No. B242700

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION ONE

IN MATTER OF SUBPOENA IN UMG RECORDINGS

Plaintiff and Appellant,

v.

DIGITAL MUSIC NEWS LLC,

Defendant and Appellant.

Appeal from An Order Enforcing a Subpoena Emanating from Another State
Of the Superior Court, County of Los Angeles, No. SS022099
Hon. Richard Stone, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

This appeal presents one of many important questions in a debate about the relative importance of potential evidence in private money litigation versus the free public flow of information in 21st century electronic media. This appeal is about how litigation strategies burden the free flow of information by intruding in witnesses' electronic trash. By declaring that there is no civil liability for throwing out physical evidence in old-fashioned trash, the California Supreme Court has at least hinted at how to resolve the much more serious concern about impairing public information flow. (*Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 466.) That is, the public interest prevails over burdensome invasions of media service providers' information systems when the invader fails to show an important need for predictably extant and useful data. The superior court erred by allowing Escape Media Group (Escape) a burdensome invasion of the servers of Digital Music News (Digital) without showing any of: (i) the need was important enough to justify the burden; (ii) data meeting the need probably exists; and (iii) the probably extant data would be in a useful condition. The RB fails to defend the discovery orders effectively.

Despite the importance if this appeal, the RB contains much aggressive personal language. (See *Bennett v. State Farm Mut. Auto. Ins. Co.* (6th Cir., Sept. 24, 2013, No. 13-3047) ___F.3d ___, 2013 U.S. App. LEXIS 19494, *1.) In this brief, Digital replies only to Escape's limited legal arguments.

DISCUSSION

I. The Orders Below Should Be Reversed Because Escape Did Not Make the Showings Required To Justify Forensic Examination of Digital's Servers for Deleted Identification Data, and Absent Such a Justified Forensic Examination Order There Was No Compliance To Compel Because Digital Searched Its Files and Found No Responsive Information

In its opening brief, Escape argued that, in entering the discovery order under appeal, the superior court ignored the key distinction between discovering existing files and discovering deleted data. (AOB 27-35.) Digital's technical staff testified that IP addresses that could be used to identify the posters of anonymous comments on its web site are routinely overwritten within a few days after they are logged and that, over the six months between Escape's first request for preservation of any identifying data and the ruling on the motion to compel compliance with the subpoena, repeated searches of Digital's existing files had turned up no data responsive to the subpoena. (2 AA 237, 276, 278.) Because the subpoena sought deleted data, the superior court should have conformed its rulings to the operative discovery principle, drawn from both federal and state case law as well as the well-respected Sedona Principles Addressing Electronic Document Production (2d. ed. 2007) from which both federal and state e-discovery rules have been developed: just as in the paper world a subpoena recipient is not required to go through its trash to look for responsive documents,

in the electronic world a subpoena recipient is not required to undertake heroic measures to look for deleted data. (AOB 27-35.)

This is the proper rule despite the fact that electronically deleted data can, in theory, sometimes be recovered through a forensic examination of the unallocated blocks of computer equipment such as the servers on which Digital stores its web site. (AOB 27-35.) Because such forensic examinations are costly and extremely intrusive, requiring the computers to be taken offline while they are being preserved or searched (see AOB 27-28), courts impose those burdens only when there is reason to believe that a party has disregarded its discovery obligations or deliberately deleted relevant data to avoid liability, rather than simply deleting data in the ordinary course of business. (AOB 27-32.) Even then, forensic examinations are ordered only when the court has been given reason to believe that relevant forensic data could, in fact, be recovered. (AOB 30.) And most important, Digital showed that in every state and federal decision ordering a forensic examination, a *party* was subjected to those burdens; there is not a single case in which a non-party witness had its computer equipment subjected to a forensic examination or the preservation procedures require to facilitate such an examination. (AOB 27-33.)

In the RB, Escape never argues that the discovery orders it obtained are consistent with the Sedona Principles, it never identifies a case in which a non-party witness was subjected to forensic examinations, and it never identifies a case in which a party was subjected to forensic examination absent evidence that

it had either flouted its discovery obligations or deliberately deleted relevant evidence to avoid an adverse legal ruling. The failure to meet these arguments is enough to require reversal.

What Escape does argue is that various federal decisions on which Digital relies are distinguishable. For example, Escape objects (RB 29-30) to Digital's reliance on *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 217 F.R.D. 309 (*Zubulake*) and its federal court progeny because *Zubulake* supposedly distinguished between existing and deleted data only for the purpose of deciding whether the cost of further searching should be shifted to the party seeking discovery. This argument errs—*Zubulake* reached the cost shifting issue only after concluding that relevant materials were likely located in the electronic backup tapes on which the discovery target had stored deleted data. (*Id.* at pp. 216-217; see also *Playboy Enterprises, Inc. v. Welles* (S.D. Cal. 1999), 60 F.Supp.2d 1050, 1054-1055; *Jimena v. UBS AG Bank* (E.D. Cal. Aug. 27, 2010, No. 1:07-cv-00367-OWW-SKO) 2010 WL 3397431, *4 [denying discovery where subpoena recipient said that searches would not likely yield relevant results].)

Similarly, in *Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762 (*Toshiba*), the court said that the parties should have to meet and confer to determine whether the relevant tapes are likely to yield relevant data. And in *Boeynaems v. LA Fitness Internat. LLC* (E.D. Pa. 2012) 285 F.R.D. 331, 336, the court noted that under the relevant federal rule, discovery of deleted data should not be ordered unless the party seeking discovery shows good cause; California's electronic

discovery statute imposes a similar condition. Surely good cause must be more than simply that the data sought to be discovered is relevant or necessary; after all, that is the standard for compelling any discovery. Good cause to pursue deleted data surely includes reason to believe that the deleted data would contain relevant information that would likely be accessible in a forensic examination.

In this regard, Escape argues that it is unfair to impose on it the burden of showing that the deleted data is likely to yield relevant material because Digital knows its own equipment. (RB 33.) However, after Digital's technical staff testified that the data would not likely be retrievable, the trial court gave Escape access to Digital's experts, ordering precisely the sort of meet and confer that the *Toshiba* court ordered. (2 AA 387, 389, 401) After the meet and confer, Escape still could not offer any testimony that retrieval of relevant data was likely. In contrast, the discovery parties in such cases as *Welles* and *Zubulake* were able to make a showing that retrieval was likely, based on circumstantial evidence. (*Playboy v. Welles*, *supra*, 60 F. Supp.2d at pp. 1053, 1054-1055 [finding it likely based on plaintiff's own testimony that relevant emails had been on computer, but requiring submission of additional, expert affidavit establishing likelihood that deleted emails could be recovered]; *Zubulake v. UBS Warburg*, *supra*, 217 F.R.D. at p. 317 [finding likelihood from evidence that plaintiff produced copies of emails to and from defendant that defendant did not produce].) Finally, given the burdens that forensic examination imposes on a subpoena

recipient, it is only fair that a discovering party should not be allowed such heroic measures unless there is reason to believe that the imposition would be productive. (*Welles*, 60 F. Supp.2d at p. 1054; Sedona Principles, comment 5(e), page 33.)

Escape also argues that Digital is wrong to rely on federal case law, because this case arises under California's electronic discovery statute, section 1985.8 of the Code of Civil Procedure. But California cases such as *Toshiba* rely on federal case law governing electronic discovery See, e.g., *Toshiba*, *supra*, 124 Cal.App.4th at p. 773, citing *Zubulake*, *supra*, 217 F.R.D. 309), and Escape never points to differences between section 1985.8 and the federal rules that would make federal decisions an inapt guide in construing the state statute.

Moreover, in arguing against Digital's reliance on the California e-discovery statute, Escape ignores Code of Civil Procedure section 1985.8, subdivision m(1), which Digital cited at page 31 of the AOB. Instead, Escape discusses section 1985.8, subdivision (e) (RB 33), which gave Digital the burden of showing that the information sought is from a source not reasonably accessible (that is, it is deleted data). But Digital met that burden by showing that its technical staff had searched existing files for identifying data and had found none.

Escape objects to Digital's reliance on the significant burdens imposed on its business by the trial court's preservation orders, coupled with Escape's procrastination in deciding just what degree of forensic examination it would demand and what forms of preservation it would be willing to finance, arguing that

those burdens are now sunk costs that cannot be undone by reversal of the discovery orders below. This argument misses the mark. The appeal from the order authorizing a forensic examination is not moot, despite Escape's earnest efforts below to moot that appeal by insisting that the inspection occur without any stay pending appeal. The burdens to which Digital has pointed should be considered by this Court because they support adoption of the legal standard that Digital advocates to govern orders for preservation and forensic examination of computer equipment and of the servers on which online providers maintain their web sites. What happened to Digital below is typical of what a decision affirming the order below would do to the many technology companies throughout this state that host anonymous comments but discard identifying information when they no longer have good business reasons to store that data.

Escape also argues that any burdens Digital bore were the consequence of Digital's voluntary preservation efforts. (RB 35.) It is true that it was not until July 26, 2013 that the court below entered a written preservation order. But the court's oral preservation orders, that Digital avoid further overwriting of deleted data, were clear and unmistakable. (AA 365, 366, 367; see also AA 386 [Escape's counsel asks court to "continu[e] the order for the moment that nothing be destroyed"].) Nor is there any doubt that, if Digital had not repeatedly assured the court below that it was honoring the court's oral orders (see, e.g., AA 236-237, 392-393, 404), the court would have immediately entered a written order compelling preservation of the physical servers

pending the development of a final order governing preservation and inspection. Nor has Escape taken issue with the showing made below that the preservation burdens that Digital incurred were needed to minimize the overwriting of data pending finalization of the preservation and inspection order and appeal. (AA 236-237, 238. 243-245.)[1]

Consequently, the burden argument, as well as the authority cited *ante* and in Digital's opening brief, provide ample reason to reverse the orders below.

II. The Order Compelling Compliance with the Subpoena Should Be Reversed Because Escape Did Not Make the Showings Required by the First Amendment

In its opening brief, Digital argued that the initial discovery order below, requiring Digital to comply with the subpoena for information identifying Visitor, should be reversed because Escape had neither shown that it was entitled to the information to enable it to sue Visitor for defamation, nor shown that it could meet the test for obtaining identifying information as evidence to use against the existing parties in its New York State litigation. (AOB 38-51.) The RB apparently disclaims reliance on any contention that Escape is entitled to the discovery

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[1] Escape also accuses Digital of overstating the threat it faced below, challenging Digital to provide citations to the record showing that it was threatened with criminal or civil sanctions for spoliation or contempt. In fact, Escape's local counsel, Edward McPherson, made repeated claims of sanctionable spoliation, (2 AA 366, 375-376) and the trial judge recognized that these arguments were being made, going out of his way to say that he saw nothing of the sort happening. (AA 404)

to enable it to sue the Anonymous Commenter; it characterizes the decision below as resting solely on Escape's quest for evidence for use in support of its Digital Millenium Copyright Act (DMCA) immunity defense to the state-law infringement claims. (RB 16.) But at the same time, Escape does not argue that it can meet the First Amendment requirements for discovery of identifying information for use as evidence against the existing parties; instead, it argues that it should not have to meet that test because, having established a prima facie case that Visitor's statements about it are false and defamatory, and Visitor therefore enjoys no First Amendment protection for his speech, citing such cases as *Krinsky v. Doe No. 6* (2005) 159 Cal.App.4th 1154, and *Beauharnais v. Illinois* (1952) 343 U.S. 250, 266.

The significant flaw in this argument is that Escape has not shown that the Anonymous Comments are unprotected by the First Amendment. Just last year, the Supreme Court decided that the mere fact that speech is false does not deprive it of all First Amendment protection. (*United States v. Alvarez* (2012) ___ U.S. ___, 132 S. Ct. 2537, 2545.) Specifically addressing the issue of falsity in the defamation context, the court held that allegedly defamatory speech is deprived of First Amendment protection only if the plaintiff can establish that the false speech was published with actual malice. (*Id.* at p. 2545.) To be sure, if the information is sought to identify a defendant who has already been sued for defamation, the balancing test in such cases as *Krinsky v. Doe No. 6, supra*, 159 Cal.App.4th 1154, and *Dendrite Internat., Inc. v. Doe, No. 3* (N.J. App. Div. 2001) 342 N.J. Super.

134, 775 A.2d 756, allows identification without proof of actual malice. But lack of evidence of actual malice is excused not because the speech has been found lacking in First Amendment protection, but because when the justification for discovery is to identify a specific defendant so that he or she can be served with process, courts deem it sufficient to allow identification based on a showing of only those elements of a prima facie case that are likely to be within the grasp of a defamation plaintiff that has not yet had the opportunity to take discovery. (*Doe v. Cahill* (Del. 2005) 884 A.2d 451, 464.) Here, however, Escape has disclaimed reliance on discovery to identify a potential defendant; it cannot rely on the fact that it met part of the prima facie case requirement—averring the falsity of the Anonymous Comments—to evade the requirements of a different First Amendment test, the test for identifying speakers to provide evidence for use in existing litigation against other parties.

To meet that test, as argued in the AOB at pages 45-51, Escape has to show both that it needs the evidence to support a core claim or defense, and that it has exhausted other means of establishing that claim or defense. Not only has it not shown alternate means (AOB 48-50), but developments in its state court litigation show that DMCA immunity is not even a viable defense. While this appeal was pending, the Appellate Division reversed the decision of the New York Supreme Court, which had upheld the viability of DMCA immunity as a defense to the infringement of state-law copyrights. (*UMG Recordings v. Escape Media Group* (N.Y.App. Div. 2013) 107 A.D.3d 51, 964 N.Y.S.2d

106.) The Appellate Division held that DMCA immunity applies only to copyright claims under federal law, for sound recordings made on or after February 15, 1972. (964 N.Y.S.2d at pp. 111-112.) Thus, even if an anonymous Internet comment were admissible to support the assertion that Escape deliberately uploads copyrighted sound recordings, and hence forfeits its claim to DMCA immunity—itself a highly questionable evidentiary proposition—DMCA immunity is no longer a viable defense in the state-court proceeding that the subpoena to Digital was intended to assist. Consequently, DMCA immunity is no longer a core defense that supports enforcement of the subpoena at a cost to the rights of the anonymous speaker. For this reason, as well as the other reasons presented in Digital's opening brief, the order compelling Digital to produce whatever IP information might be found in the unallocated blocks of its virtual server should be reversed.

CONCLUSION

The orders enforcing the subpoena, and commanding Digital to preserve its servers and make them available for forensic inspection, should be reversed with directions to enter a new and different order denying enforcement.

Respectfully submitted,

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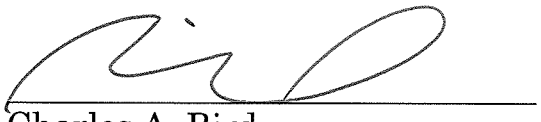
CERTIFICATE OF COMPLIANCE

I, Charles A. Bird, appellate counsel to Digital Music News, LLC, certify that the foregoing brief is prepared in proportionally spaced Century Schoolbook 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 2,808 words long.



Charles A. Bird

PROOF OF SERVICE

IN THE MATTER OF SUBPOENA IN UMG RECORDINGS v. DIGITAL MUSIC NEWS, LLC.
Court of Appeal, Second Appellate District, Division One, Case No. B242700, c/w B243623
Los Angeles Superior Court, Case No. SS022099; Judge Richard A. Stone

I, Renee M. Evans, declare as follows: I am employed with the law firm of McKenna Long & Aldridge LLP, whose address is 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen years, and am not a party to this action. On **October 1, 2013**, I served the foregoing document described as:

APPELLANT'S REPLY BRIEF

[X] **U. S. MAIL:** I placed a copy in a separate envelope, with postage fully prepaid, for each addressee named below for collection and mailing on the below indicated day following the ordinary business practices at McKenna Long & Aldridge LLP. I certify I am familiar with the ordinary business practices of my place of employment with regard to collection for mailing with the United States Postal Service. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit or mailing affidavit.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed at San Diego, California on **October 1, 2013**.

Renee M. Evans

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