

EXHIBIT 1A

1 MUNGER, TOLLES & OLSON LLP
GLENN D. POMERANTZ (SBN 112503)
2 Glenn.Pomerantz@mto.com
KELLY M. KLAUS (SBN 161091)
3 Kelly.Klaus@mto.com
MELINDA E. LEMOINE (SBN 235670)
4 Melinda.LeMoine@mto.com
355 South Grand Avenue
5 Thirty-Fifth Floor
Los Angeles, CA 90071-1560
6 Telephone: (213) 683-9100
Facsimile: (213) 687-3702
7

8 MUNGER, TOLLES & OLSON LLP
SUSAN TRAUB BOYD (229664)
Susan.Boyd@mto.com
9 JONATHAN H. BLAVIN (SBN 230269)
Jonathan.Blavin@mto.com
10 560 Mission Street, 27th Floor
San Francisco, CA 94105-2907
11 Telephone: (415) 512-4000
Facsimile: (415) 512-4077
12

13 Attorneys for Plaintiffs

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

18 IN RE SUBPOENAS TO ELECTRONIC
FRONTIER FOUNDATION AND FRED
19 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,
23 v.
24 LIME WIRE LLC, et al.,
25 Defendants.

**PLAINTIFFS' SUPPLEMENTAL BRIEF
REGARDING EXPEDITED MOTION TO
QUASH SUBPOENAS AND PLAINTIFFS'
REQUEST TO COMPEL COMPLIANCE
WITH SUBPOENAS**
Date: TBD [Per Scheduling Order, Doc. No. 7]

26 PUBLIC REDACTED VERSION
27
28

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

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND	2
A. Prior Proceedings on EFF/von Lohmann Motion to Quash.....	2
B. Plaintiffs Meet and Confer with EFF & von Lohmann	4
C. Plaintiffs Meet and Confer with Lime Wire	4
D. The Scope of the Remaining Disputes Between Plaintiffs and EFF/von Lohmann	5
E. Supplemental Briefing and Proceedings	6
III. ARGUMENT	6
A. The Subpoenas Seek Highly Relevant Information.....	6
B. EFF And von Lohmann Have Not Articulated Any Credible Claim Of Burden	10
C. Plaintiffs Are Not Required To Rely On Lime Wire's Production Of Documents	11
D. EFF And von Lohmann Must Log Documents Withheld Under A Claim Of Privilege	13
E. EFF And von Lohmann Are Required To Produce A Witness For Deposition In Compliance With the Subpoenas	15
IV. CONCLUSION.....	16

TABLE OF AUTHORITIES

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

Page(s)

FEDERAL CASES

Arista Records LLC v. Lime Group LLC,
715 F. Supp. 2d 481 (S.D.N.Y. 2010)..... 9

Bryant v. Media Right Productions, Inc.,
603 F.3d 135 (2d Cir. 2010)..... 8, 9

Compaq Computer Corp. v. Packard Bell Electronics, Inc.,
163 F.R.D. 329 (N.D. Cal. 1995)..... 6

Friends of Hope Valley v. Frederick Co.,
268 F.R.D. 643 (E.D. Cal. 2010) 13, 14

GP Industries, LLC v. Bachman,
2007 WL 4245786 (D. Neb. Nov. 29, 2007) 10

In re Coan,
2007 WL 128010 (N.D. Cal. Jan. 12, 2007) 13

In re Grand Jury Investigation,
974 F.2d 1068 (9th Cir. 1992)..... 13

In re Napster, Inc. Copyright Litigation,
462 F. Supp. 2d 1060 (N.D. Cal. 2006) 12

Micron Technology, Inc. v. Tessera, Inc.,
2006 WL 1646132 (N.D. Cal. June 14, 2006) 10

Phoenix Solutions Inc. v. Wells Fargo Bank, N.A.,
254 F.R.D. 568 (N.D. Cal. 2008)..... 6

RSO Records, Inc. v. Peri,
596 F. Supp. 849 (S.D.N.Y 1984)..... 8

Truswal Sys. Corp. v. Hydro-Air Engineering, Inc.,
813 F.2d 1207 (Fed. Cir. 1987)..... 6

FEDERAL RULES

Fed. R. Civ. Pro. 45..... 13

OTHER AUTHORITIES

www.onehouse.com/pho.htm..... 7

1 **I. INTRODUCTION**

2 Plaintiffs have met-and-conferred with counsel for Electronic Frontier Foundation
3 ("EFF") and von Lohmann twice in person and multiple times by phone and email in the three
4 weeks since this Court ordered such a process to see if these parties could work out agreeable
5 compliance with the subpoenas. (Doc. No. 21) Unfortunately, and despite Plaintiffs' best efforts
6 and agreements to narrow multiple topics, EFF and von Lohmann still refuse to provide
7 reasonable compliance with the subpoenas. The disputes are as follows:

- 8 • EFF and von Lohmann will agree to produce only those documents that actually
9 *constitute* communications with the *Lime Wire* Defendants. Plaintiffs are entitled
10 as well to documents exchanged with third parties and to internal EFF documents
11 that *refer to* communications with Lime Wire. Such documents by definition
12 would disclose communications to which Lime Wire was a party; and the burden
13 to EFF and von Lohmann actually is in *excluding* such communications from the
14 results of key word searching, not from producing the documents.
- 15 • Whether EFF and von Lohmann may "carve out" of their production obviously
16 non-privileged communications that took place over a *public* listserv called the
17 "pho" list. Again, the burden is in taking these documents *out* of EFF and von
18 Lohmann's search result, not keeping them in. Those "pho" list records that
19 Plaintiffs do have show communications involving EFF and Lime Wire that make
20 it clear both were well aware of the infringement the latter was inducing. Such
21 documents may be embarrassing for EFF and von Lohmann, but that is not a
22 reason for withholding them.
- 23 • EFF and von Lohmann have not agreed to provide a privilege log — something
24 that is critical here, given that they previously threw up a blanket privilege
25 objection, but had to admit (in response to this Court's Order) that: (1) EFF and
26 von Lohmann have non-privileged, responsive documents; and (2) *multiple*
27 individuals from EFF — including non-lawyer "activists" and "technologists" —
28 have had communications with Lime Wire. *See, e.g., Supp. Cohn*

1 Decl. ¶ 11. (Doc. No. 18)

- 2 • EFF and von Lohmann refuse to appear for deposition, as the subpoenas require.
- 3

4 The subpoenas seek indisputably relevant information. The underlying case relates to
5 Lime Wire — the most recent in a line of notorious “peer-to-peer” services designed to induce the
6 mass infringement of Plaintiffs’ copyrights through the unauthorized distribution of “mp3” music
7 files.¹ The subpoenas seek evidence of communications between EFF/von Lohmann and the
8 *Lime Wire* Defendants regarding Lime Wire’s knowledge of its users’ widespread infringing
9 activity, its destruction (or decision not to obtain) incriminating information about that activity,
10 and its adoption (or not) of infringement-reducing technologies. EFF and von Lohmann have not
11 provided *any* substantiation for their boilerplate claims of “burden.” And EFF/von Lohmann’s
12 assertion that Plaintiffs should get (or have gotten) all EFF/von Lohmann communications from
13 Lime Wire is disingenuous, given the evidence that von Lohmann advised Lime Wire to “purge”
14 information and that Lime Wire followed that advice by instituting a two week document
15 retention program. *See* Supp. Boyd Decl. Ex. 5, ¶ 21.

16 Plaintiffs are facing an impending discovery cut-off in the underlying action. The last day
17 for document production is December 29, 2010. Plaintiffs simply cannot allow EFF and von
18 Lohmann to try to run out the discovery clock. Compliance with the subpoenas should be
19 compelled — and whatever is left of the Motion to Quash denied.

20 **II. BACKGROUND**

21 **A. Prior Proceedings on EFF/von Lohmann Motion to Quash**

22 On November 9, 2010, EFF and von Lohmann moved to quash Plaintiffs’ subpoenas,
23 arguing that the subpoenas “seek nothing but the contents of privileged communications.”
24 Motion to Quash at 5:2-3. (Doc. No. 1)

25 Plaintiffs opposed. (Doc. No. 8) Among other things, Plaintiffs advised the Court that
26 EFF/von Lohmann had engaged in demonstrably non-privileged communications with Lime

27 ¹ The underlying action is *Arista Records LLC et al. v. Lime Wire LLC et al.*, Civil No. 06-5936
28 (KMW) (U.S.D.C. S.D.N.Y.).

1 Wire, and that the claims of privilege asserted before this Court had a storied history that EFF and
2 von Lohmann had omitted from their brief. *See* Opposition at 6-7. That history led Judge Wood
3 to conclude that it was an open question whether Mr. von Lohmann's advice, including advice
4 regarding document destruction, could qualify for a claim of privilege. Boyd Decl. Ex. 3 at 2.
5 The *Lime Wire* District Court also stated that it would "benefit" from further briefing on the
6 privilege issues. *Id.*

7 On November 18, 2010, after briefing on the Motion to Quash had closed, the Court
8 issued an order directing EFF, von Lohmann, and Mark Gorton (*Lime Wire's* Founder and CEO)
9 to submit supplemental declarations certifying: (1) "whether any non-privileged documents exist
10 that are responsive to the requests for production and deposition topics identified in the
11 subpoenas" and (2) "whether Mr. Gorton or other personnel from the *Lime Wire* entities had
12 discussions with EFF personnel, other than Mr. von Lohmann, and, if so, the identity of such
13 personnel, and their positions at EFF." *See* November 18, 2010 Order at 1. (Doc. No. 16)²

14 On November 19, 2010, EFF (through its general counsel, Cindy Cohn), von Lohmann,
15 and Mark Gorton submitted the requested Supplemental Declarations. All three acknowledged
16 that responsive, non-privileged information existed. *See* Supp. Cohn Decl. ¶ 2; Supp. von
17 Lohmann Decl. ¶ 4; Supp. Gorton Decl. ¶ 2. The Declarations also indicate that individuals other
18 than Mr. von Lohmann communicated with *Lime Wire*. *See* Supp. Cohn Decl. ¶ 12 (noting that
19 Corynne McSherry, Jason Schultz, and Ms. Cohn were "copied on a handful of emails with *Lime*
20 *Wire* personnel"); *id.* at ¶ 11 (noting discussions between *Lime Wire* and EFF staff, including,
21 *inter alia*, attorneys, "activists," and "technologists"); *see also* Supp. von Lohmann Decl. ¶ 6.

22 Later that same day, the Court issued an order reserving a ruling on the Motion to Quash,
23 and ordering the parties to meet and confer in person and to submit supplemental briefs to the
24
25

26 ² Also on November 18, 2010, the *Lime Wire* District Court extended certain discovery deadlines,
27 setting the last date for document production as December 29, 2010 and the last date for
28 depositions as January 30, 2011. Plaintiffs promptly advised the Court, EFF and von Lohmann.
(Doc. No. 17)

1 Court in the event that they were unable to resolve their differences. *See* November 19, 2010
2 Order at 1-2. (Doc. No. 21)

3 **B. Plaintiffs Meet and Confer with EFF & von Lohmann**

4 Plaintiffs and EFF/von Lohmann met and conferred in person on November 23, 2010 and
5 November 30, 2010, as well as via phone and email. EFF and von Lohmann acknowledged that
6 their investigation into the scope of responsive documents in their possession was incomplete.
7 *See also* Supp. Cohn Decl. ¶ 3 (“I cannot certify that my review was complete . . .”). They
8 refused to complete any further investigation, however, and instead asked Plaintiffs to withdraw
9 their requests with respect to various categories of hypothetically responsive documents. *See,*
10 *e.g.*, Supp. Boyd Decl. Ex. 6. They also declined to provide information regarding their claim of
11 burden. *See id.* at 2-3.

12 On December 4, 2010, Plaintiffs advised EFF/von Lohmann via phone that Plaintiffs were
13 willing to narrow their request for production to seek only documents that constitute or refer to
14 communications with Lime Wire regarding each of the eight topics detailed in the requests for
15 production. Supp. Boyd Decl. ¶ 12. Plaintiffs offered this compromise in response to EFF/von
16 Lohmann’s stated (but unsubstantiated) concerns regarding the alleged burden of searching
17 various categories of documents. EFF/von Lohmann advised Plaintiffs that they were unwilling
18 to provide responsive documents unless Plaintiffs further limited their request to seek only
19 documents that constituted communications with Lime Wire for all custodians other than von
20 Lohmann. *Id.* (Mr. von Lohmann apparently acknowledges his obligation to provide a full
21 response to Plaintiffs’ requests, as modified.)

22 EFF and von Lohmann also refused to produce documents related to communications on
23 the “pho” list, discussed below. Supp. Boyd Decl. ¶ 12. Plaintiffs and EFF/von Lohmann also
24 were unable to resolve their disagreement with respect to a privilege log and depositions. *Id.*

25 **C. Plaintiffs Meet and Confer with Lime Wire**

26 In a related development, Plaintiffs recently met and conferred with Lime Wire regarding
27 entries related to EFF/von Lohmann on Lime Wire’s privilege log. As a result, Lime Wire
28 acknowledged that certain documents previously withheld were *not* subject to a viable claim of

1 privilege and agreed to produce those documents to Plaintiffs. *See* Supp. Boyd Decl. Ex. 7. That
2 recent production includes, *inter alia*, a 2003 email in which Mr. von Lohmann advised key
3 officers at Lime Wire (and other peer-to-peer file-sharing companies) regarding the focus of
4 RIAA enforcement efforts vis-à-vis file sharing at college campuses — a communication that
5 underscores that Lime Wire (and the other peer-to-peer) recipients knew how their software
6 devices were being used. Supp. Boyd Decl. Ex. 1.

7 **D. The Scope of the Remaining Disputes Between Plaintiffs and EFF/von**
8 **Lohmann**

9 The unresolved and disputed issues are:

10 (1) Whether EFF and von Lohmann must search for and produce *non-privileged*
11 documents that *constitute* or *refer to* communications with Lime Wire on each of the below
12 topics; or whether they may instead produce only documents that *constitute* communications with
13 Lime Wire on these topics (with the exception of Mr. von Lohmann, who would produce
14 documents that *constitute or refer to* communications with Lime Wire):

- 15 • The retention or destruction of documents, including without limitation
16 communications regarding a document retention policy or program. (RFP No. 1)
- 17 • The actual or potential use of Lime Wire to share copyrighted materials. (RFP No.
18 2)
- 19 • The actual or potential tracking or monitoring of downloads by users of Lime Wire
20 or other peer-to-peer file sharing networks. (RFP No. 3)
- 21 • The architecture, design, or structure of Lime Wire or other peer-to-peer file
22 sharing networks (RFP No. 4) and the Lime Wire Entities' or Mark Gorton's state
23 of mind, purpose or motivation for adopting or not adopting particular
24 architectures, designs, structures or features for Lime Wire (RFP No. 5)
- 25 • Infringement-reducing technologies, including without limitation filtering or
26 acoustic-fingerprinting technologies (RFP No. 6) and the Lime Wire Entities' or
27 Mark Gorton's state of mind, purpose or motivation for adopting or not adopting
28 infringement reducing technologies, including without limitation filtering or
acoustic-fingerprinting technologies (RFP No. 7)
- Actual or anticipated litigation by copyright holders (RFP No. 8)

(2) Whether EFF and von Lohmann may “carve out” of their production certain
communications that occurred on a public listserv called the “pho” list.

1 (3) Whether EFF and von Lohmann must provide a privilege log.

2 (4) Whether EFF and von Lohmann must appear for a deposition. (Plaintiffs' deposition
3 topics to EFF track the information requested in the document requests.)

4 **E. Supplemental Briefing and Proceedings**

5 Plaintiffs and EFF/von Lohmann agreed to submit simultaneous supplemental briefing to
6 the Court on Thursday, December 9, 2010, with any final response on Monday, December 13,
7 2010. Plaintiffs intend to request oral argument, subject to the availability of the Court, during
8 the week of December 13-17, 2010.

9 **III. ARGUMENT**

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

11 Forced by this Court's Order to acknowledge that they engaged in non-privileged
12 communications with Lime Wire, EFF and von Lohmann now switch gears and argue that some
13 unidentified number of unquestionably responsive documents may not be relevant to the *Lime*
14 *Wire* litigation. See Supp. Cohn Decl. ¶ 6. It is not for EFF — which claims to be a third party
15 — to decide what is and is not relevant to the *Lime Wire* litigation. In any event, EFF/von
16 Lohmann's "relevance" objection is demonstrably false.

17 For purposes of discovery, relevance is broadly construed. See *Phoenix Solutions Inc. v.*
18 *Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 583 (N.D. Cal. 2008). Further, "[a] district court whose
19 only connection with a case is supervision of discovery ancillary to an action in another district
20 should be 'especially hesitant to pass judgment on what constitutes relevant evidence thereunder.'
21 Where relevance is in doubt ... the court should be permissive." *Compaq Computer Corp. v.*
22 *Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 335 (N.D. Cal. 1995) (citing *Truswal Sys. Corp.*
23 *v. Hydro-Air Engineering, Inc.*, 813 F.2d 1207, 1211-12 (Fed. Cir. 1987)). Below are just a few
24 examples of the types of relevant communications between or involving EFF, von Lohmann and
25 Lime Wire during the relevant period:

26 *First*, as Judge Wood has stated, Mr. von Lohmann instructed Defendants to "establish a
27 document retention program to purge incriminating information about LimeWire users'
28

1 activities.” See Boyd Decl. Ex. 3 at 1. Judge Wood has invited further briefing on these issues —
2 which is precisely why Plaintiffs seek further discovery.

3 *Second*, in 2003, von Lohmann sent an email to officers of several peer-to-peer file
4 sharing companies, including Lime Wire, entitled “Interesting RIAA subpoena stats” in which he
5 forwarded research (apparently compiled by EFF staff attorney Wendy Seltzer) regarding RIAA
6 enforcement efforts vis-à-vis file sharing at college campuses. Supp. Boyd Decl. Ex. 1. Mr. von
7 Lohmann notes that the RIAA efforts are largely “aimed at Kazaa users” but that the RIAA also
8 appears to be targeting the “gnutella net” (the system used by Lime Wire). *Id.* This
9 communication (which Plaintiffs received yesterday when Lime Wire conceded that it should not
10 have been withheld under a claim of privilege) demonstrates Lime Wire’s knowledge that its
11 product was being used for mass infringement.

12 *Third*, in October 2006, a gentleman named Adam Fisk wrote an email to Mr. von
13 Lohmann as well as *all* the recipients of the “pho” mailing list. The “pho” list is “an e-mail
14 listserv devoted to the Pho group’s discussion of issues related to the digital delivery of art,
15 especially music, movies and books.” See www.onehouse.com/pho.htm. See Supp. Boyd Decl.
16 Ex. 2. Until 2004, Mr. Fisk was a Senior Software Engineer at Lime Wire. *Id.* Ex. 8 (Fisk Depo.)
17 at 7:13-9:22. It appears that one member of the “pho” mailing list who received Messrs. Fisk and
18 von Lohmann’s communications was Mr. Greg Bildson, Lime Wire’s Chief Technology Officer
19 until his resignation in September 2008.³ Mr. Fisk writes to von Lohmann, Mr. Bildson, and
20 others:

21
22
23
24
25



26
27
28 ³ The email at issue was produced from Mr. Bildson’s files. Supp. Boyd Decl. ¶ 3.

1 See Supp. Boyd Decl. Ex. 2 at LW DE 2352018 (emphasis added).⁴

2 *Fourth*, in an extended email thread on the “pho” list (including Mr. Bildson) regarding

3 [REDACTED] von Lohmann advised that [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 See Supp. Boyd Decl. Ex. 3 at LW DE 2352303-04; *id.* Exhibit 3 at LW DE

8 2352325-26.

9 *Fifth*, in a similar email, [REDACTED]
10 [REDACTED]
11 [REDACTED]

Supp. Boyd

12 Decl. Ex. 4 at LW DE 2352078.

13 *Sixth*, Mr. von Lohmann has advised peer-to-peer companies on avoiding liability in other
14 public forums as well. In the wake of the Ninth Circuit’s 2001 decision affirming (in large part)
15 this Court’s decision to enjoin the Napster service, von Lohmann published a “primer” teaching
16 peer-to-peer services to avoid copyright liability by creating “plausible deniability” and
17 “choos[ing] an architecture that will convince a judge that . . . monitoring and control is
18 impossible.” Boyd Decl. Ex. 4 at 8. In the same primer, von Lohmann also suggested that peer-
19 to-peer developers should avoid “software that sends back usage reports” because such usage
20 reports “may lead to more knowledge than you want.” *Id.*

21 These examples leave no doubt that there are likely numerous other responsive, highly
22 relevant documents referencing communications between EFF/von Lohmann and Lime
23 Wire/Gorton. Communications demonstrating Lime Wire’s knowledge of infringement and its
24 efforts to harness that infringement to [REDACTED] are relevant to the “infringer’s state of
25

26 ⁴ The *Lime Wire* Defendants marked this and other documents from the pho list “Confidential”
27 according to the Protective Order in the *Lime Wire* action. Accordingly, Plaintiffs have lodged
28 these documents conditionally under seal, although they note that there would seem to be nothing
confidential about communications on this public listserv.

1 mind” — a key consideration in determining Plaintiffs’ entitlement to statutory damages. *See*
2 *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010). *See also* *RSO*
3 *Records, Inc. v. Peri*, 596 F. Supp. 849, 863 (S.D.N.Y. 1984) (where defendants acted in a
4 “wholly willful manner” the “maximum statutory award” was appropriate). Requests for
5 Production No. 2 (communications regarding the use of Lime Wire to share copyrighted
6 materials); Nos. 4-5 (communications regarding the design or structure of Lime Wire —
7 including, for example, the above communication about [REDACTED]
8 [REDACTED]); and Nos. 6-7 (regarding Lime Wire’s decision, or not, to implement
9 infringement-reducing technologies) are narrowly tailored to seek such information. *See* Supp.
10 Boyd Decl. Exs. 9-10.

11 Lime Wire’s efforts to destroy (or avoid collecting) incriminating evidence [REDACTED]
12 [REDACTED] are likewise relevant to demonstrating the “infringer’s state of mind” and
13 consciousness of guilt. *See Bryant*, 603 F.3d at 144. In addition, Defendants’ lack of
14 “cooperation in providing evidence concerning the value of the infringing material” is another
15 relevant consideration used in determining where to set the statutory award. *Id.* *See generally*
16 *Opposition* at 9-10. Requests for production No. 1 (regarding document retention and
17 destruction); No. 3 (regarding efforts to monitor infringing use on the Lime Wire system); and
18 No. 8 (regarding actual or anticipated litigation by copyright holders) are narrowly tailored to
19 seek such information.⁵ *See* Supp. Boyd Decl. Exs. 9-10.

20 Finally, while there is no basis to require Plaintiffs to prove at the outset what information
21 they will find in the files they do not have, the record suggests that responsive documents likely
22 will be found in the files of Mr. von Lohmann *as well as* additional custodians at EFF:

23 ⁵ Responsive documents will be relevant to other issues as well. For example, whether and when
24 Mark Gorton (Lime Wire’s founder and CEO) anticipated copyright litigation (RFP No. 8) is
25 relevant to Plaintiffs’ extant fraudulent conveyance claims. Lime Wire’s decisions regarding the
26 “architecture, design, or structure” of the Lime Wire system (including its efforts studiously to
27 avoid [REDACTED]) and its decision to institute (or not) infringement-reducing
28 technologies (RFPs Nos. 4-7) also are relevant to Plaintiffs’ claim of vicarious liability, which
also remain to be tried. *See Arista Records LLC v. Lime Group LLC*, 715 F. Supp. 2d 481, 518
(S.D.N.Y. 2010) (“[a] defendant is liable for vicarious copyright infringement if it ‘profit[s] from
direct infringement while declining to exercise a right to stop or limit it’”).

1 (1) EFF/von Lohmann's own declarations establish that individuals other than
2 Mr. von Lohmann had some communications with Lime Wire. *See, e.g.*, Supp. Cohn Decl. ¶¶ 11-
3 12.

4 (2) As noted, former EFF staff attorney Wendy Seltzer appears to have
5 engaged in non-privileged discussions regarding copyright issues with former Lime Wire
6 engineer Adam Fisk and others. *See* Supp. Boyd Decl. Ex. 4 at LW DE 2352077-78; *id.* Ex. 1.
7 Plaintiffs do not know – but are entitled to discover – the extent of similar communications
8 between Lime Wire and Ms. Seltzer during her tenure at EFF.

9 (3) Any responsive documents exchanged between EFF and third-parties (or
10 internal EFF documents) that *refer* to communications with Lime Wire likely are highly relevant
11 — but Plaintiffs are unlikely to have them or even know of them in advance of receiving
12 requested discovery from EFF. EFF/von Lohmann's steadfast refusal to provide Plaintiffs with
13 any threshold information as to the existence, quantity, and custodians of potentially responsive
14 documents leaves Plaintiffs unable to fully assess this category of documents.

15 **B. EFF And von Lohmann Have Not Articulated Any Credible Claim Of**
16 **Burden**

17 The party resisting relevant discovery has the burden to provide specific *facts*
18 demonstrating that any burden is undue:

19 The party resisting discovery has the burden to show facts
20 justifying its objection by demonstrating that the time or expense
21 involved in responding to requested discovery is unduly
22 burdensome. This imposes an obligation to provide sufficient detail
23 and explanation about the nature of the burden in terms of time,
24 money and procedure required to produce the requested documents.

23 *GP Industries, LLC v. Bachman*, 2007 WL 4245786, at *6 (D. Neb. Nov. 29, 2007) (citations
24 omitted). *See also Micron Technology, Inc. v. Tessera, Inc.*, 2006 WL 1646132, at *2 (N.D. Cal.
25 June 14, 2006) (“[b]ald statements of counsel that a subpoena is unduly burdensome, unsupported
26 by affidavits or evidence, are unhelpful”).

27 EFF and von Lohmann have provided no facts with respect to the burden of complying
28 with *any* aspect of Plaintiffs' subpoena — such as the quantity of documents at issue, the number

1 of relevant of custodians, or any other details “about the nature of the burden in terms of time,
2 money, and procedure required to produce the requested documents.” *GP Industries*, 2007 WL
3 4245786, at *6. Nonetheless, by agreeing to limit the RFPs to documents that *constitute or refer*
4 *to* communications with Lime Wire (including communications that took place on listservs such
5 as the “pho” list), Plaintiffs have mooted EFF/von Lohmann’s hypothetical claims of burden.

6 Nor have EFF and von Lohmann explained why the further limitation that they now press
7 — *e.g.*, restricting their response to documents that *constitute* communications with Lime Wire
8 for all custodians other than Fred von Lohmann — would be appropriate. Plaintiffs are not aware
9 of any reason why, in searching the files of a custodian who has *otherwise been identified by*
10 *Lime Wire as reasonably likely to have responsive documents*, the search procedure could be
11 meaningfully simplified by limiting the response to actual communications with Lime Wire, as
12 opposed to documents that constitute or refer to communications with Lime Wire.

13 EFF/von Lohmann’s apparent desire to carve out of their production communications
14 from the “pho” list is likewise unadorned by any suggestion that doing so will reduce the burden
15 to search for and produce responsive documents. EFF and von Lohmann do not suggest — nor
16 does it seem plausible — that they maintain their files in a manner which segregates “pho” list
17 communications from other documents. Attempting to segregate out such communications from
18 otherwise responsive documents would seem to complicate, not simplify, EFF/von Lohmann’s
19 search efforts.

20 Finally, EFF/von Lohmann’s failure to provide Plaintiffs with any meaningful explication
21 of burden (despite Plaintiffs’ repeated requests that they do so) undermines the meet and confer
22 process ordered by this Court. Should EFF and von Lohmann finally provide such statistics in
23 response to this brief, such gamesmanship should not be rewarded.

24 **C. Plaintiffs Are Not Required To Rely On Lime Wire’s Production Of**
25 **Documents**

26 EFF and von Lohmann also have argued that Plaintiffs need not seek discovery from EFF
27 and von Lohmann because they have access to evidence from other sources, such as the *Lime*
28 *Wire* Defendants. This too, is wrong. Although Plaintiffs have received *some* documents from

1 Lime Wire, there is a genuine issue as to whether that document production is adequate. As
2 Judge Wood stated, von Lohmann instructed Defendants to “establish a document retention
3 program to purge incriminating information about LimeWire users’ activities.” *See* Boyd Decl.
4 Ex. 3 at 1. Mr. Bildson, Lime Wire’s former Chief Technology Officer, has further explained
5 how these instructions were carried out:

6
7 Mr. Gorton implemented a two-week document retention policy.
8 Under this policy, employees were told to eliminate old emails and
9 documents after two-weeks. Mr. Gorton asked me to communicate
10 this policy to LimeWire’s employees. Mr. Gorton followed this
11 request up with his own review of employee email histories for
12 keywords such as “Napster”. I personally observed Mr. Gorton
13 conducting these reviews of the email of others as well as my own
14 email.

15 *See* Supp. Boyd Decl. Ex. 5, ¶ 21.

16 EFF/von Lohmann’s suggestion that Plaintiffs have access to particular examples of
17 communications “completely misses the point of plaintiffs’ citation of the documents.” *In re*
18 *Napster, Inc. Copyright Litigation*, 462 F. Supp. 2d 1060, 1077 n.5 (N.D. Cal. 2006). It is
19 axiomatic that the *particular* examples referenced are available to Plaintiffs from other sources —
20 otherwise Plaintiffs would not have them. *Id.* But these examples illustrate the *type* of non-
21 privileged, highly relevant communications occurring between Lime Wire and EFF/von
22 Lohmann. Plaintiffs should not be limited to the documents that happened to remain at Lime
23 Wire after Mr. Gorton’s efforts to scrub incriminating evidence.

24 In any event, irrespective of Lime Wire’s document retention (or lack thereof), EFF and
25 von Lohmann likely have relevant, responsive, non-privileged documents that *refer* to
26 communications with Lime Wire, regardless of whether those documents ever were forwarded to
27 Lime Wire. For example, documents exchanged between EFF and *third-parties* that refer to
28 statements made to or from Lime Wire would likely not be covered by a claim of privilege or, in
any event, any such claim would be waived by its disclosure to a third party.

EFF/von Lohmann’s suggestion that Plaintiffs have access to documents from the “pho”
listserv likewise “misses the point of plaintiffs’ citation of the documents.” *In re Napster*, 462 F.
Supp. 2d at 1077 n.5. Once again, these documents illustrate the types of communications that

1 are likely to exist in EFF and von Lohmann's files. Accordingly, it is appropriate for EFF and
2 von Lohmann to search for responsive documents from *all* sources, not only from the "pho" list.
3 Nor is it sensible for EFF and von Lohmann to "carve out" documents from the pho listserv as
4 any attempt to do so would seem to increase, not reduce, the burden of their search and
5 production.

6 **D. EFF And von Lohmann Must Log Documents Withheld Under A Claim Of**
7 **Privilege**

8 "The party asserting the attorney-client privilege has the burden of proving that the
9 privilege applies to a given set of documents or communications." *In re Grand Jury*
10 *Investigation*, 974 F.2d 1068, 1070-71 (9th Cir. 1992). See Opposition at 9-10. If a party
11 responding to discovery wants to assert privilege over a document, they can assert it by logging it.
12 *Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 650-51 (E.D. Cal. 2010).

13 EFF and von Lohmann have suggested that a party subpoenaed pursuant to Rule 45 does
14 not have to log documents claimed to be privileged. Reply to Mot. to Quash at 4:16-17. This is
15 simply not the law. Rule 45 requires that "[a] person withholding subpoenaed information under
16 a claim that it is privileged" must "expressly make the claim" and "describe the nature of the
17 withheld documents, communications, or tangible things in a manner that, without revealing
18 information itself privileged or protected, will enable the parties to assess the claim." Fed. R.
19 Civ. Pro. 45(d)(2). This requirement — which exactly mirrors the language applied to parties
20 under Rule 26(b)(5) — contains the same privilege log requirement applied to party discovery.
21 See also *In re Coan*, 2007 WL 128010, at *5 (N.D. Cal. Jan. 12, 2007) ("where discovery
22 requests are objected to because they seek privileged information, the objecting party must
23 submit, with its objections, a privilege log identifying the nature of the document") (citing Fed. R.
24 Civ. P. 45 (d)(2)).

25 A privilege log customarily is required because the "[party seeking discovery] and the
26 court should not be obligated to take [the objecting party's] blanket assertion at face value."
27 *Friends of Hope Valley*, 268 F.R.D. at 651. Indeed, just recently, the *Lime Wire* Defendants were
28 forced to concede that certain communications between Lime Wire and Mr. von Lohmann were

1 in fact *not privileged* (contrary to their previous claims) after Plaintiffs inspected their privilege
2 log and raised questions regarding their privilege claim. *See* Supp. Boyd Decl. Ex. 7. Lime
3 Wire's recent withdrawal of certain aspects of their privilege claims illustrate the genuine
4 disputes over the privilege claims in this matter that will be appropriately informed by the
5 information contained on a privilege log.

6 The history of EFF and von Lohmann's response to Plaintiffs' subpoenas further confirms
7 this point. EFF and von Lohmann originally suggested to this Court (via boilerplate allegations)
8 that communications among EFF/von Lohmann and Lime Wire/Gorton were exclusively
9 exchanges of legal advice in the context of an attorney-client relationship. *See, e.g.*, Motion to
10 Quash at 5:2-3 (arguing that the subpoenas "seek nothing but the contents of privileged
11 communications"). Only when forced to do so by this Court's Order did EFF and von Lohmann
12 acknowledge the existence of responsive, non-privileged communications. Under these
13 circumstances, it is particularly inappropriate to expect Plaintiffs to accept EFF and von
14 Lohmann's "blanket assertion at face value." *Friends of Hope Valley*, 268 F.R.D. at 651.

15 Further, the District Court in the *Lime Wire* action already has concluded that there are
16 open questions as to whether certain communications — such as advice to "purge" incriminating
17 information — are subject to a privilege claim, and contemplated further briefing on this issue.
18 The same foundational information that EFF and von Lohmann are required to provide in a
19 privilege log will be relevant to that briefing.

20 Finally, EFF and von Lohmann's vague protestations provide no reason to believe that
21 compiling a privilege log would result in any meaningful burden. Certainly there can be no
22 undue burden with respect to communications directly between Lime Wire and EFF/von
23 Lohmann.⁶ As for documents that were not sent directly to or from Lime Wire, Plaintiffs' offer to

24
25 ⁶ In any event, any suggestion of burden cannot be squared with EFF/von Lohmann's position
26 that Plaintiffs must content themselves with seeking information from the *Lime Wire* Defendants.
27 The *Lime Wire* Defendants included just a few dozen communications with EFF and von
28 Lohmann in their privilege log and just recently withdrew certain of those claims. (As noted,
Plaintiffs have a legitimate basis for concern that these numbers are artificially low due to Lime
Wire's document retention practices.) Plaintiffs find it hard to believe that EFF and von
Lohmann would object to providing a privilege log if the responsive communications in their files

1 limit the request for production to documents that constitute or refer to communications with
2 Lime Wire largely moots EFF's stated concern that responsive documents may be covered by a
3 third party claim of privilege unless EFF made a habit of sharing information learned in
4 conversations with Lime Wire with their other putative clients. In any event, EFF and von
5 Lohmann have provided no statistics or other explanation substantiating any meaningful burden.

6 **E. EFF And von Lohmann Are Required To Produce A Witness For Deposition**
7 **In Compliance With the Subpoenas**

8 EFF and von Lohmann must also appear for the depositions sought in the subpoena.
9 Plaintiffs *already* have identified various relevant, non-privileged communications between
10 EFF/von Lohmann and Lime Wire regarding Lime Wire's efforts [REDACTED]
11 [REDACTED]

12 relevant issues. Plaintiffs are entitled to depose EFF and von Lohmann regarding these
13 documents and the documents that will be produced. Plaintiffs also are entitled to ask such
14 questions as whether von Lohmann or other individuals at EFF engaged in *oral*, non-privileged
15 communications with Lime Wire regarding similar topics, where and when such communications
16 took place, what was said and by whom, and other pertinent details.

17 In the circumstances of this case, Plaintiffs also are entitled to depose EFF and von
18 Lohmann regarding the foundational facts underlying any claim of privilege, including the time
19 frame and scope of the purported attorney-client relationship, how that supposed relationship can
20 be squared with EFF/von Lohmann's representations to the *Lime Wire* District Court, in an
21 amicus filing, that they were a "neutral" party, the particular individuals at Lime Wire with whom
22 EFF and Lime Wire communicated, and whether that information was shared with third-parties
23 such that a waiver may have occurred. This information will also be relevant to the further
24 briefing that Judge Wood invited as to the question of whether a claim of privilege can apply.

25
26
27 are similarly limited to a few dozen documents — further confirming why discovery from EFF
28 and von Lohmann will reveal additional documents not produced or logged by Lime Wire.

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

IV. CONCLUSION

For the reasons stated, the Motion to Quash should be denied and the Court should further issue an order compelling EFF and von Lohmann to search for and produce non-privileged, responsive documents, to provide a privilege log for any document withheld under a claim of privilege, and to produce witnesses for a deposition.

DATED: December 9, 2010

MUNGER, TOLLES & OLSON LLP

By: s/Susan T. Boyd
Susan T. Boyd
Attorneys for Plaintiffs