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13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16
 17

18 IN RE SUBPOENAS TO ELECTRONIC
 19 FRONTIER FOUNDATION AND FRED
 VON LOHMANN.

CASE NO. Misc. 10-80276 (JSW)

[Case No. 06 Civ. 05936 (KMW), U.S. District Court, Southern District of New York]

20
 21 ARISTA RECORDS LLC, et al.,
 22 Plaintiffs,

**PLAINTIFFS' OPPOSITION TO
 EXPEDITED MOTION TO QUASH
 SUBPOENAS**

Date: TBD [Per Scheduling Order, Doc. No. 7]

23 v.

24 LIME WIRE LLC, et al.,
 25 Defendants.

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1 **I. INTRODUCTION**

2 Movants' motion to quash lawfully issued subpoenas based on a claim of a purported
3 attorney-client privilege is manifestly deficient, both procedurally and substantively, and the
4 Court should deny it.¹ Movants have the burden of backing up their assertion that they were in a
5 privileged relationship with the Defendants in the underlying civil litigation (the *Lime Wire*
6 Action) with competent evidence, not attorney rhetoric.² The motion assumes that, because
7 certain EFF personnel and von Lohmann have Bar cards, the Court must presume that any
8 communications between them and the *Lime Wire* Defendants are privileged. That is not and
9 never has been the law. Communications must be made within the scope of a professional
10 attorney-client relationship to be privileged. *See United States v. Martin*, 278 F.3d 988, 1000 (9th
11 Cir. 2002). The motion is not supported by any competent declaration — from anyone at EFF,
12 from von Lohmann, or from any putative "client" — swearing under oath that they were engaged
13 in an attorney-client relationship, when that relationship started, how long it lasted, or anything of
14 the kind. In fact, there is strong reason to believe that EFF and von Lohmann were *not* the Lime
15 Wire Defendants' counsel, given that EFF (represented by von Lohmann) previously represented
16 to the Court in the *Lime Wire* Action that it was a *neutral* with respect to that case. *See Boyd*
17 Decl. Ex. 5 (Amicus Brief); *id.* Ex. 6 (Declaration of Fred von Lohmann in Support of Amicus
18 Brief). Because Movants have not — as is their burden to do — supported the assertion of such a
19 relationship with competent evidence, the motion can and should be denied at the outset.

20 Even if Movants had submitted a declaration attesting to the claim of an attorney-client
21 relationship, Movants' motion still would have to be denied because there is strong reason to
22 believe that the communications the subpoenas seek to discover are not subject to a privilege
23 claim. The subpoenas seek to discover communications between EFF/von Lohmann and the
24 *Lime Wire* Defendants about numerous subjects relating to Lime Wire not obtaining (or retaining)
25 incriminating information about its users' widespread infringing activity and the adoption (or not)

26 _____
¹ Movants are the Electronic Frontier Foundation ("EFF") and Fred von Lohmann.

27 ² *Arista Records LLC et al. v. Lime Wire LLC et al.*, Civil No. 06-5936 (KMW) (U.S.D.C.
28 S.D.N.Y.)

1 of infringement-reducing technologies. The subjects include Lime Wire’s adoption of document-
2 purging policies to avoid retaining such incriminating communications. Movants omit to tell this
3 Court that **the District Court in the *Lime Wire* action has already said that it is an open**
4 **question whether such communications are subject to a privilege claim, and expressly**
5 **invited further briefing on this issue.** This motion thus seeks to short-circuit privilege briefing
6 expressly called for by the Court in the underlying action.

7 Lime Wire is the most recent in a line of notorious services set up to induce the mass
8 infringement of Plaintiffs’ (the major record companies’) copyrighted sound recordings.
9 Plaintiffs sued Lime Wire in 2006. In May of this year, the District Court (Hon. Kimba M.
10 Wood) granted Plaintiffs summary judgment, finding the evidence undisputed that Defendants
11 intentionally induced infringement and were well aware of the mass illegal activity taking place
12 on their service. The Court issued its first opinion on May 11. In it, the Court said it had
13 reviewed evidence from Lime Wire’s founder and a named Defendant (hence, a putative “client”
14 here) showing that von Lohmann “gave [Defendants] confidential legal advice **regarding the**
15 **need to establish a document retention program to purge incriminating information about**
16 **LimeWire users’ activities.”** Boyd Decl. Ex. 1 at 14-15 (emphasis added). EFF sent Judge
17 Wood a letter, encouraging her to delete this sentence so it would not harm von Lohmann’s
18 “professional reputation.” *Id.* Ex. 2. Judge Wood amended the Opinion to delete the sentence,
19 but did not take EFF’s assertions about von Lohmann’s statements at face value. Instead, Judge
20 Wood said that “the Court is of the view that it would benefit from further briefing on the issue of
21 whether the statements are protected by the attorney-client privilege[.]” Boyd Decl. Ex. 3 at 2.

22 The steps the *Lime Wire* Defendants took to avoid being in possession of incriminating
23 information is highly relevant to the forthcoming damages trial. Among other things, such
24 evidence would show the extent of Defendants’ willful infringing activity, and provide support
25 for the maximum statutory damages award. 17 U.S.C. § 504(c)(2). If EFF/von Lohmann
26 recommended that the *Lime Wire* Defendants enact a document-purging program to eliminate
27 incriminating information, that would be significant evidence for Plaintiffs’ damages case. There
28 also would be a serious question whether — even if EFF/von Lohmann had an attorney-client

1 relationship with the *Lime Wire* Defendants — this would be the kind of “advice” that the
2 privilege would protect.

3 This Court, of course, does not have to resolve the question whether the *Lime Wire*
4 Defendants can maintain a claim of privilege over such communications, or how the underlying
5 communications weigh in the damages calculus. Those matters will be decided in the *Lime Wire*
6 Action in the Southern District of New York, including in the briefing that Judge Wood expressly
7 invited. This motion, however, aims to eliminate any such inquiry by preventing Plaintiffs from
8 obtaining even the basic foundational information that would be required to assess and test the
9 claim of privilege. The motion should be denied, and the Court should enter an Order compelling
10 Movants’ response to the subpoenas.

11 **II. BACKGROUND**

12 **A. The Lime Wire Litigation**

13 Plaintiffs are the major record music companies. They produce, manufacture and
14 distribute the vast majority of copyrighted sound recordings sold in the United States. *See Arista*
15 *Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481 (S.D.N.Y. 2010).

16 Until it was enjoined by Judge Wood on October 26 of this year, Lime Wire boasted of
17 being the world’s largest “peer-to-peer” service for what it euphemistically called “file-sharing”
18 — and which in reality was the mass uploading and downloading of copyrighted works. Lime
19 Wire positioned itself as the successor to the likes of Napster, Aimster and Grokster, all of which
20 ultimately were found to be responsible for the mass infringement they intentionally perpetrated.
21 *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster*
22 *Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d
23 1004 (9th Cir. 2001). Like its ignominious predecessors, Lime Wire intentionally induced the
24 widespread infringement of Plaintiffs’ copyrighted works on a “massive scale.” *Arista Records*,
25 715 F. Supp. 2d at 510.

26 Plaintiffs sued Lime Wire, its corporate parent (Lime Group LLC) and the founder of both
27 companies, Mark Gorton (collectively, “Defendants”) in 2006, in the Southern District of New
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1 York. *Id.* at 492. In May of this year, Judge Wood granted Plaintiffs’ motion for summary
2 judgment, holding that Lime Wire “intentionally encouraged” the “massive scale” copyright
3 infringement committed by its “enormous user base.” *Id.* at 508, 510, 512. Lime Wire’s main
4 product — the LimeWire Client software — is used “overwhelmingly for infringement.” *Id.* at
5 509. Indeed, without infringement, Lime Wire would have no business at all. The Court
6 recognized that Lime Wire’s very existence *depends* on the “massive user population generated
7 by” the LimeWire Client’s “infringement-enabling features.” *Id.* at 512. The Court found the
8 evidence overwhelming and undisputed that Lime Wire had acted intentionally to promote mass
9 infringement by Lime Wire’s users. The Court further acknowledged that Lime Wire has known
10 for years about the undeniably “massive scale” of Lime Wire’s induced infringement. *Id.* at 510.

11 The case will now proceed to a trial, set for January 18, 2011, on, *inter alia*, the damages
12 that Defendants will have to pay under the Copyright Act’s statutory damages provision for their
13 intentional inducement of thousands upon thousands of copyrighted sound recordings by millions
14 upon millions of Lime Wire users.

15 **B. EFF and Mr. von Lohmann**

16 Contrary to Movants’ suggestion that EFF is a “law firm” (Mot. at 2), EFF and von
17 Lohmann are not exclusively lawyers doling out confidential legal advice. EFF is an *advocacy*
18 organization, which publicly boasts that its mission is to combat copyright owners (including the
19 Plaintiff-record companies) that EFF accuses of “trying to dumb down technology to serve their
20 ‘bottom lines’ and manipulate copyright laws[.]” www.eff.org/about/history (last visited Nov.
21 12, 2010). While EFF has lawyers on staff and sometimes represents parties in litigation, much
22 of EFF’s work is in the sphere of public activism, “[b]lending the expertise of lawyers, policy
23 analysts, activists, and technologists.” www.eff.org/about. Mr. von Lohmann held the title of
24 senior staff attorney at EFF between 2002 and earlier this year (he now is a senior copyright
25 counsel at Google). *See* Mot. at 2 & n.1.

26 Neither EFF nor von Lohmann have limited their advice and activism to private clients in
27 the confines of attorney-client relationships. On the contrary, they have aired their advice and
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1 opinions publicly for years. For example, in the wake of the Ninth Circuit’s 2001 decision
2 affirming (in large part) Judge Patel’s decision to enjoin the Napster service, von Lohmann
3 offered advice to other peer-to-peer services about how they could do the same thing that Napster
4 was doing but avoid that company’s fate in the legal system. Mr. von Lohmann’s 2001 “primer”
5 stated that, to avoid liability from anticipated litigation by copyright holders, peer-to-peer services
6 should create “plausible deniability” by “choos[ing] an architecture that will convince a judge
7 that . . . monitoring and control is impossible.” Boyd Decl. Ex. 4 at 8. In the same primer, von
8 Lohmann also suggested that peer-to-peer developers should avoid “software that sends back
9 usage reports” because such usage reports “may lead to more knowledge than you want.” *Id.*

10 Services like Grokster and Lime Wire followed much of von Lohmann’s advice to the
11 letter. Where Napster had maintained central servers that facilitated mass infringement, Grokster,
12 Lime Wire and others utilized a decentralized architecture, and relied on that technological
13 difference to claim that they had no “actual knowledge of specific acts of infringement.”
14 *Grokster*, 545 U.S. at 927. The Supreme Court saw through this illicit strategy, holding
15 unanimously that a defendant that distributes a product like a peer-to-peer service “with the object
16 of promoting” its use to infringe is liable under the copyright laws. *Id.* at 919. Judge Wood in the
17 *Lime Wire* Action held that the Defendants in this case were liable under exactly the same theory.

18 The instant motion asks this Court to take it as a given that EFF and von Lohmann were
19 acting as counsel to the *Lime Wire* Defendants. These Movants have not substantiated that claim
20 at all. Indeed, there is no declaration whatsoever from either EFF or von Lohmann. Contrary to
21 their counsel’s present assertion that EFF/von Lohmann were in an attorney-client relationship
22 with the *Lime Wire* Defendants, EFF previously represented itself to the Court in the *Lime Wire*
23 Action as a neutral party. On September 26, 2008, EFF (along with other entities) sought leave to
24 submit a brief *amici curiae* — with von Lohmann listed as “of counsel” — purportedly offering
25 “no view on which parties should prevail” in connection with “the [then-] pending cross-motions
26 for partial summary judgment[.]” Boyd Decl. Ex. 5 at 2. *See also id.*, Ex. 6. The *amici* filing
27 nowhere discloses that EFF or von Lohmann ever acted as legal counsel to Defendants.

28

1 **C. Judge Wood’s Statements Regarding Alleged Privileged Communications**
2 **Between von Lohmann and Lime Wire**

3 As noted in the introduction to this brief, the issue of communications between EFF and
4 von Lohmann and Lime Wire does not arise on a blank slate. Judge Wood considered and
5 discussed these communications in a series of orders at the summary judgment stage. This is
6 what happened.

7 Lime Wire’s former Chief Technology Officer — and a former named defendant in the
8 case — was a gentleman named Greg Bildson. Mr. Bildson settled with the Plaintiffs and
9 executed a declaration, which Plaintiffs submitted in support of their motion. Bildson’s
10 declaration attested to numerous facts about Defendants’ intent to induce copyright infringement,
11 as well as steps that Defendants had taken to avoid being in possession of incriminating
12 information revealing their intent.³

13 Defendants moved to strike these statements, as well as other parts of Bildson’s
14 declaration, claiming that they revealed information shielded by Defendants’ privilege. In
15 support of this motion to strike, Defendants submitted *in camera* declarations from CEO (and
16 named Defendant) Mark Gorton, as well as from Defendants’ then-litigation counsel. *See Arista*
17 *Records*, 715 F. Supp. 2d at 500. Judge Wood’s initial summary judgment opinion, filed May 11,
18 2010, struck a handful of sentences and phrases from the Bildson declaration. In ordering this
19 relief, Judge Wood stated that the *in camera* declaration of Mark Gorton — a Defendant and a
20 putative “client” in the relationship — had stated that:

21 an[] attorney, Frederick von Lohmann, gave [Defendants]
22 confidential legal advice regarding the need to establish a document
23 retention program to purge incriminating information about
24 LimeWire users’ activities.

24 Boyd Decl. Ex. 1 at 14-15.

25 _____
26 ³ The Bildson Declaration was filed under seal in the *Lime Wire* Action. In light of Defendants’
27 claim of privilege over the Bildson Declaration (which Plaintiffs dispute), Plaintiffs have not
28 included the Bildson Declaration with their opposition papers. Should the Court wish to view the
Bildson Declaration, Plaintiffs will meet and confer with Defendants in an effort to make that
document available.

1 On May 18, 2010, EFF wrote to Judge Wood, requesting that she amend the summary
2 judgment opinion to remove the reference to von Lohmann's advice. Boyd Decl. Ex. 2.
3 Plaintiffs opposed the request. See Boyd Decl. Ex. 7 (May 20, 2010 Pomerantz letter).

4 Judge Wood amended her summary judgment opinion to remove the above-referenced
5 language, which the Court said had not been necessary to the Court's summary judgment ruling.
6 Boyd Decl. Ex. 3 at 2. Judge Wood further said that whether von Lohmann's statements in fact
7 were privileged was an open issue, and that the Court would "benefit" from further briefing on
8 the issue:

9 In the Opinion, the Court granted Defendants' motion to strike three
10 statements from the declaration of Gregory Bildson . . . accepting
11 Defendants' argument that they reflect confidential legal advice.
12 The Court did not rely on this finding of privilege in deciding the
13 motions at issue in the Opinion. Because the Court is of the view
14 that it would benefit from further briefing on the issue of whether
15 the statements are protected by attorney-client privilege, the Court's
16 Amended Opinion omits reference to this issue. The Court will
17 address issues related to privilege as they arise.

18 *Id.* See also *Arista Records*, 715 F. Supp. 2d at 500 (amended summary judgment opinion
19 concluding that advice provided by von Lohmann and EFF "may reflect privileged
20 communications") (emphasis in original).

17 **D. Plaintiffs' Subpoenas**

18 The Court in the *Lime Wire* Action has allowed a limited period for discovery in advance
19 of the January 2011 trial. In an effort to obtain the information that would be needed for the
20 further briefing from which the Court said it would benefit, Plaintiffs served deposition and
21 document subpoenas on EFF and von Lohmann. The subpoenas seek, *inter alia*, documents
22 relating to communications between Fred von Lohmann or EFF and the Lime Wire Entities or
23 Gorton regarding "the retention or destruction of documents," the tracking or monitoring of
24 downloads by users of Lime Wire" and "infringement-reducing technologies." Because the
25 discovery cut-off in the underlying action is rapidly approaching (November 24), the subpoenas
26 require prompt compliance.

27 On November 5, 2010, Plaintiffs and Movants met and conferred regarding the subpoenas.
28

1 Movants’ counsel — as they do in the instant motion — simply asserted that EFF/von Lohmann
2 were in a privileged attorney-client relationship with the Defendants, even though they could not
3 provide any details about the nature of that relationship. The parties thereafter stipulated to brief
4 this motion on an expedited schedule.

5 On November 9, 2010, Movants filed the instant Motion to Quash. On November 9,
6 2010, Movants served objections to the document request portion of the subpoenas which mirror
7 the arguments made in the Motion to Quash. *See* Boyd Decl. Exs 8-9. The full text of the
8 requests, and Movants’ objections, are set out in the Appendix to this Opposition Brief.

9 **III. ARGUMENT**

10 A party seeking a protective order must demonstrate good cause for the order based on
11 “specific demonstrations of fact, supported where possible by affidavits and concrete examples,
12 rather than broad, conclusory allegations of potential harm.” *Foltz v. State Farm Mut. Auto. Ins.*
13 *Co.*, 331 F.3d 1122, 1130-1131 (9th Cir. 2003); *see also* F.R.C.P. 26(c). Where, as here, the
14 party seeking to prevent disclosure relies on a claim of privilege, the privilege claim must
15 likewise be supported by specific demonstrations of fact. “[B]oilerplate objections or blanket
16 refusals” are insufficient. *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of*
17 *Mont.*, 408 F.3d 1142, 1149 (9th Cir. 2005). Movants fall well short of these standards.

18 **A. The Subpoenas Seek Highly Relevant Information**

19 The subpoenas seek information central to the January 2011 trial on Plaintiffs’ claim for
20 statutory damages. Under the Copyright Act, the Defendants are liable for statutory damages “for
21 all infringements involved in the action” with respect to each work and for each infringement for
22 which the Defendants are jointly and severally liable with individual Lime Wire users. 17 U.S.C.
23 § 504(c)(1). The range of statutory damages runs from \$750 to \$30,000 — but for willful
24 infringement, the maximum is increased to \$150,000 per statutory award. *Id.* § 504(c)(2). In
25 addition to triggering a higher damages range, the defendants willfulness guides the jury’s
26 determination of *where* within the statutory range to set the award. *See RSO Records, Inc. v.*
27 *Peri*, 596 F. Supp. 849, 863 (S.D.N.Y 1984) (where defendants acted in a “wholly willful
28

1 manner” the “maximum statutory award” was appropriate). *See also Bryant v. Media Right*
 2 *Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (the “infringer’s state of mind” is one of the
 3 factors the jury may consider in setting statutory damages).⁴

4 The information that these subpoenas seek is highly relevant to the willfulness issue.
 5 “Willfully” as used in 17 U.S.C. § 504(c)(2) means ‘with knowledge that the defendant’s conduct
 6 constitutes copyright infringement.’” *Peri*, 596 F. Supp. at 859. Communications between von
 7 Lohmann, EFF, and Defendants related to “purg[ing] incriminating information about LimeWire
 8 users’ activities,” maintaining “plausible deniability” or avoiding “software that sends back usage
 9 reports” demonstrate that Defendants were fully aware that their conduct constituted copyright
 10 infringement — and chose to cover it up. Evidence that Defendants knew they were inducing the
 11 mass infringement of copyright and were taking steps to cover up their guilty knowledge would
 12 be highly relevant in support of an award at the highest end of the statutory damages range.
 13 Plaintiffs subpoenas properly seek discovery into these topics.⁵

14 Likewise, the jury also may consider Defendants’ lack of “cooperation in providing
 15 evidence concerning the value of the infringing material” in determining where to set the
 16 statutory award. *Bryant*, 603 F.3d at 144. For example, in *Peri*, 596 F. Supp. at 863, the statutory
 17 award was at the upper end because the defendants had obstructed the plaintiffs’ ability to fully
 18 assess the scope of the infringing activity. *See id.* (“the information which would indicate the

19 _____
 20 ⁴ Moreover, Mr. Gorton has asserted a good faith belief in the legality of the LimeWire Client and
 21 identified von Lohmann as one of the attorneys with whom he discussed “copyright issues” —
 22 although Mr. Gorton was not sure whether those discussions rose to the level of “advice.” *See*
 23 *Boyd Decl. Ex. 10 at 48:8-17&97:7-99:22*. If Mr. Gorton is permitted to and does assert an
 24 advice of counsel defense, the entirety of Mr. Gorton’s discussions with Mr. von Lohmann and
 25 EFF may be discoverable for that additional reason. *See generally United States v. Bilzerian*, 926
 26 F.2d 1285, 1292 (2d Cir. 1991); *Worthington v. Endee*, 177 F.R.D. 113, 116 (N.D.N.Y. 1998). At
 27 this juncture, it is certainly appropriate for Movants to provide a privilege log and deposition
 28 testimony that discloses the frequency, timing, and subject matter of communications between
 Mr. von Lohmann, EFF, the Lime Wire Entities, and Gorton.

⁵ *See, e.g.*, Scherb Decl. Ex. A (EFF subpoena), Deposition Topic (“DT”) No. 1 & RFP No. 1
 (document retention), DT No. 2 & RFP No. 2 (infringing activity by Lime Wire users); DT Nos.
 4-5 & RFP Nos. 3-6 (design and structure of the LimeWire Client, including tracking or
 monitoring of downloads and infringement-reducing technologies); DT No. 7 & RFP No. 8
 (information regarding actual or anticipated litigation). *See also* Appendix A.

1 scope of [the infringing activity] is wholly in defendants' hands, and they have not disclosed it
2 . . . the maximum statutory award is again appropriate"). In this case, Defendants' failure to
3 retain information about who was infringing Plaintiffs' works, when they were doing it, how
4 many times, etc., was designed to undermine Plaintiffs' ability to assess the scope and magnitude
5 of the mass infringement Defendants perpetrated. Evidence that EFF and von Lohmann were
6 telling Defendants to avoid retaining this type of information thus would be highly relevant to the
7 issue of where within the statutory range to set the award.

8 In short, the subpoenas indisputably seek relevant information.

9 **B. Movants Must Substantiate Any Claim of Privilege**

10 "Because it impedes full and free discovery of the truth, the attorney-client privilege is
11 strictly construed." *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir.
12 1981); *see generally United States v. Nixon*, 418 U.S. 683, 710 (1974) (privileges are not to be
13 "expansively construed" because they are "exceptions" to the rule that the law has a right to every
14 person's evidence and are "in derogation of the search for truth"). It is well-settled that "[t]he
15 party asserting the attorney-client privilege has the burden of proving that the privilege applies to
16 a given set of documents or communications." *In re Grand Jury Investigation*, 974 F.2d 1068,
17 1070-71 (9th Cir. 1992) (citations omitted). As the party invoking a claim of privilege to defeat
18 discovery, Movants bear the burden of substantiating the privilege assertion with facts, not
19 attorney rhetoric. *See e.g., Friends of Hope Valley v. Frederick Co.*, 26 F.R.D. 643, 650-651
20 (E.D. Cal. 2010).⁶

21 Among other things, Movants have the burden of showing:

- 22 • *First*, that the communications involve an *attorney*, meaning a
23 "*professional legal adviser in his capacity as such.*" *In re Fischel*, 557
24 F.2d 209, 211 (9th Cir. 1977) (emphasis added). Defendants'
25 communications with Mr. von Lohmann or EFF in his role as an advocate

26
27 ⁶ The same allocation of burden and requirement of presenting supporting evidence apply to
28 assertions of work product. *See In re Grand Jury Investigation*, 974 F.2d at 1070-71; *Hodges,*
Grant & Kaufmann v. Dep't of the Treasury, 768 F.2d 719, 721 (5th Cir. 1985).

1 on behalf of the general public in support of EFF's mission (*see eff.org*)
2 fall outside the scope of any privilege.

- 3 • *Second*, that the “client” — the other half of the attorney-client relationship
4 — is just that: a *client*. The individual must be receiving (or inquiring
5 about receiving) legal services in the course of a professional relationship.
6 *See Martin*, 278 F.3d at 1000. Here, there is no factual support for the
7 claim that there was an attorney-client relationship, whether or how it was
8 memorialized, who the client was, how long it lasted, or anything of the
9 kind.
- 10 • *Third*, that the communications relate to the attorney-client relationship,
11 *i.e.*, they have to reflect a request for, or the provision of, legal services.
12 *See id.* Movants here improperly seek to bar inquiry into *all*
13 communications regardless of subject matter.
- 14 • *Fourth*, that the communications made in the course of the relationship
15 have been diligently kept confidential. *See, e.g., Fischel*, 557 F.2d at 211.
16 Communications between Movants and Lime Wire on “public listserv or
17 mailing list[s]” and “general updates shared with numerous recipients,” do
18 not meet this requirement. *See Mot.* at 3, n.2.

19 Even assuming that communications were made within the scope of an attorney-client
20 relationship, and that Movants meet all of the other requirements for claiming privilege, there still
21 would be a serious question whether recommendations that a party purge documents in order to
22 get rid of incriminating information would be subject to the privilege, or rather would be subject
23 to the crime-fraud exception.

24 All of the foundational information that would be needed to support this motion also
25 would be relevant to the further briefing that Judge Wood has invited. If EFF and von Lohmann
26 want to invoke the privilege and refuse to produce documents or answer questions at deposition,
27 then they must do that on the record. In that event, Plaintiffs would have the foundational
28 information that they need to present further briefing to Judge Wood to test Defendants' privilege

1 assertion. This Motion seeks to eliminate Plaintiffs' ability to obtain even the predicate,
2 indisputably non-privileged information that would inform that briefing. That attempt should be
3 rejected.

4 **C. Even If There Were A Properly Supported Privilege Claim, Movants Could**
5 **Not Use It To Shield Non-Privileged Information**

6 Movants must also produce (and testify regarding) all *non-privileged* information
7 responsive to the subpoenas. *See* Fed. R. Civ. P. 26(b)(1) (authorizing discovery into “*any*
8 nonprivileged matter that is relevant to any party’s claim or defense”) (emphasis added). Even
9 Movants themselves acknowledge that they engaged in some non-privileged communications
10 with Defendants, including “public listserv or mailing list communication and general updates
11 shared with numerous recipients.” *See* Mot. at 3, n.2. Indeed, von Lohmann’s suggestion —
12 well-heeded by Lime Wire — that software developers create “plausible deniability” and avoid
13 “more knowledge than you want” is memorialized in a publicly available article which
14 specifically *disclaims* any intent to provide legal advice. *See* Boyd Decl. Ex. 4 at 1, 8.

15 Where an attorney is a witness to “pre-litigation factual matters,” there is no bar to
16 deposing an attorney regarding non-privileged matters. *U.S. v. Philip Morris Inc.*, 209 F.R.D. 13,
17 17 (D.D.C. 2002). *See also* *Jamison v. Miracle Mile Rambler, Inc.*, 536 F.2d 560, 565-566 (3d
18 Cir. 1976) (approving attorney deposition and rejecting a “blanket prohibition”). So here,
19 movants should be required immediately to produce a witness and testify regarding all non-
20 privileged matters.

21 Relying on *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), Movants
22 seek to quash the subpoenas *in their entirety*, regardless of whether the subpoenas seek non-
23 privileged materials. Movants’ reliance on *Shelton* is misplaced. In that case, the Eighth Circuit
24 held that a party could not depose the opposing parties’ litigation counsel unless (1) there were no
25 other means to obtain the information; (2) the information sought is relevant and nonprivileged;
26 and (3) the information is crucial to the preparation of the case. *Id.* at 1327. In *Pamida, Inc. v.*
27 *E.S. Originals, Inc.*, 281 F.3d 726, 730 (8th Cir. 2002), however, the Eight Circuit clarified that
28 the *Shelton* test did not apply in every instance in which a party seeks to depose an attorney.

1 Rather, the *Shelton* test was only intended to protect “trial attorneys” from depositions “which
2 could potentially lead to the disclosure of the attorney’s litigation strategy.” *Id.* Thus, in *Pamida*,
3 the Eighth Circuit held that the *Shelton* analysis applied to a proposed attorney deposition only to
4 the extent that the deposition inquired into the litigation strategy of the *pending trial*. The
5 attorney deposition could go forward, irrespective of the *Shelton* factors, to the extent the
6 deposition sought information related to other matters (including the attorney’s representation in a
7 related but separate patent infringement case). *See also Philip Morris Inc.*, 209 F.R.D. at 17
8 (“[t]hus, *Pamida* makes clear that the three *Shelton* criteria apply to limit deposition questions of
9 attorneys in only two instances: (1) when trial and/or litigation counsel are being deposed, and (2)
10 when such questioning would expose litigation strategy in the pending case”).

11 Even if *Shelton* were the law in this Circuit — and it is not — the case has no application
12 here.⁷ Whatever their role as counsel to Lime Wire (if any), it is abundantly clear that Movants
13 have never been Lime Wire’s litigation counsel — Movants’ participation in the *Lime Wire* case
14 was only as *amici*, not as attorneys for Lime Wire. Moreover, at least some of the information
15 Plaintiffs seek predates the filing of this lawsuit by several years.

16 Finally, even if the *Shelton* analysis applied, Plaintiffs meet the *Shelton* criteria here. As
17 noted, Plaintiffs seek information that is highly relevant to their claim of statutory damages. *See*
18 § III.A. At this juncture, Plaintiffs seek only the discovery of *non-privileged* communications
19 (which Movants acknowledge have occurred) as well as the foundational facts underlying any

20 ⁷ *Shelton* has not been adopted by the Ninth Circuit, and at least one other Circuit has questioned
21 whether its holding can be squared with the broad discovery authorized by the Federal Rules of
22 Civil Procedure. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003)
23 (rejecting *Shelton* as a talisman and emphasizing that “the standards set forth in Rule 26 require a
24 flexible approach to lawyer depositions”). Although two decisions of this Court have applied the
25 *Shelton* analysis, they have done so where a party was seeking to depose its adversary’s *litigation*
26 counsel. *See Fausto v. Credigy Services Corp.*, 2008 WL 4793467, at *2 (N.D. Cal. Nov. 3,
27 2008) (quashing deposition which sought, *inter alia*, to depose attorney “regarding his role in the
28 preparation of certain discovery responses”); *Nocal, Inc. v. Sabercat Ventures, Inc.* 2004 WL
3174427, at *2 (N.D. Cal. Nov. 14, 2004) (discussing prohibitions on depositions of “trial
counsel”). EFF and Mr. von Lohmann can not plausibly claim to have acted as Defendants’
litigation counsel, and certainly could not have been so acting beginning in 2002, years before the
LimeWire Action was filed.

1 claim of privilege as to other particular communications. Finally, Plaintiffs are forced to seek this
2 information from EFF and von Lohmann precisely because Lime Wire implemented a document
3 destruction campaign (*see* Boyd Decl. Ex. 3 at 2), which prevents Plaintiffs from obtaining the
4 relevant evidence from Defendants themselves.

5 **D. Cost-Shifting Is Not Warranted**

6 “Under federal law, the party responsible for production generally bears the cost.” *Clever*
7 *View Investments, Ltd. v. Oshatz*, 233 F.R.D. 393, 394 (S.D.N.Y. 2006). The Court may order
8 cost-shifting, however, to protect against “undue burden” or unreasonable expense. *See* F.R.C.P.
9 45(c)(3)(A)(iv). Thus, in *U.S. v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 366, 372
10 (9th Cir. 1982), relied upon by Movants, the Ninth Circuit held that cost shifting may have been
11 appropriate in a case where third parties expended over \$2 million complying with “extensive”
12 discovery requests. As the Court described:

13 In order to comply with the network's discovery demands, the
14 studios hired and trained large staffs of lawyers, paralegals,
15 accountants, and clerks to glean relevant material from their
16 warehouse-sized depositories of archived documents. Thousands of
17 boxes of documents were transported to offices specially set aside
18 and equipped by the studios for discovery purposes, where the
documents were reviewed, organized, copied, and sent to the
networks. The networks also subpoenaed numerous officers and
employees of the studios. Seventeen of these individuals were
eventually deposed over a period of more than eighty work days.

19 *Id.* at 366. Under these circumstances, the Court held that cost-shifting was likely appropriate,
20 but remanded the issue to the district court for further consideration. *Id.* at 372.

21 The discovery at issue here is a far cry from the warehouses of documents discussed in
22 *Columbia Broadcasting*. Although Movants claim that complying with the subpoena will “cost
23 many thousands of dollars for data collection and processing and result in significant attorney
24 time spent” (*see* Mot. at 8) they once again offer no supporting declarations, or even explanation
25 — such as an estimate of the number of relevant custodians, or the likely volume of
26 communications and other responsive materials — that would justify this conclusion.

27 Further, Plaintiffs’ handful of document requests are narrowly-tailored to avoid undue
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1 burden. Each document request is specifically tied to Lime Wire. The bulk of the requests are
2 further confined to documents “relating to communications between [Fred von Lohmann or] EFF
3 and the Lime Wire Entities or Gorton.” Plaintiffs see no reason — and Movants have offered
4 none — why Movants will be unable easily to identify these categories of documents. Cost
5 shifting is not appropriate here.

6 **IV. CONCLUSION**

7 Movants’ Motion to Quash should be denied. This Court should issue an order
8 compelling Movants to respond in full to Plaintiffs lawfully issued discovery.

9
10 DATED: November 12, 2010

MUNGER, TOLLES & OLSON LLP

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13 By: s/Susan T. Boyd
14 Susan T. Boyd
15 Attorneys for Plaintiffs
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Appendix A

**ELECTRONIC FRONTIER FOUNDATION'S
OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS**

DOCUMENT SUBPOENA REQUEST NO. 1

All documents relating to communications between EFF and the Lime Wire Entities or Gorton relating to the retention or destruction of documents, including without limitation communications regarding a document retention policy or program.

OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 1

In addition to the general objections, Electronic Frontier Foundation objects to this Request as requiring it to disclose information protected by the attorney-client privilege, the work product privilege, and the common interest privilege. The Electronic Frontier Foundation objects to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to lead to the discovery of relevant, admissible evidence.

DOCUMENT SUBPOENA REQUEST NO. 2

All documents reflecting or referring to the actual or potential use of Lime Wire to share copyrighted materials.

OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 2

In addition to the general objections, Electronic Frontier Foundation objects to this Request as requiring it to disclose information protected by the attorney-client privilege, the work product privilege, and the common interest privilege. The Electronic Frontier Foundation objects to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to lead to the discovery of relevant, admissible evidence. The Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic Frontier Foundation as an unretained expert and its privileged communications with, or work product for, other clients aside from the Lime Wire Entities and Mr. Gorton.

DOCUMENT SUBPOENA REQUEST NO. 3

All documents relating to communications between EFF and the Lime Wire Entities or

1 Gorton relating to the actual or potential tracking or monitoring of downloads by users of Lime
2 Wire or other peer-to-peer file sharing networks.

3 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 3**

4 In addition to the general objections, Electronic Frontier Foundation objects to this
5 Request as requiring it to disclose information protected by the attorney-client privilege, the work
6 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
7 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
8 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
9 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
10 Frontier Foundation as an unretained expert.

11 **DOCUMENT SUBPOENA REQUEST NO. 4**

12 All documents relating to communications between EFF and the Lime Wire Entities or
13 Gorton relating to the architecture, design, or structure of Lime Wire or other peer-to-peer file
14 sharing networks.

15 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 4**

16 In addition to the general objections, Electronic Frontier Foundation objects to this
17 Request as requiring it to disclose information protected by the attorney-client privilege, the work
18 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
19 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
20 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
21 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
22 Frontier Foundation as an unretained expert.

23 **DOCUMENT SUBPOENA REQUEST NO. 5**

24 All documents reflecting or referring to the Lime Wire Entities' or Mark Gorton's state of
25 mind, purpose or motivation for adopting or not adopting particular architectures, designs,
26 structures or features for Lime Wire.

1 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 5**

2 In addition to the general objections, Electronic Frontier Foundation objects to this
3 Request as requiring it to disclose information protected by the attorney-client privilege, the work
4 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
5 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
6 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
7 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
8 Frontier Foundation as an unretained expert and its privileged communications with, or work
9 product for, other clients aside from the Lime Wire Entities and Mr. Gorton.

10 **DOCUMENT SUBPOENA REQUEST NO. 6**

11 All documents relating to communications between EFF and the Lime Wire Entities or
12 Gorton relating to infringement-reducing technologies, including without limitation filtering or
13 acoustic-fingerprinting technologies.

14 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 6**

15 In addition to the general objections, Electronic Frontier Foundation objects to this
16 Request as requiring it to disclose information protected by the attorney-client privilege, the work
17 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
18 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
19 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
20 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
21 Frontier Foundation as an unretained expert.

22 **DOCUMENT SUBPOENA REQUEST NO. 7**

23 All documents reflecting or referring to the Lime Wire Entities' or Mark Gorton's state of
24 mind, purpose or motivation for adopting or not adopting infringement reducing technologies,
25 including without limitation filtering or acoustic-fingerprinting technologies.

26 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 7**

27 In addition to the general objections, Electronic Frontier Foundation objects to this
28 Request as requiring it to disclose information protected by the attorney-client privilege, the work

1 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
2 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
3 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
4 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
5 Frontier Foundation as an unretained expert and its privileged communications with, or work
6 product for, other clients aside from the Lime Wire Entities and Mr. Gorton.

7 **DOCUMENT SUBPOENA REQUEST NO. 8**

8 All documents relating to communications between EFF and the Lime Wire Entities or
9 Gorton relating to actual or anticipated litigation by copyright holders.

10 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 8**

11 In addition to the general objections, Electronic Frontier Foundation objects to this
12 Request as requiring it to disclose information protected by the attorney-client privilege, the work
13 product privilege, and the common interest privilege. The Electronic Frontier Foundation objects
14 to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and
15 not reasonably calculated to lead to the discovery of relevant, admissible evidence. The
16 Electronic Frontier Foundation objects to this Request as seeking reports of the Electronic
17 Frontier Foundation as an unretained expert.

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1 **FRED VON LOHMANN'S OBJECTIONS**
2 **AND RESPONSES TO DOCUMENT REQUESTS**

3 **DOCUMENT SUBPOENA REQUEST NO. 1**

4 All documents relating to communications between Fred von Lohmann or EFF and the
5 Lime Wire Entities or Gorton relating to the retention or destruction of documents, including
6 without limitation communications regarding a document retention policy or program.

7 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 1**

8 In addition to the general objections, Mr. von Lohmann objects to this Request as
9 requiring him to disclose information protected by the attorney-client privilege, the work product
10 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
11 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
12 lead to the discovery of relevant, admissible evidence.

13 **DOCUMENT SUBPOENA REQUEST NO. 2**

14 All documents reflecting or referring to the actual or potential use of Lime Wire to share
15 copyrighted materials.

16 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 2**

17 In addition to the general objections, Mr. von Lohmann objects to this Request as
18 requiring disclosure of information protected by the attorney-client privilege, the work product
19 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
20 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
21 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request
22 as seeking reports of Mr. von Lohmann as an unretained expert and his privileged
23 communications with, or work product for, other clients aside from the Lime Wire Entities and
24 Mr. Gorton.

25 **DOCUMENT SUBPOENA REQUEST NO. 3**

26 All documents relating to communications between Fred von Lohmann or EFF and the
27 Lime Wire Entities or Gorton relating to the actual or potential tracking or monitoring of
28 downloads by users of Lime Wire or other peer-to-peer file sharing networks.

1 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 3**

2 In addition to the general objections, Mr. von Lohmann objects to this Request as
3 requiring disclosure of information protected by the attorney-client privilege, the work product
4 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
5 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
6 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request
7 as seeking reports of Mr. von Lohmann or EFF as unretained experts.

8 **DOCUMENT SUBPOENA REQUEST NO. 4**

9 All documents relating to communications between Fred von Lohmann or EFF and the
10 Lime Wire Entities or Gorton relating to the architecture, design, or structure of Lime Wire or
11 other peer-to-peer file sharing networks.

12 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 4**

13 In addition to the general objections, Mr. von Lohmann objects to this Request as
14 requiring disclosure of information protected by the attorney-client privilege, the work product
15 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
16 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
17 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request
18 as seeking reports of Mr. von Lohmann or EFF as unretained experts.

19 **DOCUMENT SUBPOENA REQUEST NO. 5**

20 All documents reflecting or referring to the Lime Wire Entities' or Mark Gorton's state of
21 mind, purpose or motivation for adopting or not adopting particular architectures, designs,
22 structures or features for Lime Wire.

23 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 5**

24 In addition to the general objections, Mr. von Lohmann objects to this Request as
25 requiring disclosure of information protected by the attorney-client privilege, the work product
26 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
27 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
28 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request

1 as seeking reports of Mr. von Lohmann as an unretained expert and his privileged
2 communications with, or work product for, other clients aside from the Lime Wire Entities and
3 Mr. Gorton.

4 **DOCUMENT SUBPOENA REQUEST NO. 6**

5 All documents relating to communications between Fred von Lohmann or EFF and the
6 Lime Wire Entities or Gorton relating to infringement-reducing technologies, including without
7 limitation filtering or acoustic-fingerprinting technologies.

8 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 6**

9 In addition to the general objections, Mr. von Lohmann objects to this Request as
10 requiring disclosure of information protected by the attorney-client privilege, the work product
11 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
12 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
13 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request
14 as seeking reports of Mr. von Lohmann or EFF as unretained experts.

15 **DOCUMENT SUBPOENA REQUEST NO. 7**

16 All documents reflecting or referring to the Lime Wire Entities' or Mark Gorton's state of
17 mind, purpose or motivation for adopting or not adopting infringement reducing technologies,
18 including without limitation filtering or acoustic-fingerprinting technologies.

19 **OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 7**

20 In addition to the general objections, Mr. von Lohmann objects to this Request as
21 requiring disclosure of information protected by the attorney-client privilege, the work product
22 privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague,
23 ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to
24 lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request
25 as seeking reports of Mr. von Lohmann as an unretained expert and his privileged
26 communications with, or work product for, other clients aside from the Lime Wire Entities and
27 Mr. Gorton.

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DOCUMENT SUBPOENA REQUEST NO. 8

All documents relating to communications between Fred von Lohmann or EFF and the Lime Wire Entities or Gorton relating to actual or anticipated litigation by copyright holders.

OBJECTION TO DOCUMENT SUBPOENA REQUEST NO. 8

In addition to the general objections, Mr. von Lohmann objects to this Request as requiring disclosure of information protected by the attorney-client privilege, the work product privilege, and the common interest privilege. Mr. von Lohmann objects to this Request as vague, ambiguous, overly broad, burdensome, harassing and oppressive, and not reasonably calculated to lead to the discovery of relevant, admissible evidence. Mr. von Lohmann objects to this Request as seeking reports of Mr. von Lohmann or EFF as unretained experts.