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4 As owner/publisher
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10 **SUPERIOR COURT OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES**

12 ARISTA MUSIC, ARISTA
13 RECORDS LLC, ATLANTIC
14 RECORDING CORPORATION,
15 ELEKTRA ENTERTAINMENT
16 GROUP INC, LEFACE RECORDS
17 LLC, SONY MUSIC ENTER-
18 TAINMENT, UMG RECORDINGS
19 INC, WARNER BROS. RECORDS
20 INC, and ZOMBA RECORDING LLC.
21 Plaintiffs

22 v.

23 ESCAPE MEDIA GROUP INC,
24 SAMUEL TARANTINO, JOSHUA
25 GREENBERG, PAUL GELLER,
26 BENJAMIN WESTERMANN-CLARK,
27 JOHN ASHENDEN, CHANEL MUNEZERO
28 and NICOLA ARABADJIEV
Defendants
New York Action 100152/2010; 11 Civ. 8407
(TPG)(KNF)

CA Case No. SS022099

[Assigned for all purposes to:
Hon. Richard A. Stone –
Dept WE-X]

Response and Memorandum of Law
of Digital Music News With Regard to
Petition to Enforce Subpoena of
Escape Media Group Inc

27 I, Paul Resnikoff, appearing *pro se* as owner/proprietor of the daily publication Digital
28 Music News, submit this Response and Memorandum of Law with Regard to the

1 Petition of Escape Media dated March 20, 2012 seeking to enforce its out-of-state third
2 party Subpoena against my company. By signing this document I declare under penalty
3 of perjury under the laws of California that the facts stated here are true.

4 **Summary of Response**

5 The main points of the Response of Digital Music News to the Petition to Enforce
6 are these:

7 o Petitioner Escape Media misleads this court concerning the need for Subpoena
8 enforcement. It says to this Court that a subpoena seeking information from Digital
9 Music News concerning observations of an anonymous commenter is important to its
10 defense of the New York State action brought by UMG and others against Escape and
11 others. Yet Escape has argued the opposite to the New York Court in its recent motion
12 to dismiss (which it omits in its submissions here). It argues in New York that the
13 anonymous comments have no significant evidentiary weight. The New York Court may
14 well agree with Escape's New York argument. For that reason it makes little sense for
15 Escape to ask this Court to decide that Escape needs to enforce a third party subpoena
16 concerning anonymous comments, since the New York court may, as Escape

17 requested, decide that the anonymous comments have no evidentiary significance.
18 o Escape Media argues that the anonymous commenter defamed Escape-
19 Grooveshark, but Escape brings no defamation action to this Court, only a request for
20 subpoena enforcement to aid its New York case. There is no defamation in any event,
21 only the anonymous commenter's public observations supporting highly publicized and
22 litigated complaints about Escape-Grooveshark's business conduct.

23 o Since there is no legitimate purpose for Escape to enforce the Subpoena, the
24 main effect of subpoena enforcement would be to chill exercise of First Amendment
25 rights and journalists' privilege, impose great burdens and expense on Digital Music
26 News, and put the anonymous commenter at personal risk. If subpoena enforcement
27 revealed that the commenter is an Escape-Grooveshark employee, that revelation
28 would *add* evidentiary weight to the comments and would hurt Escape in the New York
litigation, not help, but it would permit Escape-Grooveshark to retaliate against the
commenter for being a whistleblower.

1 o Escape has marshaled prestigious attorneys and provided many, many pages
2 of argument to dispute important journalistic and free speech protections. Simply
3 stated, the right to publish anonymous comments should be protected.

4 Furthermore, I believe that the right of an individual to post anonymous comments
5 taking a position about a hotly debated public controversy should also be protected.

6 o Petitioner argues that as attorney *pro se* I have made procedural errors,
7 particularly in not pursuing a motion to quash. I did not pursue the motion to
8 quash after realizing that Petitioner had never served the Subpoena as required by
9 California law, and never started a California action prior to the Petition filed just
10 recently. Rather than my initiating a California action with a motion to quash, which
11 involves a filing fee of more than \$300, I decided to rely on the statement of objections
12 that I had served by mail in January (Escape Petition Exhibit C). I have not waived and
13 do not waive proper service of the Subpoena as required by California law

14 o Subpoena enforcement is likely to be expensive and burdensome to my very
15 small company, and fruitless. Digital Music's repeated public position is that it does not
16 retain information that would allow identification of anonymous commenters. The cost
17 and burden of subpoena enforcement to me and my small company is not balanced by
18 any legitimate need for information.

19 **1. The Petition fails to establish the need for Subpoena enforcement**

20 a. The Petition's allegations of evidentiary need are disingenuous. Petitioner says
21 that the Subpoena will yield evidence that Escape needs in the New York litigation
22 charging Grooveshark with illegal use of copyrighted material. Escape's position here is
23 that the anonymous commenter statements could be offered into evidence against
24 Escape by Plaintiff in the New York action. And, in order to defend in New York, Escape
25 must establish the identity of the commenter. But in its motion to dismiss filed on
26 February 29, 2012 in the New York action (conspicuously missing from the voluminous
27 submissions on the New York action provided to this California Court, but attached
28 here) Escape argues the opposite:

1 "The content of the Anonymous Comment is implausible on its face." Escape
2 Motion to Dismiss, page 12.

3 "[E]ven if the content of the Anonymous Comment was plausible (and it is not),
4 plaintiffs do not allege any facts that endow these anonymous hearsay assertions with
5 even the barest trace of reliability." Motion to Dismiss, page 12.

6 "The Courts in this District [in New York] have consistently disregarded
7 allegations based on anonymous sources when a plaintiff provides no factual
8 allegations to bolster the reliability of such sources." Motion to Dismiss, page 13
9 See Case 1:11-cv-08407-TPG Document 23 [Escape's Motion to Dismiss] Filed
10 02/29/12,
11 http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/arista_escape_120229Deft
12 [GroovesharkMemoMotDismiss.pdf](#)

13
14 The Court in New York may well agree with Escape's position there that the
15 anonymous comments addressed in the Petition here in California should be
16 "disregarded." So, what Petitioner Escape seeks from this California Court is subpoena
17 enforcement to secure information concerning an anonymous commenter with regard to
18 evidence that the Court in New York may soon decide should be disregarded.

19 b. The Subpoena seeks much information that could easily be obtained from
20 plaintiffs. As pointed out in the statement of objections sent to Escape attorneys in
21 January, communication between UMG and Digital Music News involves information
22 that Escape is presumably seeking directly from UMG, a plaintiff in the New York
23 litigation. That makes it unnecessary for Escape to inappropriately harass Digital Music
24 News for the same information.

25 The lack of good purpose for subpoena enforcement suggests bad ones,
26 including inflicting extremely intrusive and punitive burdens on a small company, despite
27 the conflict with the public policies embodied in the California reporter shield law, and
28 the First Amendment right of free speech. As noted in Escape's papers, an officer

1 of Escape-Groovespark, Paul Geller, explained publicly that a reason for the subpoena
2 request is that Digital Music News is engaged in a conspiracy with a New York action
3 plaintiff. That is ridiculous, and not a good reason for subpoena enforcement.

4 **2. Vaguely alleged defamation is not a basis for Subpoena enforcement**

5 Petitioner makes much of its supposed claims against the anonymous
6 commenter as a defamer. But, there is no action before this Court asserting a
7 defamation claim, only a flawed request to obtain evidence for a New York action. Even
8 if the purpose of the Subpoena were to be found in a hypothetical law suit by Escape-
9 Groovespark independent of the Petition to Enforce and the pending New York action, it
10 is not at all clear what the basis of the Subpoena would be. An independent action
11 against the anonymous commenter would need to survive both the California shield law
12 discussed later, and the First Amendment rights of speech, as well as the Code of Civil
13 Procedure section 425.16, California's anti-SLAPP law. With regard to the anti-SLAPP
14 law, as a plaintiff in a hypothetical case suing a commenter, Escape-Groovespark would
15 need to deal with the facts that the anonymous statements were made in a public forum
16 about a matter of public interest (Groovespark's hotly debated unauthorized use of
17 copyrighted materials), and caused no damage (the comments are anonymous and
18 similar to more ordinary and persuasive available information on the same point, as
19 alleged in UMG's New York lawsuit). Likely the hypothetical Escape-Groovespark suit
20 against the commenters would be found meritless on its face.

21 **3. The Main Effect of Subpoena enforcement would be to chill free speech**

22 An important part of the business model of Digital Music News and many other
23 publications involves embracing the wide body of information offered by the thousands
24 of professional executives, performing musicians, and experts, while offering them
25 protections to facilitate the safe and unfettered access to this information. Many times,
26 information shared on our site can only be shared anonymously – or not at all –
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1 but it is nonetheless critical to the people that read us every day. They rely upon the
2 insights and information that can only come from an open forum. It is our belief that
3 these opinions and information must be shared as part of an open, free exchange. The
4 free exchange must be free of a hovering and chilling threat from Escape-GroovesHark
5 or others who want to “out” whistleblowers. That involves core principles important to a
6 free press.

7 In brief, we rely on the California journalists Shield Law and the First Amendment
8 to the U.S. Constitution to protect Digital Music News’ rights, as well as the rights of the
9 anonymous commenter targeted by the Subpoena. In addition, we think California’s
10 anti-SLAPP laws protect commenters.

11 Great principles are at stake here. We believe that the California Constitution
12 shields journalists like me and others at Digital Music News from being required to
13 disclose the information Escape seeks. Cal. Const., art. I, § 2(b). Originally enacted as
14 Section 1070 of the Evidence Code, the people of California elevated the shield to
15 constitutional status in 1980, illustrating the voters “intention to favor the interests of the
16 press in confidentiality over the general and fundamental interest of the state in having
17 civil actions determined upon a full development of material facts.” *Playboy Enters., Inc.*
18 *v. Superior Court*, 154 Cal.App.3d 14, 27 - 28 (1984).

19 The Constitutional reporter’s shield provides that:

20 A publisher, editor, reporter, or other person connected with or employed upon a
21 newspaper, magazine, or other periodical publication, or by a press association or wire
22 service, or any person who has been so connected or employed, shall not be adjudged
23 in contempt by a judicial, legislative, or administrative body, or any other body having
24 the power to issue Subpoenas, for refusing to disclose the source of any information
25 procured while so connected or employed for publication in a newspaper, magazine or
26 other periodical publication, or for refusing to disclose any unpublished information
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1 obtained or prepared in gathering, receiving or processing of information for
2 communication to the public. Cal. Const., art. I, § 2(b).

3 The 2006 California Court of Appeals case *O'Grady v. Superior Court* 44 Cal.
4 Rptr. 3d 72 (Cal. Ct. App. 2006) extends shield protections to publications like Digital
5 Music News. See [http://www.rcfp.org/first-amendment-handbook/4-confidential-sources-
6 and-information/internet-issues-reporters-obligation](http://www.rcfp.org/first-amendment-handbook/4-confidential-sources-and-information/internet-issues-reporters-obligation), which contains the following
7 discussion: “[T]he California Court of Appeals in 2006 interpreted the term ‘magazine or
8 other periodical publication’ in the state’s Shield Law to include two websites devoted to
9 news and information about Apple Macintosh computers and related products. In
10 allowing the defendant-bloggers to invoke the shield law as protection from compelled
11 disclosure of the identities of anonymous sources who leaked confidential trade secrets
12 about soon-to-be-released Apple products, the court concluded that the online
13 publishers’ activities “constitute[d] the gathering and dissemination of news, as that
14 phrase must be understood and applied under our shield law.”

15 The *O'Grady* case is also discussed in a 2010 article found at
16 <http://www.tandfonline.com/doi/pdf/10.1080/08838151.2010.519809>

17 The article is called **Blogging and Journalism: Extending Shield Law Protection to**
18 **New Media Forms**, by Sharon Docter Ph.D. and J.D.

19 The journalists’ shield protection is absolute. The journalists’ immunity cannot be
20 overcome even “by a showing of need for unpublished information.” see *Miller v.*
21 *Superior Court*, 21 Cal.4th 883, 890 (1999) (“The shield law is, by its own terms,
22 *absolute. . .*”

23 The journalists of Digital Music News are also entitled to the Federal First
24 Amendment privilege. The California Supreme Court has held that under the First
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1 Amendment, "in a civil action a reporter, editor, or publisher has a qualified privilege to
2 withhold disclosure of the identity of confidential sources and of unpublished information
3 supplied by such sources." *Mitchell v. Superior Court* 37 Cal.3d 268 , 208 Cal.Rptr. 152;
4 690 P.2d 625 (Cal. Sup. Ct. 1984) (applying qualified constitutional immunity rather than
5 shield law to allow newsmen to withhold identity of sources in defamation suit.)

6 Likewise, in the federal courts, the First Amendment privilege has been applied
7 broadly to protect journalists of all stripes.

8 ***A commenter has independent First Amendment rights***

9 Petitioner Escape puts great weight on the fact that the anonymous comment was
10 unsolicited and appeared in a comment section of Digital Music News that is open to all
11 comments. It is correct that comments are generally not moderated. As explained
12 earlier, such comments are important to the success of Digital Music News. But even if
13 the comments section at Digital Music News is looked at as a simple posting board, the
14 protections of the First Amendment extend to anonymous speech, independent of the
15 reporter's privilege. The First Amendment protects the privacy rights of all speakers,
16 reporters or not. See *Rancho Publ'ns v. Superior Court*, 81 Cal. Rptr. 2d 274, 281
17 (1999) . Accordingly, the First Amendment requires courts to "carefully balance the
18 'compelling' public need to disclose against the confidentiality interests to withhold,
19 giving great weight to fundamental privacy rights." *Id.* at 1549. For this reason, courts
20 have recognized that "[p]eople ... should be able to participate online without fear that
21 someone who wishes to harass or embarrass them can file a frivolous lawsuit and
22 thereby gain the power of the court's order to discover their identity[ies]." *Columbia Ins.*
23 *Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

24 The U.S. Supreme Court has repeatedly upheld the First Amendment right to
25 speak anonymously. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182,
26 197-200 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-44 (1995); *Talley*
27 *v. California*, 362 U.S. 60, 64 (1960). These cases celebrate the important role played
28

1 by anonymous or pseudonymous writings through history. As the Supreme Court said
2 in *McIntyre*: “[A]n author is generally free to decide whether or not to disclose his or her
3 true identity. The decision in favor of anonymity may be motivated by fear of economic
4 or official retaliation, by concern about social ostracism, or merely by a desire to
5 preserve as much of one’s privacy as possible. Whatever the motivation may be, . . .
6 the interest in having anonymous works enter the marketplace of ideas unquestionably
7 outweighs any public interest in requiring disclosure as a condition of entry. Accordingly,
8 *an author’s decision to remain anonymous, like other decisions concerning omissions or*
9 *additions to the content of a publication, is an aspect of the freedom of speech*
10 *protected by the First Amendment.” McIntyre, 514 U.S. at 341-342 (emphasis added).*

11 The right to remain anonymous extends to the internet. “Against the backdrop of
12 ‘First Amendment protection for anonymous speech, courts have held that civil
13 subpoenas seeking information regarding anonymous individuals raise First
14 Amendment concerns.” *Sony Music Entertainment v. Does*, 326 F.Supp.2d 556, 565
15 (S.D.N.Y. 2004). In *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088 (W.D. Wash.
16 2001), the federal court said: “If Internet users could be stripped of that anonymity by a
17 civil Subpoena enforced under the liberal rules of civil discovery, this would have a
18 significant chilling effect on Internet communications and thus on basic First
19 Amendment rights.” *Id.* at 1093.

20 **4. The Claim of Procedural Errors**

21 The claims of procedural error by Petitioner do not require great elaboration.
22 As stated before, I did not pursue the motion to quash after I realized that Petitioner
23 never served the Subpoena as required by California law, and never started a
24 California action prior to the Petition filed just recently. Rather than my initiating a
25 California action with a motion to quash, which involves a filing fee of more than \$300, I
26 decided to rely on the statement of objections that I had served in January. (Escape
27 Exhibit C) I have not waived and do not waive proper service of the Subpoena as
28 required by California law.

1 **5. A Few Additional Practical Points**

2 Petitioner Escape cares little that subpoena enforcement is likely to be expensive
3 and burdensome to my very small company, chill free speech, and be fruitless. No
4 matter to them that the potential cost and burden to me and my small company is not
5 balanced by any legitimate need for information.

6 Counsel for Escape seems unmoved by additional practical points we've made to
7 them. They must understand by now that Digital Music News follows a long standing
8 privacy policy, so that identifying data on comments is promptly flushed rather than
9 retained. For example, a November 11, 2011 article in Digital Music News said: "Digital
10 Music News did not attempt to clarify the identity of the commenter, given our long-
11 standing privacy policies on the matter." Given that the whistleblower or "Anonymous
12 Commenter," who only identifies himself/herself as a Grooveshark employee, left a
13 comment in mid-October of 2011, there is no chance that we have retained any
14 information outside of that which is viewable by the entire world.

15 It is true, as stated by Escape's counsel, that I have not indulged counsel in
16 endless communications following up on their lectures about inapplicability of free
17 speech rights, and their belief that I have records that in fact I don't keep. My great
18 hope is that this Court will clarify for Escape counsel some common sense points about
19 balancing of free speech rights and burden against assertions of need for evidence that
20 have no basis.

21 **6. I Am Not A Lawyer**

22 I am not a lawyer. We can't afford to hire a lawyer to defend against Escape's
23 onslaught. I have tried to absorb relevant legal principles, and apply common sense in
24 this Response and Memorandum. But, I believe that Digital Music News and the Court
25 will be best served if the Court requests "friend of the court" briefing from civil liberties
26 organizations. I gather that such involvement is unusual before a trial level court, but I
27 imagine that organizations will respond to a request from the Court.
28

1 Great principles are at stake in this cavalier yet formidable threat to a very small
2 company like Digital Music News. As James Madison understood, “[a] popular
3 government without popular information or the means of acquiring it is but a prologue to
4 a farce or tragedy or perhaps both.” 9 James Madison, WRITINGS OF JAMES
5 MADISON, 103 (G. Hunt ed., 1910). Protections for the media’s sources and for
6 anonymous commenters are critical for journalists in communicating to the public. As
7 journalists, albeit for a very small publication, the voice of non-party Digital Music News
8 must be protected by the reporter’s shield and the First Amendment. And, under the
9 First Amendment and the California anti-SLAPP law, Code of Civil Procedure section
10 425.16, the anonymous commenter’s speech should also be protected, not chilled.

11 **7. Conclusion**

12 We respectfully request that the Petition of Escape Media for enforcement of the
13 third-party out-of-state Subpoena be denied by this Court.

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Respectfully submitted.

Dated. April 2, 2012


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