

ATTACHMENT B

Response to Defendants' Evidentiary Objections to Deposition Testimony

Deponent Page/Line¹	Objection	Plaintiffs' Response to Objection
Berlin 6:04-9:11	<i>Relevance ("Personal opinions regarding 'stealing' are irrelevant to any issues in this Lawsuit.")</i>	Although the testimony to which defendants object relates to statements made by Berlin in Exhibit 192 (Plaintiffs' Deposition Ex. 219), defendants do <i>not</i> object to Exhibit 192 on relevance grounds. In any event, defendants' objections are baseless: Berlin's testimony is relevant in that it authenticates Exhibit 192. (See Pls. Mot. to Strike Opp'n Br., Attach. A at Ex. 192.) Berlin's testimony is also relevant because it is probative of the fact that Lime Wire LLC's Senior Software Developer Berlin (see Attach. C) ² was of the opinion that copyright infringement is not stealing.
Berlin 26:6-26:17	<i>Speculation</i>	Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Berlin testimony. Nor do plaintiffs cite to Plaintiffs' Deposition Ex. 222 to which this testimony is related.
Berlin 217:15-218:9	<i>Speculation</i>	Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Berlin testimony.
Berlin 243:18-243:24	<i>Assumes facts not in evidence; improper opinion question from a lay witness</i>	The fact that the content filter in the LimeWire client is disabled or set "off" by default was introduced into evidence <i>by defendants</i> in the expert report of Prof. Steven Gribble at 25. The deposition testimony objected to here then does not assume facts not in evidence. Berlin is the Senior Software Developer of Lime Wire LLC. (See Attach. C.) He declared that "I have been one of the chief software developers for LimeWire" and that "I am extremely familiar with the design features and functionality of LimeWire and the Gnutella network in general." (See Berlin 07/17/08 Decl. ¶ 3; see also Berlin 09/26/08 Decl. ¶ 3.) The question "[d]o you know why LimeWire didn't design the program so that content filtering would not be automatically on?" is proper because it asks for Berlin's knowledge of these facts. To the extent the question asks for Berlin's opinion, it is

¹ All deposition transcript citations cited herein are contained in Vols. VI or VII unless otherwise noted.

² Attachment C appended hereto ("Attach. C") contains the relevant names and titles of the officers, directors, and employees of Lime Wire LLC and their respective periods of employment.

		admissible because it asks for an opinion based on Berlin's perception, is helpful to the determination of Lime Wire LLC's filtering efforts, and does not require any specialized knowledge. <i>See</i> Fed. R. Evid. 701.
Berlin 247:13-247:23	<i>Speculation</i>	This testimony is not speculation because Berlin, Lime Wire LLC's Senior Software Developer (<i>see</i> Attach. C), has personal knowledge of the content filtering system.
Catillaz 163:11-163:21	<i>Assumes facts not in evidence ("This portion of the transcript assumes that there were actual user testimonials posted in the French version of LimeWire, which Plaintiffs have not proven.")</i>	Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Catillaz testimony. In addition, the fact that there were user testimonials posted on the French website of Lime Wire LLC is proven by Exhibit 119 (Plaintiffs' Deposition Ex. 55) which was authenticated by the Catillaz testimony (Catillaz (Vol. XII) Tr. 161:15-162:6.) (<i>See</i> Attach. A, at Ex. 119.) Thus, this testimony does not assume facts not in evidence.
Catillaz 183:15-183:19	<i>Speculation</i>	Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Catillaz testimony. However, if plaintiffs <i>had</i> cited it, it would be admissible. Catillaz is Lime Wire LLC's Business Developer (<i>see</i> Attach. C) and testified that Lime Wire LLC received customer service inquiries regarding the legality of LimeWire from time to time. (Catillaz Tr. 183:9-183:14.) Catillaz's "reasonable guess" that Lime Wire LLC received dozens of such inquiries is based on personal knowledge of these inquiries and is not speculation.
Catillaz 324:07-324:19	<i>Improper lay opinion; speculation</i>	Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Catillaz testimony. However, if plaintiffs <i>had</i> cited to it, it would be admissible. Catillaz's testimony relates to Exhibit 61 (Plaintiffs' Deposition Ex. 93) which is a report authored by Catillaz (Catillaz Tr. 322:9-322:14), and lists groups of LimeWire users that "we invented". (Catillaz Tr. 324:11.) Catillaz's opinion as to whether "hardcore pirates [which is one of the LimeWire user groups defined in her report] make up more than 50 percent of the LimeWire user base" is based on her perception and knowledge gained as the author of this report. Her testimony is not one of an "expert", and is thus admissible. <i>See</i> Fed. R. Evid. 701.

<p>Falco 157:23-158:11</p>	<p><i>Speculation; assumes facts not in evidence</i></p>	<p>Falco was the Chief Executive Officer of Free Peers, Inc., a company that “created and distributed ‘BearShare’” which is a P2P application operating on the Gnutella network. (See Ex. 10 (Falco 05/17/07) Decl. ¶ 2); Falco (Vol XII) Tr. 66:8-16, 67:2-6.) Falco testified to what Bildson, Lime Wire’s Chief Technology Officer and Chief Operating Officer (see Attach. C), told him “he [Bildson] thought would be the downside for filtering.” Further, Falco’s testimony is not speculation, but his opinion as to whether “Lime Wire LLC users [would] ... basically switch away from Lime Wire LLC if it filtered” is based on the perception of Gnutella network users’ preferences that Falco gained as CEO of Free Peers, Inc. See Fed. R. Evid. 701. Neither plaintiffs’ question nor Falco’s response assumed facts not in evidence.</p>
<p>Fisk 153:7-154:5</p>	<p><i>Speculation</i></p>	<p>Neither plaintiffs’ brief nor Pls. 07/18/08 SOF cites to this portion of the testimony of Adam Fisk.</p>
<p>A. Gorton 101:21-102:9</p>	<p><i>Speculation</i></p>	<p>Amy Gorton authored Exhibit 322 (Plaintiffs’ Deposition Ex. 213; A. Gorton (Vol. XII) Tr. 99:12-100:10) in which she wrote that “[t]he new features [of the new LimeWire release] include the debut of firewall-to-firewall transfers, a completely new MP3 player, <i>iTunes</i> integration on Windows.” (Ex. 322; emphasis added.) Thus, Gorton has personal knowledge of what iTunes is, and her statement thereto is not speculation.</p>
<p>M. Gorton 88:18-88:24</p>	<p><i>Assumes facts not in evidence; compound question (“This section assumes that infringement could have been reduced or prevented, which Plaintiffs have not proven.”)</i></p>	<p>Neither plaintiffs’ brief nor Pls. 07/18/08 SOF cites to this portion of the testimony of Mark Gorton. Moreover, Gorton did not answer plaintiffs’ question. Even if plaintiffs had cited to this part of Gorton’s testimony, it would be admissible because the question is straightforward and does not assume facts not in evidence: plaintiffs have proven that Lime Wire LLC had the ability and opportunity to implement an effective filter for copyrighted works. (See Pls. 07/18/08 SOF ¶¶ 493-509.)</p>

<p>M. Gorton 484:2-485:21</p>	<p><i>Assumes facts not in evidence; speculation</i> (“This portion of the transcript assumes that Lime Wire had to take action to comply with the Grokster ruling, which Plaintiffs have not proven.”)</p>	<p>Defendants’ objections are baseless. <i>First</i>, plaintiffs’ questions did not imply that Lime Wire LLC had a duty to take action to comply with the <i>Grokster</i> ruling, but simply asked whether Lime Wire LLC had taken any such actions. <i>Second</i>, Mark Gorton himself has declared that “when the Supreme Court specifically stated that a P2P company that tried to reduce infringement by implementing a copyright filter could not be liable for copyright infringement, I had Lime Wire LLC build a copyright filter” which proves that Lime Wire LLC believed that they had to take action following <i>Grokster</i>. (See Gorton 09/26/08 Decl. ¶ 36.) Further, the questions about any possible action Lime Wire took to comply with the Supreme Court’s <i>Grokster</i> decision inquired as to Gorton’s knowledge, not his speculation. The fact that he has personal knowledge of such actions is also evidenced by the Gorton 09/26/08 Decl. ¶ 36.</p>
<p>M. Gorton 503:17-503:25</p>	<p><i>Argumentative; speculation</i></p>	<p>Although plaintiffs cite to the part of Mark Gorton’s non-responsive testimony to which defendants object, plaintiffs neither quote from nor rely on this portion. (See Pls. SOF 07/18/08 ¶ 138.)</p>
<p>Harris 108:14-108:24</p>	<p><i>Overbroad, vague, speculation</i></p>	<p>Adam Harris is Lime Wire LLC’s former Business Developer. (See Attach. C.) The question “[t]o the best of your recollection, did you ever write a press release or a blurb about LimeWire that did not start with the statement that LimeWire enables a sharing, searching and downloading of MP3 files” asked for Harris’ knowledge and did not call for speculation. The question is neither vague nor overbroad.</p>
<p>Horowitz Report</p>	<p><i>Authenticity; hearsay; no foundation</i></p>	<p>See Pls. Mot. to Strike Opp’n Br. at 16-17 and Pls. Expert Opp’n Br. at 24-25.</p>
<p>Mercurio 231:18-233:25</p>	<p><i>Speculation, improper foundation</i></p>	<p>Dr. Matthew Mercurio is <i>defendants’ own</i> expert witness. As an example of “flaws in Dr. Waterman’s Calculations” Dr. Mercurio, in his report, asserted that the file install_easysshare.exe was erroneously labeled “Highly Likely Infringing.” (See Expert Report of Matthew G. Mercurio at 14-15.) In his deposition, plaintiffs showed Dr. Mercurio Exhibit 49 (Plaintiffs’ Deposition Ex. 29), which is a properly authenticated printout from the Kodak EasyShare software download webpage. (See Attach. A at Ex. 49.) After reviewing Exhibit 49, Dr. Mercurio admitted that Exhibit 49 altered his “understanding of whether Mr. German was correct or incorrect in his</p>

		categorization of the EasyShare.exe file as highly likely infringing” and that contrary to the opinion stated in his report he agreed with German’s categorization. That is not speculation.
Mercurio 260:15-260:25	<i>Speculation</i>	Although plaintiffs cite to the part of Matthew Mercurio’s testimony to which defendants object, plaintiffs rely and quote only from the part of Mercurio’s testimony to which defendants do not object. (Mercurio Tr. 259:19-260:14; see Pls. SOF 07/18/08 ¶ 344.) Further, defendants’ expert’s statement that copyrighted files are more popular than other files is not speculation.
D. Nicponski 61:11-61:21	<i>Vague; overbroad</i>	David Nicponski was a Software Engineer at Lime Wire LLC. (See Attach. C.) Nicponski was specifically asked about the significant differences between Napster and LimeWire, to which he answered that “the most significant difference is that Napster ...is not a decentralized system” and that “LimeWire, or rather, Gnutella, is a decentralized system, LimeWire being one of the clients for Gnutella.” Thus, neither the question nor Nicponski’s answer are vague or overbroad. To the extent Nicponski’s testimony is in form of opinion it is an admissible lay opinion. See Fed. R. Evid. 701.
D. Nicponski 136:15-136:25	<i>Relevance (“This has to do with his work at BearShare and is therefore irrelevant.”)</i>	Neither plaintiffs’ brief nor Pls. 07/18/08 SOF cites to this portion of the testimony of Dave Nicponski. Further, Nicponski’s testimony with respect to his work at BearShare regarding the Hostiles.txt data file is relevant because it is probative of the fact that this file was used on the Gnutella network (the network both LimeWire and BearShare were on) to block the IP addresses of companies that engaged in antipiracy measures. (See Pls. 07/18/08 SOF ¶¶ 355-357.) Plaintiffs further note that defendants do not object to other Nicponski testimony regarding his work at BearShare (Nicponski (Vol. XIII) Tr. 133:23-136:14.)
D. Nicponski 138:23-139:2	<i>Speculation</i>	The testimony of former Lime Wire LLC Software Engineer David Nicponski, who was working with the Hostiles.txt file at BearShare (Nicponski Tr. 134:21-135:11), as to whether companies spoofing or spamming the Gnutella network “have made their way onto the Hostiles.txt list” is based on his personal knowledge and is not speculation. To the extent Nicponski’s testimony is in form of opinion, it is an admissible lay opinion. See Fed. R. Evid. 701.

<p>D. Nicponski 139:3-139:25</p>	<p><i>Relevance</i> ("This has to do with his work at BearShare and is therefore irrelevant.")</p>	<p>Contrary to defendants' contentions, Nicponski's testimony with respect to his work at BearShare regarding the Hostiles.txt data file is relevant because it is probative of the fact that this file was used on the Gnutella network (which both LimeWire and BearShare were on) to block the IP addresses of companies that engaged in antipiracy measures. (See Pls. 07/18/08 SOF ¶¶ 355-357.) Defendants do not object to other Nicponski testimony regarding his work at BearShare (Nicponski (Vol. XIII) Tr. 133:23-136:14.)</p>
<p>D. Nicponski 142:13-143:25</p>	<p><i>Speculation; relevance</i></p>	<p>Defendants' objections are not disputed.</p>
<p>D. Nicponski 161:22-164:25</p>	<p><i>Relevance</i> ("This is his personal opinion and is irrelevant.")</p>	<p>Defendants do not object to Exhibit 239 (Plaintiffs' Deposition Ex. 464), the e-mail thread to which Nicponski's testimony relates. At the time he wrote these e-mails discussing software features of the LimeWire client (Ex. 239), Nicponski was employed by Lime Wire LLC as a Software Engineer. (See Attach. C.) This was not simply his personal opinion. Even if it was, Nicponski's testimony is admissible lay opinion. See Fed. R. Evid. 701. It is probative of the fact that Lime Wire LLC refused to implement "a centralized capability for LimeWire to try and deduce the contents of files that are being shared".</p>
<p>Randell 34:19-35:22</p>	<p><i>Speculation; hearsay; no foundation</i></p>	<p>Google Inc. ("Google") designated Jill T. Randell to testify on its behalf pursuant to Fed. R. Civ. P. 30(b)(6). Randell's testimony relates to Exhibit 82 (Plaintiffs' Deposition Ex. 10), a Google business record. (See Attach. A at Ex. 82.) Randell's testimony discussing these business records is therefore not hearsay. Further, Randell's testimony on Google's behalf as to Google's business records is not speculation.</p>
<p>Rohrs 97:15-98:18</p>	<p><i>Speculation</i></p>	<p>Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of Rohrs' testimony. Regardless, this testimony is admissible. It relates to Exhibit 222 (Plaintiffs' Deposition Ex. 392), a paper co-authored by Lime Wire's Software Engineer Rohrs (Rohrs (Vol. XIII) Tr. 94:24-95:14.) touting privacy as a benefit of ultrapeers. Thus, his responding to a question about the nature of that privacy is not speculation but based on his own personal knowledge.</p>

<p>Rohrs 112:24-113:06</p>	<p><i>Speculation</i></p>	<p>Although plaintiffs cited to the part of Rohrs' testimony to which defendants object, plaintiffs rely and quote only from the part of Rohrs' testimony to which defendants do not object. (Rohrs Tr. 111:16-112:23, 113:7-115:05; <i>see</i> Pls. SOF (07/18/08) ¶ 411.) The questions to which defendants object in this portion of Rohrs' testimony relate to Rohrs personal knowledge and do not call for speculation.</p>
<p>Rohrs 119:03-119:21</p>	<p><i>Speculation</i></p>	<p>Neither plaintiffs' brief nor Pls. 07/18/08 SOF cites to this portion of the Rohrs testimony. Even if plaintiffs <i>had</i> cited to the objected testimony, his testimony of what he meant in a specific phrase of his post in Exhibit 14 (Plaintiffs' Deposition Ex. 398) is based on his personal knowledge and not speculation.</p>
<p>Rubinfeld 151:13-152:24</p>	<p><i>Hearsay; lay opinion</i></p>	<p>Jesse Rubinfeld is Lime Wire LLC's Chief Financial Officer. (<i>See</i> Attach. C.) Rubinfeld's testimony is not hearsay because it is not offered for the truth of the matter asserted, but to demonstrate Rubinfeld's view of the purpose of the "magic string" and the factors leading to its adoption. <i>See</i> Fed. R. Evid. 801(c). This is not speculation as Rubinfeld took part in making deals with the digital distributors that licensed their music to Lime Wire LLC. Further, Rubinfeld's testimony as to his understanding of dealings with business partners that are within his job responsibilities is not opinion testimony. Even if it was, it would be admissible lay opinion testimony. <i>See</i> Fed. R. Evid. 701.</p>
<p>Rubinfeld 251:18-252:13</p>	<p><i>Hearsay</i></p>	<p>Rubinfeld's testimony is not hearsay because he testified about his <i>own</i> understanding of the nature of the discussions between Lime Wire LLC and Audible Magic, not about any statement made during these discussions. Rubinfeld's testimony is also not hearsay because it is not offered for the truth of the statements made in these discussions, but to demonstrate that such discussions about implementing a content filtering system were held. <i>See</i> Fed. R. Evid. 801(c).</p>
<p>Rubinfeld 254:07-254:23</p>		<p>Defendants do not raise any objection to this testimony nor did they object to it at the deposition, and plaintiffs do not quote from this part of the testimony or rely on it in any way.</p>
<p>Waterman Report</p>	<p><i>Authenticity; hearsay; no foundation</i></p>	<p><i>See</i> Pls. Mot. to Strike Opp'n Br. at 16-17 and Pls. Expert Opp'n Br. at 24-25.</p>