

EXHIBIT 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE SUBPOENAS TO ELECTRONIC
FRONTIER FOUNDATION AND FRED
VON LOHMANN,

No. C 10-80276-MISC JSW

**ORDER GRANTING IN PART
AND DENYING IN PART
EXPEDITED MOTION TO
QUASH SUBPOENAS**

Now before the Court for consideration is the Expedited Motion to Quash Subpoenas filed by Electronic Frontier Foundation (“EFF”) and Fred von Lohmann (“Mr. von Lohmann”) (collectively “Movants”). EFF and Mr. von Lohmann move to quash subpoenas issued by plaintiffs in a case pending in the United States District Court for the Southern District of New York, *Arista Records v. Lime Wire, LLC*, 06-5936 (KMW) (the “*Lime Wire* action”) before Judge Kimba M. Wood. Plaintiffs in the *Lime Wire* action are thirteen major record companies (the “Plaintiffs”).

On December 15, 2010, Plaintiffs filed a request to file a sur-reply. On December 16, 2010, Movants filed a response to the sur-reply. Plaintiffs’ request to file a sur-reply is granted. The Court has considered the parties’ papers, including the supplemental declarations ordered by the Court, the supplemental briefs submitted by the parties, Plaintiffs’ sur-reply and Movants’ response thereto, and relevant legal authority, and concludes that the motion is suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b).

The Court also GRANTS Plaintiffs’ Administrative Motions to Seal portions of their supplemental briefs. The Defendants in the *Lime Wire* action have designated those documents

1 as confidential. If Plaintiffs wish to challenge those designations, they should do so in the *Lime*
2 *Wire* action.

3 The Court shall not quash the subpoenas. However, it does conclude that the scope of
4 the requests should be limited and shall modify them accordingly. Accordingly, the motion to
5 quash is granted in part and denied in part.

6 **BACKGROUND**

7 In 2006, Plaintiffs filed suit against Lime Group LLC, Lime Wire, LLC, M.J.G. Lime
8 Wire Family Limited Partnership (collectively the “Lime Wire Entities”) and Mark Gorton
9 (“Mr. Gorton”) and asserted federal and state law claims of secondary copyright infringement
10 against the Lime Wire Entities and Mr. Gorton. On May 11, 2010, Judge Wood granted in part
11 and denied in part the parties’ motions for summary judgment. (Declaration of Susan Boyd in
12 Opposition to Expedited Motion to Quash (“Boyd Decl.”), Ex. 1.)¹

13 The *Lime Wire* action is now in the damages phase, and was set for trial on January 18,
14 2011, with the deadline to complete discovery set to close on November 24, 2010. However, on
15 November 18, 2010, Judge Wood extended those deadlines. The deadline to complete
16 document production now is December 29, 2010, and the parties must complete fact depositions
17 by January 30, 2011. (See Notice of Extension of Discovery Deadline, Ex. A at 10.)

18 On or about October 27, 2010, and November 2, 2010, respectively, the Plaintiffs served
19 Movants with deposition subpoenas and requests for production of documents. (Declaration of
20 Matthew Scherb (“Scherb. Decl.”), Exs. A, B.). Plaintiffs identify eight categories of documents
21 or topics of testimony that, in general, pertain to communications between Movants and the
22 Lime Wire Entities or Mr. Gorton about Lime Wire’s capability of sharing copyrighted
23

24 ¹ Judge Wood issued an Amended Opinion in response to a letter from the EFF,
25 in which the EFF took issue with a sentence in the opinion regarding advice that Mr. von
26 Lohmann purportedly gave to the Lime Wire Entities and Mr. Gorton. (See Boyd Decl., Exs.
27 2 and 3.) In their response to Plaintiffs’ sur-reply, Movants respond to the manner in which
28 Plaintiffs characterize Judge Wood’s original opinion and her actions thereafter. (See
Movants’ Response to Respondents’ Request to File Sur-Reply and Reply at 1:3-17.)

28 This Court is capable of reading and interpreting Judge Wood’s Orders. If the parties
return to this Court, it encourages them to focus their energy on arguments that will be
dispositive of the issues presented.

1 materials, the efforts - or lack thereof - taken to minimize the possibility of infringement, and
2 the retention or destruction of documents.² (*Id.*, Ex. A at 2, 7-8; Ex. B at 5-6.) Plaintiffs
3 originally requested “any document which refers to or was created during the period from
4 January 1, 2005 through present.” However, in the sur-reply brief Plaintiffs claim that they
5 “inadvertently” listed the date as 2005, when they actually intended to request documents from
6 January 1, 2002, through the present. (*See* Plaintiffs’ Sur-Reply at 1:6-8.) In light of that error,
7 Plaintiffs sent amended subpoenas to Movants’ counsel on December 14, 2010.

8 On November 19, 2010, the Court directed the parties to meet and confer in person to
9 see if they could resolve their differences. The meet and confer process was unsuccessful. The
10 Court shall address additional facts as necessary in its analysis.

11 ANALYSIS

12 A. Applicable Legal Standards.

13 “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
14 party’s claim or defense. ... Relevant information need not be admissible at the trial if the
15 discovery appears reasonably calculated to lead to the discovery of admissible evidence. All
16 discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”³ Fed. R. Civ. P. 26(b)(1).⁴
17 Rule 26(b)(2)(C), in turn, provides:

18 [o]n motion or on its own, the court must limit the ... extent of discovery
19 otherwise allowed by these rules ... if it determines that: (i) the discovery
20 sought is unreasonably cumulative, or can be obtained for some other source
21 that is more convenient, less burdensome, or less expensive; ... or (iii) the
burden or expense of the discovery outweighs its likely benefit, considering
the needs of the case, ... the parties’ resources, ... and the importance of the
discovery in resolving the issues.

22 Rule 45(c) provides, in pertinent part, that upon a timely motion, a court must quash or
23 modify a subpoena that “requires disclosure of privileged, or other protected matter, if no

24 ² The Court sets forth the deposition topics and requests for production as an
25 appendix to this Order.

26 ³ Movants acknowledge that relevance is interpreted broadly for purposes of
27 discovery. *See, e.g., Phoenix Solutions Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 583
(N.D. Cal. 2008).

28 ⁴ Unless otherwise noted, all further citations or references to rules are to the
Federal Rules of Civil Procedure.

1 exception or waiver applies,” or if it “subjects a person to undue burden.” Fed. R. Civ. P.
2 45(c)(3)(A)(iii)(iv).

3 **B. The Scope of the Requests.**

4 Movants argue that the requests as drafted are overly broad. The discovery in question
5 pertains to Plaintiffs’ claims for damages. “[W]hen determining the amount of statutory
6 damages to award for copyright infringement, courts consider,” *inter alia*, “the infringer’s state
7 of mind...” *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010). The
8 Court has considered Movants’ status as non-parties to the Lime Wire litigation and has
9 considered whether the requested information is reasonably calculated to lead to the discovery
10 of admissible evidence of the Lime Wire Entities’ and Mr. Gorton’s states of mind.

11 In request for production (“RFP”) 1, 3-4, 6 and 8 Plaintiffs request that EFF and von
12 Lohmann produce, and be deposed about, “communications between” EFF or von Lohmann and
13 the Lime Wire entities or Gorton “relating to” various topics. (Scherb Decl., Ex. A at 2, 7-8,
14 Ex. B at 5-6.) In RFPs 2, 5 and 7, Plaintiffs seek documents “reflecting or referring to” various
15 topics. (*Id.*, Ex. A at 7-8, Ex. B at 5-6.) Movants do not argue that any of substantive topics are
16 irrelevant to the issue of damages. In addition, in their response to Plaintiffs’ sur-reply,
17 Movants do not suggest that the amended subpoenas should be limited to the time period
18 between January 1, 2005 through the present.

19 It appears from the record that the parties have reached an agreement whereby Mr. von
20 Lohmann will produce responsive, non-privileged documents that “constitute” or “refer to”
21 communications between EFF or Mr. von Lohmann and the Lime Wire Entities with respect to
22 all eight RFPs. (Movants’ Opening Supp. Br. at 2:19-21; Supplemental Declaration of Susan
23 Boyd (“Boyd Supp. Decl.”), ¶ 12.) Accordingly, each of the RFPs directed to Mr. von
24 Lohmann shall be so limited. Movants shall include documents dating from January 1, 2002
25 through the present in their production.

26 During the meet and confer process, Plaintiffs offered to limit each of the RFPs as to
27 EFF to non-privileged documents that “constitute or refer to” communications between EFF
28 employees and the Lime Wire Entities or Mr. Gorton. (*See* Boyd Supp. Decl., ¶ 12.) EFF

1 argues that the requests directed to it should be further limited to documents that “constitute”
2 communications between Movants and the Lime Wire Entities or Mr. Gorton. (*See, e.g.*,
3 Movants’ Supplemental Brief at 4 (noting that Movants offered to search documents of EFF
4 employees for documents constituting “direct communications” with the Lime Wire Entities).)
5 The Court finds EFF’s arguments persuasive. In light of Mr. von Lohmann’s concessions, the
6 Court concludes that the burden of requiring EFF to search for and review documents that
7 merely “refer to” communications with the Lime Wire Entities or Mr. Gorton, outweighs the
8 likely benefits of production and Plaintiffs’ need for such communications.

9 Accordingly, each of the RFPs directed at EFF shall be limited to require production of
10 documents that “constitute” communications between EFF and the Lime Wire Entities or Mr.
11 Gorton. Movants shall include documents dating from January 1, 2002 through the present in
12 their production. The Court addresses the issue of the “Pho” list serve in the following section.

13 **C. The “Pho” List.**

14 One source for documents that may be responsive to Plaintiffs’ RFPs is the “Pho”
15 listserv, which plaintiffs describe as a “public distribution list with a large membership list.”
16 (Movants Opening Supp. Br. at 6:5.) According to the record, Mr. von Lohmann has
17 approximately 24,000 email from the Pho listserv, that were sent to his personal email address,
18 and another EFF attorney has approximately 23,000 emails from the Pho listserv. (*See*
19 Declaration of Fred von Lohmann In Support of Movants’ Opening Supp. Br., ¶ 3; Declaration
20 of Corynne McSherry In Support of Movants’ Opening Supp. Br., ¶ 4.)

21 Movants propose to treat emails sent to the Pho listserv like any other email, that is “if
22 Lime Wire is actually a party to the email (*i.e.* if a Lime Wire domain appears in an address
23 field or if a Lime Wire employee whom Movants otherwise communicated with appears in one
24 of the address fields), Movants will review the document and produce it if it is responsive and
25 non-privileged.” (Movants Opening Supp. Br. at 8:6-10.) Plaintiffs agree, in part, to this
26 proposal. (*See* Plaintiffs’ Reply Supp. Br. at 4:13-5:2.) Plaintiffs do argue that any searches
27 should not be limited to communications sent to a Lime Wire domain.
28

1 In light of the large number of emails identified by both Mr. von Lohmann and the EFF
2 that involve the “Pho” listserv, and in light of the expanded time period involved, the Court
3 finds it would pose an undue burden to require Movants to search for documents from the Pho
4 listserv beyond those for which a Lime Wire domain appears in an address field or if a Lime
5 Wire employee whom Movants otherwise communicated with appears in one of the address
6 fields. Accordingly, the Court adopts Movants’ proposal, and the scope of the production of
7 emails from the Pho listserv shall be limited in that fashion.

8 **D. The Privilege Issue and Privilege Log.**

9 Originally, Movants primary argument in support of their motion to quash was that the
10 RPFs called for them to disclose privileged information. The Court ordered EFF and Mr. von
11 Lohmann to submit additional declarations setting forth whether non-privileged documents that
12 were responsive to the subpoenas existed. According to Movants’ supplemental declarations,
13 they do. (*See* Supplemental Declaration of Cindy Cohn (“Cohn Supp. Decl.”), ¶ 2;
14 Supplemental Declaration of Fred von Lohmann (“von Lohmann Supp. Decl.”), ¶ 4;
15 Supplemental Declaration of Mark Gorton (“Gorton Supp. Decl.”), ¶ 2.) In light of this
16 concession and Plaintiffs concession that Movants would not be required to produce documents
17 that are, in fact, privileged, the Court denies as moot this aspect of the motion to quash.

18 Although the issue of whether the motion to quash should be granted on the basis of
19 privilege has been rendered moot, the parties were not able to agree on the issue of whether
20 Movants should be required to provide a privilege log and, if so, the scope of the
21 communications that must be logged. To the extent EFF or Mr. von Lohmann will be
22 withholding documents on the basis of a privilege, Rule 45(d) requires a privilege log.
23 Accordingly, they shall produce a privilege log with regard to those documents. If Mr. von
24 Lohmann has documents that “refer to” communications between EFF or Mr. von Lohmann and
25 the Lime Wire Entities with respect to all eight RPFs which are privileged communications with
26 other clients, he shall include those documents on the privilege log.

27 //

28 //

1 **E. Depositions.**

2 Because the Court has not quashed the subpoenas, a Rule 30(b)(6) designee from EFF
3 and Mr. von Lohmann shall appear for deposition. However, the limitations set forth above
4 regarding the RFPs also shall apply to the scope of testimony taken during depositions. This
5 Court is unavailable between December 27 and December 31, 2010. Based on the history of
6 this litigation, the Court anticipates that disputes will arise during the course of the depositions.
7 Therefore, it is HEREBY ORDERED that the parties shall not commence the depositions before
8 January 3, 2011. The Court HEREBY REFERS the parties to its Standing Order on
9 Depositions, which sets forth the Court’s expectations about the manner in which depositions
10 shall be conducted.⁵ The parties are specifically referred to paragraph 9, which provides:

11 If a dispute arises during a deposition and involves a persistent obstruction
12 of the deposition or a refusal to answer a material question on the basis of
13 any ground other than privilege or the work product doctrine, counsel may
14 arrange a telephonic conference with the Court through Chambers at (415)
15 522-4160. Any such conference shall be attended by the court reporter
16 recording the deposition.

15 **F. Protective Order.**

16 Movants also ask the Court to “enter a protective order limiting disclosure to a single
17 counsel of record for [Plaintiffs] with respect to these subpoenas, Susan Boyd,” because the
18 EFF is opposing counsel to Plaintiffs’ counsel, Munger, Tolles and Olson in unrelated copyright
19 litigation. (*See* Movants’ Opening Supp. Br. at 14:5-13.) Plaintiffs respond that the Protective
20 Order that has been entered in the *Lime Wire* Action is adequate to protect any documents
21 produced by EFF and Mr. von Lohmann. (Plaintiffs’ Supp. Reply Br. at 8:14-28, Ex. A.) The
22 Court agrees with Plaintiffs on this issue. If, however, as events unfold Movants believe
23 additional protection is necessary, they may seek leave of this Court to revisit the issue.

24 //

25 //

26 _____
27 ⁵ The Court recognizes that, in this case, the parties may not be able to comply
28 with the following provision of paragraph 6: “Witnesses subpoenaed to produce documents
should ordinarily be served at least 30 days before the scheduled deposition and
arrangements should be made to permit inspection of the documents before the deposition
commences.”

1 **G. Movants Are Entitled to Reasonable Costs.**

2 Rule 45 provides that “[a] party or attorney responsible for issuing and serving a
3 subpoena must take reasonable steps to avoid imposing undue burden or expense on a person
4 subject to the subpoena. The issuing court must enforce this duty and impose an appropriate
5 sanction – which may include lost earnings and reasonable attorney’s fees – on a party or
6 attorney who fails to comply.” Fed. R. Civ. P. 45(c)(1). “Although party witnesses must
7 generally bear the burden of discovery costs, the rationale for the general rule is inapplicable
8 where the discovery demands are made on non-parties. Nonparty witnesses are powerless to
9 control the scope of litigation and discovery, and should not be forced to subsidize an
10 unreasonable share of the costs of a litigation to which they are not a party.” *United States v.*
11 *Columbia Broadcasting Syst., Inc.*, 666 F.2d 364, 371 (9th Cir. 1982).

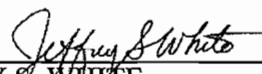
12 Although it has not granted Movants’ request to quash the subpoenas outright, and
13 although Movants and Plaintiffs were able to reach some accommodation *after* the Court
14 ordered them to meet and confer, the Court has further modified the discovery requests in order
15 to reduce the burden placed upon EFF and Mr. von Lohmann. Plaintiffs, in turn, have increased
16 the time period involved by three years. Accordingly, the Court concludes that Movants are
17 entitled to *reasonable* costs associated with searching for, reviewing and producing the
18 documents, including creating any necessary privilege logs, and in connection with the
19 depositions. Movants shall submit a request to the Court for those costs after the document
20 production and depositions are complete. Plaintiffs may file a response fourteen days
21 thereafter, and Movants may file a reply seven days after Plaintiffs have filed their response.

22 **CONCLUSION**

23 For the foregoing reasons, the Court hereby GRANTS IN PART AND DENIES IN
24 PART the motion to quash. This Order terminates Dockets 1, 22, and 28.

25 **IT IS SO ORDERED.**

26 Dated: December 17, 2010

27 
28 _____
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

APPENDIX

Deposition Topics

1. 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.

2. EFF's knowledge, understanding or analysis of the actual or potential use of Lime Wire to share copyrighted materials.

3. Communications between EFF and the Lime Wire Entities or Gorton relating to the actual or potential use of Lime Wire to share copyrighted materials.

4. Communications between EFF and the Lime Wire Entities or Gorton relating to the actual or potential tracking or monitoring of downloads by users of Lime Wire or other peer-to-peer file sharing networks.

5. Communications between EFF and the Lime Wire Entities or Gorton relating to the architecture, design, or structure of Lime Wire or other peer-to-peer file sharing networks.

6. Communications between EFF and the Lime Wire Entities or Gorton relating to infringement-reducing technologies, including without limitation filtering or acoustic-fingerprinting technologies.

7. Communications between EFF and the Lime Wire Entities or Gorton relating to actual or anticipated litigation by copyright holders.

Requests for Production of Documents to EFF.

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.

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

1 3. All documents relating to communications between EFF and the Lime Wire
2 Entities or Gorton relating to the actual or potential tracking or monitoring of downloads by
3 users of Lime Wire or other peer-to-peer file sharing networks.

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

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

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

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

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

19 **Requests for Production of Documents to Mr. von Lohmann.**

20 1. All documents relating to communications between Fred von Lohmann or
21 EFF and the Lime Wire Entities or Gorton relating to the retention or destruction of
22 documents, including without limitation communications regarding a document retention
23 policy or program.

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

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

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

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

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

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

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

17
18
19
20
21
22
23
24
25
26
27
28