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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In the Matter of Subpoena Issued to Digital Music News LLC, in UMG RECORDINGS, INC., Plaintiff, v. ESCAPE MEDIA GROUP, INC., *et al.* Defendants.	Case No.: SS 022 099 The Hon. Richard A. Stone Dept. WE-X **SUPPLEMENTAL MEMORANDUM BY NEWLY RETAINED COUNSEL IN OPPOSITION TO MOTION TO COMPEL SUBPOENA COMPLIANCE** Date: May 15, 2012 Time: 8:30 a.m. Dept: WE-X

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CONSTITUTIONS AND STATUTES

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17 U.S.C. § 512. 2

California Code of Civil Procedure

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In this case, a company that operates a music-streaming web site has been sued by a recording company that alleges that the site hosts its copyrighted content without consent and without payment of royalties. After a California journalist wrote online articles about the case, an individual or individuals, purporting to be defendant's employee(s) blowing the whistle on alleged misconduct by the employer, posted anonymously that the defendant hosting company sets uploading quotas for its staff that encourage them to find copyrighted content online and upload it to defendant's web site. Defendant subpoenaed the journalist to compel him to provide the name of the anonymous whistleblower(s). The journalist has explained to the music-hosting site that he does not have any documents responsive to the subpoena, because identifying information is normally overwritten with more recent data, but the music hosting company **still** seeks to enforce the subpoena. The journalist filed a pro se opposition to the motion to compel, but his newly retained, pro bono counsel fleshes out the relevant legal arguments in this memorandum.

There is no reason to believe that the subpoena recipient has any responsive documents, and, in any event, both the First Amendment and California's shield law preclude enforcement of the subpoena. The motion to enforce the subpoena should be denied.

STATEMENT OF FACTS AND PROCEEDINGS TO DATE

This subpoena proceeding arises from a lawsuit brought by UMG Recordings, Inc., against Escape Media Group over its operation of a music streaming service called Grooveshark. Escape, which has license agreements with several recording companies, has often faced litigation over allegations that it hosts music in excess of its license rights and that it has not lived up to its royalty agreements. *E.g.*, *Capitol Records v. Escape Media Group*, No. 151440/2012 (N.Y.); *EMI Entertainment World v. Escape Media Group*, No. 650013/2012 (N.Y.); *Yesh Music v. Escape Media Group*, 1:12-cv-00290-JBW-VVP (E.D.N.Y.). In this case, filed in a New York state court, UMG alleges that Grooveshark is infringing its copyright in many pre-1972 sound recordings which are, therefore, not subject to copyright under federal law, and hence whose enforcement is not preempted by federal law. In a parallel case pending in the United States District Court for the Southern District of New York, UMG charges Escape Media with infringing recordings that **are** subject to federal copyright protection. In defending against both cases, Escape has claimed immunity under the Digital

Millennium Copyright Act ("DMCA"), which immunizes the online hosts from relief for infringement under federal law so long as they promptly remove copyrighted recordings posted on their servers upon receiving notice that the posting infringes copyright.

Respondent Paul Resnikoff is the founder and director of respondent Digital Music News, an online newsletter and blog about the digital music industry that is posted online as www.digitalmusicnews.com. Resnikoff Affidavit ¶ 2. His blog is aimed at an audience of executives in the music industry as well as technology companies; its readers include decision-makers from every segment of the business, spanning major labels to artists to garage start-ups. *Id.* ¶ 2. Resnikoff is the main writer on the blog; technical matters are handled by Steve Hindle. *Id.* ¶ 3. The blog strives to provide an independent voice on issues arising in the industry that it covers. As principal writer, Resnikoff has covered the public controversy about Grooveshark, as well the litigation brought against it. For example, he has aggressively questioned Grooveshark about how its business operates and how much it pays musicians for the music that it hosts. *E.g.*, http://digitalmusicnews.com/stories/100711grooveshark. Resnikoff Affidavit ¶¶ 9-13.

In addition to carrying Resnikoff's articles, Digital Music News carries comments by its readers. There is no requirement of registration to post comments; anybody who wants to comment need only choose the name under which the comment will be posted and complete a "captcha" box to ensure that a real person is posting the comment. *Id.* ¶ 4. Resnikoff reads comments posted on Digital Music News, and often interacts with the commenters, always posting under his own name. *Id.* ¶ 6. Resnikoff scrutinizes the comments for story ideas and for information that he can further investigate both to continue reporting on the matter covered by the story in question, and for the development of future stories. *Id.* Although he recognizes that anonymous comments are not always reliable, he depends on readers feeling free to express themselves in the commentary because of the news value that he often gains from the comments. *Id.* Although the Internet Protocol address ("IP address") of each comment is recorded in a log file along with the time of posting, Digital Music News has only limited space on the servers that it uses to host its content, and it puts no priority on retaining such identifying information when it overwrites its servers. *Id.* ¶¶ 7-8; Levy Affidavit Exhibit F.

On October 13, 2011, Resnikoff wrote one of several articles about Grooveshark, providing

copies of email correspondence between Grooveshark executive Paul Geller and Robert Fripp, a member of the rock band King Crimson, and others associated with the band, in which the latter complained about their inability to keep King Crimson's copyrighted recordings from being hosted on Grooveshark. http://www.digitalmusicnews.com/stories/101311cc. Geller responded bitterly to Resnikoff's publication of the correspondence, accusing Fripp of deliberately omitting emails from the correspondence chain which, Geller assumed, had been leaked by Fripp, and objecting to "the headlines you've been creating out of my exchanges" with Fripp. Geller's email, which Resnikoff published in its entirety on his blog, concluded by saying, "your coverage has been disingenuous at best," and demanding that Resnikoff stop republishing Geller's emails http://www.digitalmusicnews.com/stories/101711grooveshark.

The King Crimson article provoked an extended discussion among commenters; on October 17, 2011, an anonymous Internet user, claiming to be an employee of defendant Escape Media, and using the pseudonym "Visitor," posted the following comment on the story (cited henceforth as "First Anonymous Comment"):

> I work for Grooveshark. Here is some information from the trenches:
>
> We are assigned a predetermined ammount of weekly uploads to the system and get a small extra bonus if we manage to go above that (not easy).The assignments are assumed as direct orders from the top to the bottom, we don't just volunteer to "enhance" the Grooveshark database.
>
> All search results are monitored and when something is tagged as "not available", it get's queued up to our lists for upload. You have to visualize the database in two general sections: "known" stuff and "undiscovered/indie/underground". The "known" stuff is taken care internally by uploads. Only for the "undiscovered" stuff are the users involved as explained in some posts above. Practically speaking, there is not much need for users to upload a major label album since we already take care of this on a daily basis.
>
> Are the above legal, or ethical? Of course not. Don't reply to give me a lecture. I know. But if the labels and their laywers can't figure out how to stop it, then I don't feel bad for having a job. It's tough times.
>
> Why am I disclosing all this? Well, I have been here a while and I don't like the attitude that the administration has aquired against the artists. They are the enemy. They are the threat. The things that are said internally about them would make you very very angry. Interns are promised getting a foot in the music industry, only to hear these people cursing and bad mouthing the whole industry all day long, to the point where you wonder what would happen if Grooveshark get's hacked by Anonymous one day and all the emails leak on some torrent or something.

> And, to confirm the fears of the members of King Crimson, there is no way in hell you can get your stuff down. They are already tagged since you sent in your first complaint. The administration knows that you can't afford to sue for infringement.

A day later, the following anonymous comment was posted to the story, purporting to be from the same poster and again using the pseudonym "Visitor" (cited here as "Second Anonymous Comment"):

> Yeah, sorry but that is not going happen any time soon. I am not stupid. If someone from digitalmusicnews.com thinks I am trolling, they can go ahead and delete my post. All the King Crimson music will eventually be available again, anyway. Song by song, perhaps, so that pissed English old man wont notice too soon. Don't take my word for it, just be a little bit patient, wait and see for yourselves. Do a search after a couple days or whatever. Maybe make a "mistake" and search for "King Crimson" as "song", instead of "artist".
>
> Just because you can't see an album available right now, doesn't mean its not sitting quietly in the background. It is policy to put albums on "backup", when they have to be taken down due to a DMCA notice, to chill things out with the labels and what not. The albums are not deleted, if that's what you guys think.
>
> My impression is that the labels only take action when some artist literally prints a page and holds it in front of their noses. So, if you are an artist, either accept it and move on, maybe find some other business to invest your time and talent, or do what you have to do to defend your current business. Pretending that there is some sort of middle ground won't take you very far.
>
> (You should hear the Big Boss screams today. Ho ho ho. Furious. King Crimson - office chair / Big Boss - Steve Balmer)

UMG Recordings referred to the First Anonymous Comment in an amended complaint in the federal action to support its contention that Escape Media was knowingly hosting copyrighted recordings without the consent of the owners of the copyright in those recordings. Not surprisingly, Escape Media objected, pointing out that the reliability of anonymous comments is suspect and that, in any event, an anonymous comment is hearsay and, in any event, not sworn under oath and hence not admissible as evidence. The online docket for the federal lawsuit reveals that the motion to dismiss the federal court action has been denied. Digital Music News has not been able to determine whether any party has yet attempted to use the Anonymous Comment in the state court action.

Escape Media served a subpoena duces tecum on Resnikoff dated January 9, 2012, seeking both any identifying information about the poster of the First and Second Anonymous Comments, and copies of any documents pertaining to any communications between Digital Music News and UMG Recordings about either Escape, Grooveshark or the article about King Crimson to which the comments were posted. Resnikoff Affidavit ¶ 14 and Exhibit A. Geller sent an email to fellow

industry executives explaining that the subpoena "demands details of the relationship UMG had with DMN, which we believe to be nefarious." Resnikoff obtained the email and published it on his blog. *Id.* ¶ 13; http://www.digitalmusicnews.com/permalink/2012/120122grooveshark. In correspondence with Resnikoff, one of Escape's lawyers asserted that Geller was not speaking for the company in justifying the subpoena that way; but in the same letter, that lawyer accused Resnikoff of "aligning" himself with the assertions of the anonymous posters. Resnikoff Affidavit ¶ 16 and Exhibit C.

Resnikoff served written objections to the subpoena, arguing both that, as a journalist, he was privileged by the California's shield law not to reveal his sources, and that the First Amendment protects the right of anonymous Internet speakers to remain anonymous unless Escape Media follows well-established procedures to notify the poster of the effort to identify her and presents evidence sufficient to show that the disclosure would serve a compelling government interest because the identifying information is essential to pemit Escape Media to protect its litigating interests. *Id.* ¶ 15 and Exhibit B. In addition, in an effort to avoid the need for litigation over these privileges, Resnikoff has pointed out to Escape's counsel that he makes no efforts to preserve identifying information, that the non-priority data on his servers is regularly overwritten more than once each week, and, indeed, that given his ordinary business practices, it is highly unlikely that any identifying information remains. *Id.;* Levy Affidavit Exhibit F. Resnikoff also told Escape Media's counsel that he has searched for any correspondence with UMG covered by the subpoena and turned up no copies of any such records. *Id.* By the attached affidavit, Resnikoff confirms these two facts. Resnikoff has also reported on the controversy about the subpoena on his blog.

In a letter dated January 30, one of Escape Media's attorneys denied the legal validity of Resnikoff's objections. Exhibit C. In addition, he took issue with the assertion that the identifying information had not been retained, because of even when computer files are overwritten, it is possible that fragments of the data might be scattered elsewhere than in the original file where they appear. However, the attorney provided no reason for believing that files overwritten within days after their creation, and then overwritten again and again, would still survive in any retrievable form. Nor did he explain why Digital Music News, a third party, should be put to the trouble of searching for data on the remote, highly theoretical possibility that fragments could be retrieved.

On March 20, 2012, Escape Media filed a motion to compel compliance with the subpoena. On April 2, Resnikoff filed a pro se opposition to that motion. Expressing doubt about the veracity of Resnikoff's assetion that the data was no longer extant, Escape Media asked for the opportunity to propound a number of technical questions, in writing, indicating that it had in mind to take depositions in furtherance of those questions. Levy Affidavit, ¶ 2 and Exhibit E. Digital Music News has now answered those questions in writing, confirming that it has no responsive documents. Levy Affidavit ¶ 3 and Exhibit F. Escape Media has advised Digital Media's counsel that it hopes to take the depositions of Resnikoff and his technical staff person to try to pursue further the technical questions to which it has already received answers, while saying that unspecified other topics would also be covered. *Id.* ¶ 4.

Rather than put up with this sort of extraordinary imposition on his journalistic independence, even though the underlying subpoena cannot properly be enforced under the First Amendment and the shield provision of California's constitution, Resnikoff has retained undersigned counsel and now files this further explanation of the legal basis for his objections to the subpoena. Digital Music News also submits affidavits confirming its explanation that it no longer has the demanded identifying information.

ARGUMENT

The motion to enforce the subpoena should be denied for three separate reasons. First, the motion to enforce the subpoena is moot. Resnikoff has responded to the subpoena and explained that he has no responsive documents. There is no basis for any further proceedings to enforce the subpoena at this time. Second, enforcement of the subpoena would infringe the anonymous commenters' First Amendment right to speak anonymously, and Resnikoff's First Amendment right to rely on anonymous commenters in the course of his journalistic reporrting on controversies in the digital music industry, and because there is no compelling justification for the discovery. Third, compelled disclosure would violate both the shield provision of the California Constitution and Resnikoff's rights as a journalist under both the First Amendment and the California constitution.

A. Enforcement of the Subpoena Is Moot.

Digital Music News has looked for responsive documents and found none. It has further

explained that, pursuant to its normal business operations, not only would it not have kept identifying information about anonymous commenters for more than a couple of days, but it deliberately overwrites computer files containing such information because its server space is scarce, it has no business purpose for retaining identifying information, and its business objective of preserving the anonymity of commenters is furthered by the routine disposition of such information. Resnikoff Affidavit ¶¶ 7-9; Hindle Affidavit.

Escape Media has provided no reason to doubt the veracity of these assertions, apart from the highly theoretical possibility that some fragments of data from files that would have been overwritten multiple times since late November of last year might still be retrievable in some way. If Escape Media serves additional subpoenas to try to pursue that theory, the Court may have the opportunity to pass on whether a third party may be subjected to such an imposition. But its motion to enforce the subpoena now under consideration is moot.

B. The Subpoena Should Be Quashed Because Its Enforcement Would Violate the Bloggers' First Amendment Rights.[1/]

The subpoena violates the First Amendment's protections for the right of anonymous speech. The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999); *McIntyre v. Ohio Elections Comm.,* 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by

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[1/] It is well-established that the host of a web site has standing to litigate the rights of their users not to be identified. *McVicker v. King*, 266 F.R.D. 92, 95-96 (W.D.Pa. 2010); *Enterline v. Pocono Medical Center*, 751 F. Supp.2d 782, 785-786 (M.D. Pa. 2008); *Matrixx Initiatives v. Doe*, 138 Cal. App.4th 872, 42 Cal.Rptr.3d 79 (Cal App. 6 Dist. 2006); *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 2000 WL 1210372 , *rev'd on other grounds sub nom. AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001)); and *In re Verizon Internet Services*, 257 F. Supp.2d 244 (D.D.C.2003), *rev'd on other grounds sub nom RIAA v v. Verizon Internet Services*, 351 F.3d 1229, 1239 (D.C.Cir.2003). *See also Mortgage Specialists v. Implode-Explode Heavy Industries*, 160 N.H. 227, 999 A.2d 184, 192 (2010) (allowing blog where anonymous comments were posted to defend anonymity rights of poster without mentioning standing issue); *Pilchesky v. Gatelli*, 12 A.3d 430, 437, 2011 Pa. Super 3 (Pa. Super. 2011) (same); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432, 456-457 (2009) (same, but it was a newspaper that was allowed to litigate rights of poster). Moreover, given the way Resnikoff uses the comments as part of his newsgathering effort, and the potential impact of compelled disclosure on his continuing ability to report the news, Resnikoff's own free speech rights are implicated by the requested discovery.

anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. As the Supreme Court said in *McIntyre*:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
> * * *
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.
>
> 514 U.S. at 341-342, 356.

California courts have squarely agreed that the First Amendment protects the right to speak anonymously, *Krinsky v. Doe 6*, 159 Cal. App.4th 1154, 72 Cal. Rptr.3d 231 (Cal. App. 6 Dist. 2008), and also held that the California Constitution provides its own independent support for this right. *Rancho Publications v. Superior Court*, 68 Cal. App.4th 1538, 81 Cal. Rptr.2d 274 (Cal. App. 4 Dist. 1999).

These rights are fully applicable to speech on the Internet. The Supreme Court has treated the Internet as a forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. Accordingly, First Amendment rights fully apply to communications over the Internet. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

Internet speakers speak anonymously for various reasons. They might wish to avoid having their views stereotyped according to their race, ethnicity, gender, or class characteristics. They might be associated with a group but want to express opinions of their own, without running the risk that, however much they disclaim attribution of opinions to the group, readers will assume that the individual speaks for the group. They might discuss embarrassing subjects and might want to say or imply things about themselves that they are unwilling to disclose otherwise. And they might wish to say things that might make other people angry and stir a desire for retaliation. As the California Court

of Appeal recognized in *Krinsky*, 159 Cal. App.4th at 1162, 72 Cal. Rptr. at 237,

> The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

Whatever the reason for wanting to speak anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions.

Moreover, at the same time that the Internet gives individuals the opportunity to speak anonymously, it creates an unparalleled capacity to monitor speakers and discover their identities. Speakers who send e-mail or visit a website leave behind electronic footprints that can, if saved by the recipient, provide the beginning of a path that can be followed back to the original senders. Thus, anybody with enough time, resources and interest, if coupled with the power to compel the disclosure of the information, can learn who is saying what to whom.

A court order, even if granted for a private party, is state action and hence subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). A court order to compel production of individuals' identities in a situation that threatens the exercise of fundamental rights "is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Abridgement of the rights to speech and press, "even though unintended, may inevitably follow from varied forms of governmental action," such as compelling the production of names. *NAACP v. Alabama*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-463; *Bates*, 361 U.S. at 524.

Due process requires the showing of a "subordinating interest which is compelling" where, as here, compelled disclosure threatens a significant impairment of fundamental rights. *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. Because compelled identification trenches on the First Amendment right of speakers to remain anonymous, justification for incursions on that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

In a closely analogous area of law, courts have developed a standard for the compelled disclosure of the sources of libelous speech, recognizing a qualified privilege against disclosure of otherwise anonymous sources. In such cases, many courts apply a three-part test, under which the person seeking to identify the anonymous speaker has the burden of showing that (1) the issue on which the material is sought is not just relevant to the action, but goes to the heart of the plaintiff's case; (2) disclosure of the source is "necessary" to prove the issue because the party seeking disclosure is likely to prevail on all the other issues in the case; and (3) the discovering party has exhausted all other means of proving this part of its case. *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972).

As one court stated in refusing to enforce a subpoena to identify anonymous Internet speakers whose identities were allegedly relevant to defend against a shareholder derivative action, "If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights." *Doe v. 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001). Similarly, in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999), the court expressed concern about the possible chilling effect of such discovery:

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate . . . . People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.

1. The Subpoena Cannot Be Enforced on the Theory That the Posts Are Actionable.

Several courts have enunciated standards to govern identification of anonymous Internet speakers for the purpose of suing them on the ground that their speech violates the plaintiff's rights under the law, whether it be tort, contract or statute. The first appellate decision in the country remains the leading case. In *Dendrite v. Doe*, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001), a company sued four individuals who had criticized it on a Yahoo! bulletin board. The court set out a five-part standard for cases involving subpoenas to identify anonymous Internet speakers for the purpose of

suing them as defendants:

> **1. Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
>
> **2. Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
>
> **3. Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant;
>
> **4. Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims; and
>
> **5. Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.
>
> *Id.* at 760-61.

A later case, decided by the Delaware Supreme Court, adopted the *Dendrite* standard but rejected the final, balancing stage. *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). The California Court of Appeals, Sixth District, followed *Cahill* in requiring the production of sufficient evidence to defeat a motion for summary judgment but not requiring the final, balancing stage. *Krinsky v. Doe 6*, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Cal.App. 2008).[2/]

Around the country, the full *Dendrite* standard remains the majority rule among state appellate courts that have reached the issue.[3/] Resnikoff recognizes that *Krinsky* is binding in this Court, and hence argues based on the *Krinsky*/*Cahill* standard, while reserving the right to ask the Second District Court of Appeal to consider the reasons for adopting *Dendrite*'s fifth, balancing stage in the event this subpoena issue reaches that Court. Moreover, since *Krinsky* was decided, the California legislature endorsed such protections for the anonymity of Internet speakers by amending the Code of Civil Procedure to provide for awards of attorney fees when subpoenas to identify anonymous speakers are quashed. Code of Civil Procedure, Section 1987.2(b).

[2/] *Accord Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009)*; In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

[3/] *In re Indiana Newspapers*, 963 N.E.2d 534, 549-553 (Ind. App. 2012); *Pilchesky v. Gatelli*, 2011 Pa. Super. 3, 12 A.3d 430 (2011); *Mortgage Specialists v. Implode-Explode Heavy Industries*, 160 N.H. 227, 999 A.2d 184, 192 (2010); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432, 456-457 (2009); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007).

Escape Media justifies its subpoena to identify the authors of the two anonymous comments by its contention that the comments are defamatory, and hence that Escape would be entitled to sue them for defamation. Its counsel's letters to Resnikoff suggest that anger about the statements made in the comments and the contention that they are defamatory does, in fact, provide the real reason for the subpoenas. But the allegedly defamatory character of the anonymous comments is not a sufficient basis for enforcing the subpoena. First, Escape has not, in fact, brought a defamation action against the author(s) of the two comments. And California does not allow pre-litigation discovery to obtain the identity of proposed defendants, California Code of Civil Procedure § 2035.010, and similarly does not allow foreign discovery in support of such an objective. Code of Civil Procedure § 2029.010. In *Christ v. Superior Court*, 211 Cal. 593, 296 P. 61 (1931), the California Supreme Court said that the only reason a trial court had jurisdiction to issue subpoena for pre-litigation discovery, on commission from a Guatemala court, was that the Guatemala proceeding was the same as what Code of Civil Procedure authorized within California. 296 P. at 596, 211 Cal. at 614. Consequently, even if the real reason Escape is pursuing this discovery is to counter online comments that it considers to be actionable defamation, this purpose for the subpoena cannot be considered until it brings a defamation action against the commenter, and obtains a commission for foreign discovery in support of that action.

Moreover, Escape has not come close to meeting the *Cahill*/*Krinsky* standard. Although it has set forth the entire statements on which it seeks to sue, it has not specified which particular sections of the statement it claims to be false—the statements are comprised of a mixture of non-actionable opinion and statements of fact that could be actionable if they are false. *Carver v. Bonds*, 37 Cal. Rptr.3d 480, 494-495, 135 Cal. App.4th 328, 346 (Cal. App. 1 Dist. 2005). Moreover, although its papers assert very loosely that the anonymous comments are false and defamatory, Escape's failure to file any complaint against the Does means that it has not even alleged that specific factual statements are false or that the false statements have caused damage, as required by *Global Telemedia Int'l v. Doe 1*, 132 F. Supp.2d 1261, 1270 (C.D. Cal. 2001). Moreover, as the defendant in a widely publicized series of lawsuits, Escape Media is at the very least an involuntary public figure, and hence is required to plead that any false statements about it were published with actual malice; but without

any complaint having been filed, Escape Media has not alleged actual malice. And to date Escape has not produced any evidence that particular statements about it are false. For all these reasons, the *Cahill* / *Krinsky* standard has not been satisfied.[4/]

Escape's memorandum in support of its motion to enforce the subpoena argues that the anonymous commenters' speech enjoys lesser protection under the First Amendment because the speech is "commercial," citing *Lefkoe v. Jos. A. Bank Clothiers*, 577 F.3d 240, 248 (4th Cir. 2009), but provides no basis for treating the comments as commercial speech—that is, "expression related solely to the economic interests of the speaker and its audiences," *id.* or "speech that proposes a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409 (2001). The mere fact that the speech criticizes a commercial entity, or might hurt its business, does not make speech commercial. *Bosley Medical v. Kremer*, 403 F.3d 672, 679 (9th Cir. 2005).

2. The Subpoena Cannot Be Enforced to Obtain Evidence to Defend the Existing Case.

If, however, Escape Media seeks to identify the anonymous commenters, without any reliance on their allegedly defamatory character, but only to obtain evidence for use in the current action, the leading case of *Doe v. 2TheMart.com*, *supra*, establishes the relevant test to be applied, which is akin to the First Amendment test for a subpoena for a reporter's sources. Under that test, once notice has been given to the anonymous commenters,

1. The subpoena must have been issued in **good faith**.
2. The information sought must **relate to a core claim or defense**.
3. The identifying information must be **directly and materially relevant to that claim or defense**.
4. Information sufficient to establish or to disprove that claim or defense must be **unavailable from any other source**.

140 F. Supp.2d at 1095.

In addition, "non-party disclosure is only appropriate in the exceptional case where the compelling

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[4/] The *Dendrite* balancing stage would provide an additional reason to deny enforcement of the subpoena. Assuming that they were, as they claimed employees of Escape at the time of posting, the commenters would face a serious risk of retaliation if their identities are disclosed; even if they have since left Escape's employ, they could face the risk of adverse job references or hostile communications to their current employers.

need for the discovery sought outweighs the First Amendment rights of the anonymous speaker." *Id.* Several subsequent courts have followed this test, including the United States District Court for the Eastern District of New York. *In re Rule 45 Subpoena Issued to Cablevision Systems Corp. Regarding IP Address 69.120.35.31*, 2010 WL 2219343, at *8-11 (E.D.N.Y. Feb 5, 2010), *adopted in relevant part*, 2010 WL 1686811, at *2-3 (E.D.N.Y. Apr. 26, 2010); *McVicker v. King*, 266 F.R.D. 92, 94-97 (W.D. Pa. 2010); *Sedersten v. Taylor*, 2009 WL 4802567, at *2 (W.D. Mo. Dec. 9, 2009); *Enterline v. Pocono Medical Center*, 751 F. Supp.2d 782, 787-788 (M.D. Pa. 2008). *See also Anderson v. Hale*, 2001 WL 503045, at *7-9 (N.D. Ill. May 10, 2001).

Escape Media's arguments do not meet this test. First of all, Digital Music News questions whether the continued effort to enforce the subpoena is undertaken in good faith. Even assuming that the original subpoena effort was proper, Escape Media has known for nearly four months that the file its seeking was discarded long before the subpoena was served, and it has given no reason whatsoever to doubt the veracity of that assertion.

Second, determination of the truth or falsity of the anonymous comments bears no reasonable relation to any core claim or defense in the New York litigation. For one thing, it is an open question whether the DMCA extends any immunity against claims of infringement of copyrights protected only under state law; until the New York state courts decide that question, it will not yet be certain that Escape Media enjoys such a defense at all. *See Capitol Records v. MP3tunes, LLC*, 821 F.Supp.2d 627, 640-642 (S.D.N.Y. 2011) (federal court says DMCA applies). Moreover, the anonymous comments are not admissible evidence—they are mere hearsay, and hearsay from an unknown person(s) at that. Because UMG cannot rely on the blog post as evidence, information about the truth or falsity of the post, or about the motives of the person who published the comments, will not help **Escape Media** prove its case or disprove UMG's case. And under the analogous situation of subpoenas to identify confidential sources, courts have held that the party seeking such discovery has to provide at least a prima facie basis for believing that the discovery will produce information supporting the discovering party's case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-8 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). At most, it is UMG Recordings that might be interested in identifying this individual to try to add him as a witness

in support of its case. There is no reason to believe that it has done so. And if it does, Escape Media can just notice the deposition of the person whose name has been provided by UMG. It will not need discovery from Resnikoff.

Moreover, the truth or falsity of the contention that employees engage in the uploading of copyrighted content without permission from the copyright holders, and do so with the knowledge of their supervisors, will be determined by discovery from those very individuals, not to speak of examination of Escape Media's own computer equipment. Until that discovery is completed, neither UMG nor Escape Media will have exhausted the other sources from whom discovery must be sought before the First Amendment rights of the anonymous commenter and of Resnikoff himself can be infringed. "An alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure." *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981), citing *Carey*, *supra*, 492 F.2d at 639.

Yet another reason not to enforce the subpoena is the fact that Resnikoff is not a party whose liability is sought to be enforced through discovery. As the Sixth District Court of Appeal said in *O'Grady v. Superior Court*, 139 Cal.App.4th 1423, 1468, 44 Cal.Rptr.3d 72, 107 (Cal. App. 2006), "Discovery is peculiarly appropriate when the reporter is a defendant in a libel action, because successful assertion of the privilege may shield the reporter himself from a liability he ought to bear." But Resnikoff is not a party to the litigation.

For all these reasons, the motion to enforce the subpoena should be denied because of the First Amendment protection for the anonymity of Internet speakers.

B. The Subpoena Should Be Quashed Because Its Enforcement Would Violate the Resnikoff's Rights as a Journalist.

The shield provision of the California Constitution, Article I, Section 2(b), provides as follows:

> (b) A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

The Sixth District Court of Appeals has squarely held that a blog like Digital Music News is a "periodical publication" within the meaning of the Shield Law, and that a journalist like Resnikoff, who regularly gathers news for publication on an Internet web site, is protected by the constitutional shield provision. *O'Grady v. Superior Court*, 139 Cal. App.4th 1423, 44 Cal.Rptr.3d 72 (Cal. Ct. App. 2006). Although Digital Music News has advised Escape Media that it does not have any written communications with UMG Recordings about either the anonymous comments themselves or, indeed, about Grooveshark in any other respect, if such documents existed, they would surely be covered by the Shield Law's protection against compelled disclosure of "any unpublished information obtained or prepared in gathering [or] receiving . . . information for communication to the public." Similarly, Resnikoff's affidavit submitted in this case shows that he regularly uses the comments posted to his stories in the course of his newsgathering activities—that he regularly interacts with anonymous individuals who post information there, and that he uses those postings both for story ideas and for pointers to factual issues that warrant further investigation. The comments come within the protection of the statute, and hence, even if he had retained any identifying information about those posters, they would literally be "sources" of that information. Consequently, the California Shield Provision protects Resnikoff against being compelled to disclose any such identifying information.

In moving to enforce its subpoena, Escape Media argued that *O'Grady* expressly distinguished the direct posting of information to an interactive message board from the provision of information to a journalist who then decides to what extent he should include that information in his own writing, Escape Media Brief at 8, *citing* 44 Cal. Rptr.3d at 91, 92. But in distinguishing the journalist's work from "the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group," the Court of Appeal did not say that such postings could **never** be covered by the Shield, but only that they **might** not be, 44 Cal. Rptr.3d at 99, thus leaving the question whether Shield coverage might be afforded in unique factual circumstances. Similarly, in distinguishing *Rancho Publications, supra*, which denied protection of the Shield to the identity of an advertiser, the Court of Appeal stressed that the subpoena recipient there "relinquished any newsgathering function, sold its editorial prerogatives to another, and acted as nothing more than a paid mouthpiece," 44 Cal. Rptr.3d at 98, unlike O'Grady whose work entailed

"dissemination of a particular kind of information to an interested readership. Toward that end, they gathered information by a variety of means including the solicitation of submissions by confidential sources." *Id.* Given the relationship between Resnikoff's own writing and the comments posted to his articles, the identification of the anonymous poster fits comfortably within the protection that the *O'Grady* case extends to online journalists. The same distinction applies to the New Jersey and Indiana cases that Escape Media cites in further support of its argument. *In re Indiana Newspapers*, 963 N.E.2d 534, 549-553 (Ind. App. 2012); *Too Much Media v. Hale*, 20 A.3d 364 (N.J. 2011).

California's constitutional Shield Provision provides an absolute protection against discovery, but Resnikoff is also entitled to invoke the journalists' qualified privilege under the free speech provisions of the First Amendment and the California Constitution, Article I, Section 2(a). *O'Grady*, 139 Cal. App.4th at 1466-1480, 44 Cal. Rptr.3d at 105-116; *Mitchell v. Superior Court*, 37 Cal.3d 268, 208 Cal. Rptr. 152, 690 P.2d 625 (1984). Because the factors applied to determine the balancing test under this protection closely resemble the balancing test adopted by *Doe v. 2theMart.com, supra*, and argued in the previous section of this brief, *supra* at 13-15, Digital Music News incorporates that argument by reference here and asks that enforcement of the subpoena be denied, and its motion to quash be granted, on that ground as well.

Indeed, the continued pursuit of the subpoena in this issue, even though Digital Music News has told Escape Media's counsel that it has no documents responsive to the subpoena, appears to be no more and no less than an effort by a company to punish a journalist whose reporting it does not like. Escape Media has provided no reason to believe that Digital Music News has any responsive documents; even if Digital Music News were a **party** to the underlying litigation in New York, that denial should have been the end of the matter. But Digital Music News is not a party; it is a third party that lacks any information that could help Escape Media in the defense of the litigation. There is no basis for any further imposition on this third party.

CONCLUSION

The petition to enforce the subpoena should be denied.

Respectfully submitted,

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May 8, 2012