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February 18, 2014

Mr. Joseph A. Lane, Clerk
California Court of Appeal, Second Appellate District
Second Floor, North Tower
300 South Spring Street
Los Angeles, California 90013

Re: *In re Matter of Subpoena in UMG Recordings*
Case No. B242700

Dear Mr. Lane:

This letter brief responds on behalf of appellant Digital Music News LLC (“DMN”) to the Court’s January 31, 2014 request for letter briefs addressing the application of section 2017.010 of the Code of Civil Procedure and of the balancing test required under the California Constitution’s right of privacy.

Section 2017.010

DMN contends that the requested discovery into the anonymous commenter’s identifying information is not reasonably calculated to lead to the discovery of admissible evidence in the underlying case pending in the New York state courts, for two reasons. First, although defendant Escape Media Group originally argued that it needed to identify the commenter in order to rebut the contention that it has forfeited its immunity from liability for state-law copyright infringement pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, the New York Supreme Court’s Appellate Division has stricken Escape Media Group’s DMCA immunity defense, because the DMCA created immunity only from federal copyright liability, not from liability under state law that applies to pre-1972 sound recordings. (*UMG Recordings v. Escape Media Group* (N.Y.A.D. 1 Dept. 2013) 107 A.D.3d 51, 964 N.Y.S.2d 106.) Escape also argued below that it needed to identify the commenter so that it could rebut UMG Recordings’ reliance on the anonymous comment as evidence of deliberate uploading of copyrighted material; the superior court agreed with this argument on the theory that an anonymous online comment might be admitted under the catch-all exception to the hearsay rule. (2 AA 361-363.) However, the

very fact that a comment is posted anonymously, with no identifying information, belies any contention that such comments have sufficient indicia of reliability to warrant admissibility. Finally, Escape argued below that it wants to identify the anonymous commenter in the hope that it will eventually be able to prove that the commenter is an employee of plaintiff UMG Recordings, so that the identifying information will support its counterclaim against UMG Recording for deliberately interfering in Escape Media's business. This sort of speculative argument turns the discovery into a fishing expedition that does not justify discovery from a third-party witness. Further, because Escape Media has never sued the Doe for defamation, and because the statute of limitations for defamation claims, in New York as in California, is one year, no claim can be brought against the individual anonymous commenter. (See Code Civ. Proc., § 340, subd. (c); N.Y. C.P.L.R. § 215(3).)

Second, the requested discovery is not reasonably calculated to lead to the discovery of admissible information because the expert testimony below indicates that it is highly unlikely that identifying information will be discernible in the unallocated blocks of the virtual servers, which is the only information that has been preserved for forensic examination under the trial court's orders below, in light of Escape's unwillingness to pay for a new set of servers for DMN, and for the cost of mirroring DMN's existing servers so that the old physical servers could be preserved for forensic examination. (See, e.g., 2 AA 237, 259-260, 275-276, 278-279, 291-304, 310-311.) The expert testimony below also established that, even if some fragment of identifying information might be discovered, it would be too uncertain that the identifying information could be linked reliably to particular comments posted to the DMN web site. (See, e.g., 2 AA 237, 275-276.) But without a reliable link, the identifying information would not be admissible to show either the liability of the online commenter or indeed of his or her employer. On balance, then, the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence.

California's Constitutional Right of Privacy

Because the anonymous commenter chose to post his comment without providing his name, or indeed any of his other identifying information apart from the assertion that he was formerly employed by Escape Media Group, the subpoena seeking his identifying information would invade the commenter's right of privacy under the California Constitution. The balancing test set forth in such cases as *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-375, and *Hill v. National Collegiate Athletic Assn.* (1994), 7 Cal. 4th 1, 36-37 supports DMN's appeal against enforcement of the subpoena. First, the anonymous commenter has a reasonable expectation of privacy in his identifying information. The First Amendment protects the right to speak anonymously (see, e.g., *McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 342, AOB 38-40), and DMN allows its readers to post anonymously, without providing *any* information about themselves (2 AA 278). Moreover, partly because it has no business use for Internet Protocol ("IP") addresses but also because it wants to safeguard its users' privacy, DMN deliberately exposes IP addresses recorded temporarily on its servers to frequent overwriting. (2 AA 259-261, 278.) These background facts provide the users who post

comments on DMN's stories with a significant and highly reasonable expectation of privacy. The use of subpoenas to obtain that information works a serious invasion of that privacy, and the potential justifications for obtaining that information, canvassed in the previous section of this brief, are weak. The online commenters' constitutional right of privacy provides an additional reason for overturning the discovery order below.

There is a second respect in which the constitutional right of privacy is implicated on this appeal. Although corporations do not, strictly speaking, have a right of privacy under article I section 1 of the California Constitution, an individual company "may still have limited right to privacy dependent upon its 'nexus' with human beings and 'the context in which the controversy arises.'" (*420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1348; *Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260, 1288.) DMN is the corporate form through which Paul Resnikoff conducts his journalism business (2 AA 278), and as a journalist he has an intense interest under both the First Amendment and the California Shield Law in protecting his sources and unpublished information, and in preventing the targets of his articles from conducting fishing expeditions that roam through his discarded files. When he chooses to overwrite data that is no longer needed, Resnikoff has a strong privacy interest in protecting his computer equipment from being seized to enable forensic inspections to determine whether there might be data relevant to litigation to which he is not a party.

The Sedona Principles discussed in the principal brief generally protect non-party witnesses against having to look through their trash to determine whether deleted information might contain discoverable information, but those privacy interests are accentuated when the third-party witness is a journalist. Given the harm caused to DMN and Resnikoff by the preservation efforts as shown by the evidence below, and the limited likelihood that the demanded inspection will lead to the discovery of admissible information, the balancing test required under the California Constitution's right of privacy protects against enforcement of the subpoena as ordered by the court below.

Respectfully yours,



Paul Alan Levy

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By: Charles A. Bird