

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC., <i>et al.</i> ,		)
		)
Plaintiffs,		)
		)
v.		)
		)
NOOR ALAUJAN,		)
		)
Defendant.		)
<hr/>		)

Civ. Act. No.  
03-CV-11661-NG  
(LEAD DOCKET NUMBER)

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SONY BMG MUSIC ENTERTAINMENT, <i>et al.</i> ,		)
		)
Plaintiffs,		)
		)
v.		)
		)
JOEL TENENBAUM,		)
		)
Defendant.		)
<hr/>		)

Civ. Act. No.  
07-CV-11446-NG  
(ORIGINAL DOCKET NUMBER)

**EXPERT REPORT OF DR. WAYNE MARSHALL**

I, Wayne Marshall (Ph.D., Music), hereby submit this expert report.

**1. Opinions to be expressed**

At trial, I shall express the following opinions:

### **Songs as Shared Things**

Songs have always been shareable and shared. People, young and old, share songs with each other - by singing or playing them - in a variety of ways and settings, through a variety of technologies and media or other manner of accompaniment (as well as *a capella*). Songs as recordings are not fundamentally different in this respect. Since the advent of recorded media, people have shared songs in this form as well: played for each other in private and public settings, on personally distributed mixes (mixed tapes / CDs), and, in the age of mp3s, as files sent via email, IM (instant message), torrent, third-party hosting site, or any manner of online sites and services.

Ironically, today songs are most often shared via a video site, YouTube, which has become a *de facto* public audio repository. This development and the explosion of music-centered blogs and forums offer evidence, in the form of pervasive and popular practice, of how musical recordings are treated as public culture, things which people send to friends, family, and colleagues, point to and comment on, and remix in the course of their everyday lives.

To click on a YouTube link in order to access a song (or to send such a link to a friend) would hardly be considered an illegal

action on the part of the millions of people who do so each day, and yet the action is hardly different from the Defendant's use of a filesharing network to access the seven songs in question just a few years ago. Those songs are:

- \* Incubus - New Skin
- \* Green Day - Minority
- \* Bad Religion - American Jesus
- \* Outkast - Wheelz of Steel
- \* Incubus - Pardon Me
- \* Sublime - Miami
- \* Nirvana - Come As You Are

If one searches for any of these songs on YouTube today, one finds numerous instances of each, sometimes numbering in the dozens or even hundreds. Notably, beyond merely presenting the songs, the users who upload the videos frequently add their own elements, personalizing the songs in order to share them with peers and other potential viewers: they add new images, both still and video (including found footage and self-produced material); transcribe and caption the lyrics; sometimes, they edit or remix the audio itself, especially in the case of hip-hop songs (e.g., Outkast) - an interactivity consistent with cultural practice in hip-hop more generally.

Only in the relatively recent past - within the last century - have songs, in the "fixed" media form of audio recordings, been so strongly regulated as pieces of property whose use by others might be strictly limited. An examination at the level of cultural practice - that is, how songs as audio recordings have been used by people - demonstrates that even in such "fixed" form, songs have continued to serve as a commonplace site of sharing and creative interaction (also known as remixing). This becomes particularly evident in the use of playback technologies such as turntables as creative instruments in their own right (aiding the emergence of hip-hop and disco in the 1970s), an approach powerfully extended by the tools of the digital age.

### **Historicizing the Musical Commodity**

The notion of the song as commodity is a relatively recent one, enabled by a certain technological confluence (the advent of recordable media and mass production), and it seems to be fading relatively quickly in the face of a new technological confluence (the digital). As musicologist Timothy Taylor writes in an award-winning article on "The Commodification of Music at the Dawn of the Era of 'Mechanical Music'": "the music-commodity has

to be understood as always in flux, always caught up in historical, cultural, and social forces" (Taylor 200?: 283).

The album as a commodity form is a particularly illustrative example of this socially and culturally situated flux. The age of the album - roughly, the late 60s to the late 90s - was a fleeting moment, again enabled by a particular set of technologies (the advent of the long-player record, or LP, followed by the cassette and CD). While early album-oriented artists approached the LP form as an artistic opportunity, leading to the emergence of the "concept album," by the late 90s album offerings were far more typically collections of "filler" material, propelled by a hit or two, sold at exorbitant prices (e.g., \$18.99) to customers with no alternatives. At this point, the album is, in most cases, an anachronism, either an indulgent and/or exploitative exercise. Notably, internet vendors such as iTunes or eMusic and other distribution methods (including blogs and filesharing networks) have reinstated the primacy of the single track as the prevailing unit of popular music.

Reasonable paid alternatives to free downloading have only become available recently, and even then rather unevenly with regard to what is available and in what form. The defunct torrent tracker, Oink - and its ilk - offer(ed) higher quality

files, better documented, uncrippled by DRM software, and of a far greater variety than one can find via any of the legally-permitted online music vendors.

### **Listening as a Transformative and "Fair" Use**

Listening is an active process, a rich domain of interpretation and imagination, manifesting differently - according to personal idiosyncrasies and cultural mores alike - for each person and in each moment. As anthropologist Steven Feld explains in the oft cited "Communication, Music, and Speech about Music" (Feld 1984), the listening process is, when one considers all that is potentially involved, an enormously complex phenomenon very much centered on the particular listener in question. According to Feld, listening as an act of "musical consumption" involves, among other things: the dialectics of the musical object itself (text-performance, mental-material, formal-expressive, etc.), the various interpretive moves applied by the listener (locational, categorical, associational, reflective, evaluative), and the contextual frames available at any moment (expressive ideology, identity, coherence).

All of this activity is inextricably social in character, regardless of the musical object in question. As Feld notes, "We

attend to changes, developments, repetitions--form in general-- but we always attend to form in terms of familiarity or strangeness, features which are socially constituted through experiences of sounds as structures rooted in our listening histories" (85).

While grounded in communication studies and musical semiotics in Feld's study, such an interpretation - centering the socially-situated hearing subject rather than the musical object (whether live performance or mp3) - is also consistent with a great deal of literary and media theory from the past thirty years, from Roland Barthes's infamous 1977 "Death of the Author" to Henry Jenkins's contemporary theories about spreadability and value.

## **2. Basis for Opinions**

I hold a Ph.D. in Music (Ethnomusicology) from the University of Wisconsin-Madison. I have published widely in my own and related fields. My areas of expertise include music and technology, especially digital technology. I was recently offered, and accepted, a Mellon Fellowship at the Massachusetts Institute of Technology to pursue a research project on global internet music culture.

My curriculum vitae is attached to this report as Exhibit A.

### **3. Data Considered**

My expertise in the area of digital culture, the history of musical recording and industry, and common musical practices and processes is informed by my own ethnographic, historical, and analytical research as well as by an engagement with an interdisciplinary literature ranging from ethnomusicology, anthropology, and sociology to media and cultural studies. Below is a partial bibliography informing the opinion above, including the specific works cited:

- Feld, Steven. 1984. "Communication, Music and Speech about Music." *Yearbook for Traditional Music* 16:1-18.
- Katz, Mark. 2004. *Capturing Sound: How Technology Has Changed Music*. Berkeley: University of California Press.
- Lysloff, Rene and Leslie Gay, Jr. 2003. *Music and Technoculture*. Middletown, CT: Wesleyan University Press.
- Small, Christopher. 1998. *Musicking: The Meanings of Performing and Listening*. Hanover and London: Wesleyan University Press.
- Sterne, Jonathan. 2003. *The Audible Past: Cultural Origins of Sound Reproduction*. Durham: Duke University Press



- Taylor, Timothy D. 2007. "The Commodification of Music at the Dawn of the Era of 'Mechanical Music.'" *Ethnomusicology* 51(2): 281-305.
- Watkins, Craig. 2009. *The Young and the Digital*. Boston: Beacon Press.

I, Wayne Marshall, declare under penalty of perjury that under the laws of this Court's jurisdiction that the foregoing is true and correct. I have not previously testified, and I am not being paid for offering my expertise.

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_