclusions he purports to offer. *Daubert*, 509 U.S. at 592. "[T]he district court has the responsibility to exclude an expert opinion that overlooks factors that render the testimony unreliable and/or speculative." *MicroStrategy Inc. v. Business Objects, S.A.*, 429 F.3d 1344, 1355-1356 (Fed. Cir. 2005). Consequently, when an expert "ignore[s] significant factors" that are relevant to understanding cause and effect, his opinion may be excluded. *Id.* Causation testimony is also unreliable when an expert fails to control for "other equally plausible causes of that effect." *R.F.M.A.S, Inc. v. Mimi So*, 2010 WL 4341331, at *23 (S.D.N.Y. 2010). Moreover, an expert's "failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony." *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d. Cir. 2000).

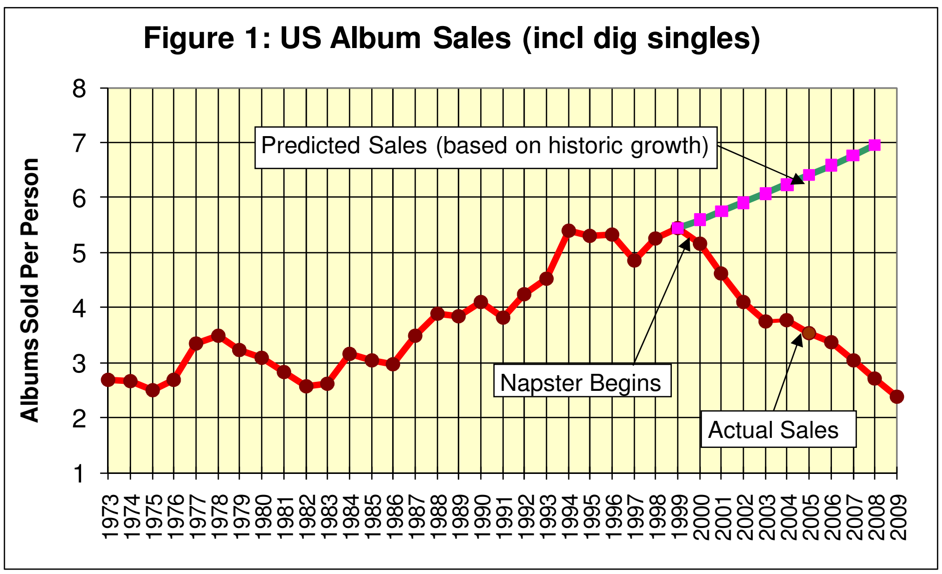
a. Strong Failed to Control For File Sharing as a Potential Cause

Although Strong attempts to offer many alternative explanations for why music revenues and sales declined precipitously starting in 2000—at the very same time that the industry entered, in Strong's words, a "brave new world … with Napster and LimeWire and the start of file sharing"—he did nothing to analyze the impact of those alternative explanations on sales and revenues *prior to* the advent of file sharing. (Depo at 248:15-249:12; 245:15-248:13).[5]

Strong's failure to control for the impact of file sharing by looking at the influence of

[5] Similarly, although Strong observes that digital music distribution has grown rapidly since 2004, he made no attempt to determine whether the number of digital music sales would have been even higher were it not for the existence of illegal services like LimeWire. (Depo at 201:17-202:13).

alternative variables on music sales and revenues before and after the emergence of file sharing makes his analysis unreliable. "It is plain that one cannot determine whether something caused an observed effect without controlling for other equally plausible causes of that effect." *See R.F.M.A.S.,* 2010 WL 4341331 at *23. As Figure 1[6] below reflects, file sharing is an obvious candidate to explain the significant declines the record industry began to experience starting in the 1999-2000 time period. Strong's failure to test his hypothesized alternative causes by examining their impact on music sales and revenues *prior to* the advent of file sharing leaves "too great an analytical gap between the data and the opinion proffered" by Strong on causation. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).



b. Strong Failed to Consider Other Relevant Factors

Strong also failed entirely to analyze other relevant variables. Remarkably, although Strong purports to offer an opinion on the economic harm to Plaintiffs attributable to LimeWire's infringement, he did not attempt to measure the total decline in Plaintiffs' revenues or sales of

[6] Liebowitz Report, ¶ 14.

music, and he did not examine LimeWire's share of the peer-to-peer market. (Depo at 194:5-195:11; 173:25-174:25). In other words, he did not know the full extent to which Plaintiffs have been harmed economically, nor did he consider the extent to which LimeWire was responsible for the infringement of Plaintiffs' works relative to other illegal services. Moreover, although Strong acknowledged that the revenue Plaintiffs are able to generate depends on the price consumers are willing to pay for music, he did not evaluate the impact that the vast illegal market spawned by LimeWire and similar services had on prices. Strong conceded that it "might be relevant to take [this impact] into account if we're measuring economic harm," but "didn't look at price impact" directly. (Depo at 186:8-187:13). Strong's failure to consider relevant factors renders his testimony unreliable. *See R.F.M.A.S*, 2010 WL 4341331 at *24 (excluding testimony of damages experts who failed to "equip themselves with the information necessary" to offer opinions about copyright damages).

c. Strong Failed to Test His Theories

Compounding these analytical deficiencies, Strong failed to address or explain critical facts about the music industry decline, in particular the fact that: (1) the decline has been dramatic; (2) the decline has been sustained over a decade; and (3) the decline occurred in all major international markets, as Table 1 below and Figure 1 above reflect.

Table 1:Trade Revenue Change, 1999-2009 (inc ringtn)			
	1999 Revenues (inflation adjusted 2009 Local Currency)	Nominal 2009 Revenues	% Change
USA	10,826.22	4,562.30	**-57.86%**
Japan	499,209.03	370,979.74	**-25.69%**
UK	1,464.48	928.80	**-36.58%**
Germany	2,036.83	1,046.40	**-48.63%**
France	1,379.22	622.76	**-54.85%**
Canada	1,165.96	430.21	**-63.10%**
Australia	908.72	470.23	**-48.25%**
Italy	604.22	162.05	**-73.18%**
Spain	599.83	151.06	**-74.82%**
Netherlands	345.42	156.11	**-54.81%**
Switzerland	376.45	186.07	**-50.57%**

Any cause of the decline must explain these facts, yet Strong ignores them in proffering alternative "causes" for the decline.

For example, Strong asserts that declining costs due to technological advances associated with digital distribution, as well as the "unbundling" of music—the shift from selling "bundles" of tracks in an album to selling individual tracks—caused the decline in music sales and revenues. (Report ¶¶ 87-95). But as Strong acknowledges, this shift took place starting with the emergence of iTunes in 2003 (Depo at 228:5-230:20; Report ¶¶ 77, 87)—a full four years after the music industry had entered a sustained period of decline. Moreover, international markets have not been as quick to adopt digital forms of distribution, yet they have experienced steady declines similar in magnitude to the decline in the U.S. market. (Liebowitz Report, ¶ 5). Lower production costs and unbundling simply do not fit the facts as an explanation for the decline.

Virtually all of the other alternative explanations proffered by Strong suffer from similar flaws. For example, Strong fails to analyze trends over time and/or internationally when he discusses increased competition from other forms of entertainment, the use of digital rights management technologies that purportedly "made purchasing less attractive," the end of the "replacement cycle" for CDs (i.e., the purchase of CDs to replace vinyl and cassette formats), and the economic recessions in 2000 and 2008. (Report Section VIII). Nor does Strong attempt to measure the magnitude of the purported impact these variables, either alone or in combination, against the size of the decline in music sales and revenues. (Depo at 204:16-20; 249:12-250:7). Instead, he looks at snapshots of data that fail to explain why, after decades of relatively steady growth, music sales and revenues fell off of a cliff and still have not recovered ten years later. Strong's "failure to test a theory of causation" against the data "justify [the] trial court's exclusion of [his] testimony." *Brooks,* 234 F.3d. at 92.

In short, Strong's conclusions are the product of an unreliable analysis that fails to use adequate controls, does not account for basic facts necessary to address the economic harm attributable to LimeWire as opposed to other potential causes, and does not test Strong's theories against the facts. Strong's conclusion that factors other than file sharing are responsible for Plaintiffs' losses are not the product of a reasoned analytical approach. They are just empty theory. His causation testimony should therefore be excluded.

2. Strong's Causation Testimony is Not Based on "Sufficient Facts or Data"

Rule 702 requires expert testimony to be based on "sufficient facts or data." Expert testimony that is merely "subjective belief or unsupported speculation" should be excluded. *Daubert*, 509 U.S. at 590.

Despite his heavily footnoted report, Strong has no empirical basis for many of the conclusions he offers. For example, Strong purports to opine that the Plaintiffs have actually *benefited* from illegal file sharing because file sharing has promotional value, and "has stimulated demand for complements of recorded music" such as concerts and merchandise. (Report at 53; Depo at 269:21-270:4). Strong, however, has no empirical basis for stating that any increased demand for concerts and other complimentary goods due to file sharing benefits *the Plaintiffs* to any material degree. He conceded that he did not know how much revenue the record labels make off of concerts, merchandise, or other goods and services under so-called "360 degree deals" that divide revenue between artists and labels from a variety of revenue streams. (Depo at 272:22-273:11; 274: 9-276:11). Nor did he know how many 360 degree deals the record labels have entered into. (*Id.* 275:19-21). His testimony that file sharing has benefitted Plaintiffs by increasing demand for compliments to recorded music is based entirely on speculation and should be excluded.

Similarly, although Strong offers the opinion that the "costs of digital distribution are minimal," he had no idea how much it costs to put music files into formats that can be digitally distributed, or what storage costs for digital data are, or what infrastructure costs are associated with digital distribution. (Depo at 225:3-21; 231:4-7). His testimony that the costs of digital distribution are "approaching zero" is not based on any factual foundation. (Depo at 224:17-225:21).

Strong also makes the claim that technological advances "have undermined the major record labels' role as middlemen between artists and consumers" resulting in artists leaving labels to distribute their music through other channels. But here again, he conceded that he did not know the extent to which this had actually happened. (Depo at 233:11-24; 236:14-237:9).

Coupled with the analytical flaws in Strong's testimony and his failure to address critical facts, the speculative nature of Strong's testimony underscores both its unreliability and Strong's unfamiliarity with the music industry. Strong's causation testimony should be excluded.

3. Strong's Causation Testimony Does Not Assist the Jury

Finally, Strong's causation testimony at Sections VI, VIII, IX and X of his report should be excluded because it provides no independent analysis that would assist the jury. Instead of conducting his own analysis and reaching his own conclusions, Strong simply summarizes various articles and studies by other analysts. Because such testimony is not based on the application of Strong's *own* expertise, it should be excluded. Rule 702.

As Strong conceded at his deposition:

- He is ***not*** offering an opinion that there is a causal relationship between downloading activity through peer-to-peer services and legal music purchases, but rather is "***summarizing what I have read and what others have said***." (emphasis added) (Depo at 151:1-11);

- He is ***not*** offering a professional opinion on the relative merits of the studies cited in his report that analyze the effect of file sharing on music sales.[7] (Depo at 164:16-165:18);

- He did ***nothing*** to satisfy himself that the studies he relied on were accurate and reliable. (Depo at 124:10-19; 116:5-18; 152:25-155:14; 162:25-163:24);

- He did ***nothing*** to measure sales of music that were purportedly stimulated by peer-to-peer file sharing or sales that were lost because of peer-to-peer file sharing. (Depo at 159:25-161:7; 115:15-20;120:10-19);

- He did ***nothing*** to measure, individually or in the aggregate, the extent to which the alternative causes he identified affected music sales and revenues (Depo at 204:16-205:9; 206:11-22; 216:10-13; 219:2-10; 233:23-234:18; 245:1-24; 249:16-250:1; 260:1-261:7);

- The only "methodology" he used to conclude that the effect of file sharing was small "was to search all available information" and review it. (Depo at 110:8-112:22). He employed a similar "methodology" to reach his conclusion that the Plaintiffs failed to establish a causal link between infringement over LimeWire and their losses. (Depo at 195:12-196:7 (testifying that his methodology was to "review a whole host of material" identified in the footnotes to his report);

[7] The only exception was Strong's evaluation of study conducted by Plaintiffs' expert Dr. Stan Liebowitz, which Strong singled out from the rest to critique.

- ***He "can't say [file sharing] did or didn't" impact music revenues or sales***; rather his opinion is that "*there has been no demonstration* [by the Plaintiffs] that [file sharing] caused any impact." (Depo at 262:19-263:4 (emphasis added)).

As this testimony makes clear, Strong did not employ any analytical methodology of his own; he simply collected analyses that were done by others and summarized them in his report, without even attempting to confirm their reliability and accuracy. Strong is not using his own "specialized knowledge" to "assist the trier of fact to understand the evidence or to determine a fact in issue," as required by Rule 702. Fed. R. Evid. 702. He is merely acting as a mouthpiece to uncritically voice the conclusions of *others.* His causation testimony should therefore be excluded. *See R.F.M.A.S., Inc. v. Mimi So*, 2010 WL 4341331, at *19 (S.D.N.Y. 2010) (excluding causation testimony of damages experts in copyright infringement action where the experts "simply do not draw on their areas of actual expertise in arriving at the conclusion that defendants' alleged infringement … caused plaintiffs' diminished sales" and "[a]ny juror could have employed common sense to perform the same analysis" in reviewing the available data).

E. Strong's Testimony About The "Expenses Saved" By LimeWire Rests On The Legally And Factually Incorrect Premise That LimeWire's Profits Provide An Upper Bound On The License The Parties Would Have Negotiated

Strong's opinion on LimeWire's "expenses saved" is both legally wrong and factually unsupportable. Strong intends to testify that, had LimeWire chosen not to build its business by inducing its users to infringe Plaintiffs' copyrights on a massive scale, but instead sought to acquire a license for the infringed works, the parties would have agreed to a license valued at no more than LimeWire's actual profits attributable to the infringement. (Report ¶¶ 143-145). That opinion is based on an incorrect understanding of the law, and assumes factual predicates with no basis in reality. By Strong's logic, if LimeWire's inducement of millions upon millions of instances of infringement had generated only one dollar in profits, then that's the value of the license that it would have acquired, and its "expenses saved" would be limited to one dollar—even if LimeWire had expected to make hundreds of millions of dollars at the time the infringement began . Similarly, according to Strong, Plaintiffs would have been forced to agree to a one dollar license, regardless of the fact that the license would be used to make Plaintiffs' works available to millions of users world wide to copy as many times as they liked, and to distribute to millions of others. This result is absurd on its face, and incorrect as a matter of law.

1. Strong's Analysis Rests on an Incorrect Understanding of the Law.

Strong defends his approach by reference to the patent law concept of a "hypothetical negotiation" for a "reasonable royalty." In doing so, he perverts the "hypothetical negotiation" framework beyond recognition.[8]

First, **nothing in patent law caps a reasonable royalty at the profits the infringer actually made.** Strong relies on *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (1970) to support his approach, in particular "*Georgia-Pacific* Factor 15" which looks to the amount that the infringer would have been willing to pay for a license "yet be able to make a reasonable profit, and which amount would have been acceptable by a prudent [licensor]." (Report ¶ 144 (quoting *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (1970) (excluding Strong's emphasis)). Strong's analysis looks only at one side of the coin—the amount the infringer would pay "yet be able to make a reasonable profit"—and completely ignores the flip side, which dictates that the amount must be "***acceptable by a prudent patentee***."

[8] Moreover, even if Strong were correct on the law, which he is not, his testimony would be inadmissible to the extent he purports "to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir. 1983); *see also U.S. v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (holding that testimony "embodying legal conclusions exceed[s] the permissible scope of opinion testimony under the Federal Rules of Evidence.").

Id. (emphasis added). Strong also conveniently ignores the ***fourteen other*** *Georgia-Pacific* factors, which make clear that the intellectual property owner's perspective must be taken into account by addressing such things as the nature and scope of the license. *Id.* The "hypothetical negotiation" is not one sided, and there is no basis for Strong to treat it as such.

Moreover, Strong focused only on Defendants' actual profits, while ignoring the profits Defendants *expected* to make from the infringement, even though he conceded that Defendants' expectations would be relevant. He did not look at Defendants' business plans, or any of their revenue projections, or their projected profitability. (Depo at 301:3-305:22). In fact, Defendants' business plans and internal projections reveal that they believed they could develop an extremely lucrative business that would generate *hundreds of millions of dollars in profits* using Plaintiffs' intellectual property to build a massive user base. (*See, e.g.*, LeMoine Decl. Ex. 5, Ex. 6, Ex. 7 and Ex. 8).There is no legal basis for focusing on actual profits to the exclusion of all other factors.

Second, **Strong misreads the "book of wisdom" by arguing that 20/20 hindsight can be used to cap the outcome of a hypothetical negotiation at the profits actually made by the infringer.** As the Supreme Court has noted, one problem with the "hypothetical negotiation" is that, at the time infringement begins, the true value of a patented invention might not be known, and thus in a hypothetical negotiation, an infringer might have reasonably been expected to acquire a license at a bargain rate. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 698-99 (1933). Because that would not provide a patentee with a reasonable royalty for the use actually made by the infringer once the patent was revealed to be quite valuable, courts are permitted in those circumstances to look at the actual use made of a patented invention (*i.e.*, to consult the "book of wisdom") to determine a truly reasonable royalty. *Id.*

Strong turns this entire framework on its head. Rather than consider how the parties would have actually approached a negotiation, Strong begins in the first instance by peering into the "book of wisdom" in order to identify the profits that he attributes to infringement, and then sets that figure as a hard cap on LimeWire's "expenses saved." (Report ¶¶ 143-145). As Strong admitted, under this approach, the results of a hypothetical negotiation for two businesses with identical business plans would depend solely on how successful each business actually was, rather than on any realistic analysis of what the business's expectations were or the use each actually made of the intellectual property they stole. (Depo at 323:3-325:6). That is plainly incompatible with the law. Courts consult the "book of wisdom" to protect rights holders from receiving an unreasonably low "reasonable royalty" due to *ex ante* uncertainty, not to protect infringers from *ex post* incompetence in profiting from their infringement.

Third**, Strong fails to establish that resort to a "hypothetical negotiation" is necessary or appropriate.** In patent law, the "hypothetical negotiation" is a means to estimate ***a floor*** for damages ***when no better proxy is available***. In cases when there is no established royalty rate for the patented invention, the "hypothetical negotiation" methodology "must on occasion be used ***for want of a better***." *Fromson v. Western Litho Plate and Supply Co.*, 853 F.2d 1568, 1574-75 (Fed. Cir. 1988), *overruled on other grounds*, *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (emphasis added). When it is used, "it must be carefully applied to achieve a ***truly reasonable royalty***, for the methodology risks creation of the perception that blatant, blind appropriation of inventions patented by individual, nonmanufacturing inventors is the profitable, can't-lose course." *Id.* (emphasis added); *see also King Instruments Corp. v. Perego,* 65 F.3d 941, 951 n.2 (Fed. Cir. 1995) ("Congress set the reasonable royalty as ***the floor, not the ceiling*** of damages for infringement.”). Strong fails to articulate why it is appropriate to resort to a hypothetical negotiation when Plaintiffs have been licensing their music for years.[9]

2. Strong’s Analysis Depends upon Speculative and Unreasonable Assumptions.

Strong’s “expenses saved” analysis is incompatible not just with the law, but with reality. His analysis depends upon the assumption that Plaintiffs would have agreed to license LimeWire the right to induce millions upon millions of downloads of their copyrighted works for whatever LimeWire’s profits turned out to be, no matter how small. (Report ¶ 145). That is preposterous. As Strong conceded at his deposition, a rational economic actor would not enter into a license agreement unless it believed that doing so would be profitable. (Depo at 318:19-319:2). Yet in forming his opinion that Plaintiffs would have agreed to such a deal, Strong gave no consideration to whether it would have been beneficial for Plaintiffs to do so. Indeed, as he further conceded, he failed to consider the nature and scope of the license that LimeWire would have needed to engage in its infringing activities (Depo at 310:6-18), how many copies of Plaintiffs’ works would have been made and distributed under such a license (Depo at 319:10-25), or whether such a license would have caused substantial harm to Plaintiffs’ existing lines of business. (Depo at 313:12-21; 318:4-14; 320:9-17). Obviously, Plaintiffs would need to account for all such factors in evaluating whether or not to agree to such a transaction (*see* Liebowitz Report ¶¶ 100-101), yet Strong simply stuck his head in the sand and refused to contemplate any facts that might contradict his preferred conclusion. (Depo at 310:6-18; 313:12-314:25; 318:4-319:9; 320:2-17). This is precisely the type of opinion testimony that should be excluded for being “based on assumptions that are so unrealistic and contradictory as to suggest bad faith.”

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[9] iTunes is one example of a digital model that pays royalties to Plaintiffs for downloads, and Strong himself referred iTunes in discussing royalties for digital downloads. (Report, ¶¶ 74-75; Depo 184:11-16).

Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) (internal citations and quotations omitted).[10]

Strong defends his absurd claim by alleging that "the record companies would likely be willing to agree to such a license because the majority of the costs to the record companies of producing the Works have already been incurred." (Report ¶ 145). That assumes, counter-factually, that Plaintiffs would value the hypothetical LimeWire transaction in isolation, without regard to how such an agreement would cannibalize the rest of its business. Thus, under Strong's analysis, Plaintiffs would license the unfettered copying by LimeWire users for a hypothetical one dollar in profit, even if that would cause immeasurable losses to their bottom line by allowing users to download unlimited music from LimeWire for free rather than purchase identical copies of those sound recordings on CD, from iTunes, or via some other distribution channel that provided greater revenue. This Court, in its gatekeeping function under *Daubert*, should preclude Defendants from proffering testimony so divorced from reality.

IV. <u>CONCLUSION</u>

For the reasons discussed above, Plaintiffs respectfully request that:

(1) The Court preclude Strong from critiquing the testimony of Plaintiffs' expert, Richard Waterman, concerning the volume of infringement of Plaintiffs' works through LimeWire, on the ground that Strong is unqualified to offer such testimony;

(2) The Court preclude Strong from testifying about the music industry or about technologies related to music, on the ground that he is unqualified to offer such testimony;

[10] A district court has broad discretion "to determine whether the expert acted reasonably in making assumptions of fact upon which he would base his testimony." *Shatkin v. McDonnell Douglas Corp.,* 727 F.2d 202, 208 (2d Cir. 1984). However, "[a]dmission of expert testimony based on speculative assumptions is an abuse of discretion." *Boucher*, 73 F.3d at 22. Strong's assumption that Plaintiffs' would have granted LimeWire a license in exchange for its profits, no matter how meager, is not merely speculative but is in fact contrary to basic economics and common sense.

(3) The Court preclude Strong from testifying about causation, on the grounds that (a) the testimony is unreliable, (b) the testimony is not based on sufficient facts or data, and (c) the testimony does not assist the jury; and

(4) The Court preclude Strong from testifying as to the "expenses saved" by LimeWire as a result of its infringement, on the grounds that Strong's opinion is based upon legally and factually incorrect assumptions.

Dated: March 2, 2011

Respectfully submitted

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