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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **FOR THE COUNTY OF LOS ANGELES**

Dept. X
830am

9
10 *In the Matter of the Subpoena Issued to*
11 *Digital Music News LLC in:*

12 UMG RECORDINGS, INC.,

13 Plaintiffs,

14 v.

15 ESCAPE MEDIA GROUP, INC., ET AL.

16 Defendants.

CASE NO. SS022099

In the Supreme Court of the State of
New York, New York County
Index No. 100152/2010

- (1) **PETITION TO ENFORCE THE SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS SERVED BY ESCAPE MEDIA GROUP, INC. ON DIGITAL MUSIC NEWS, LLC**
- (2) **DECLARATION OF MATTHEW H. GIGER**

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18
19 Defendant Escape Media Group, Inc. ("Escape") submits this memorandum of law in
20 support of its Petition to Compel Digital Music News, LLC to comply with the Subpoena for
21 Business Records issued by Escape on February 20, 2012 (the "Subpoena"), and respectfully
22 requests the assigned Court to schedule a hearing date for this Petition at its earliest
23 convenience:

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Escape brings this Petition under California Code of Civil Procedure §2025.480 and
4 §2029.600, seeking an order of this Court compelling Digital Music News, LLC (“DMN”) to
5 comply with the Subpoena, which Escape served pursuant to the Interstate and International
6 Depositions and Discovery Act in connection with a lawsuit entitled *UMG Recordings, Inc. v.*
7 *Escape Media Group, Inc.*, Index No. 100152/2010, pending in the Supreme Court of the State
8 of New York, New York County (the “New York State Action”). The Subpoena requests
9 information relating to a false and defamatory anonymous comment (the “Anonymous
10 Comment”) to a blog post by Paul Resnikoff, the self-described “founder” and “publisher” of
11 DMN, in October of 2011. The Anonymous Comment, in which an unidentified individual
12 claiming to be a Grooveshark employee falsely accuses Escape and its executives of encouraging
13 Escape’s employees to upload copyrighted sound recordings to Escape’s “Grooveshark” music
14 streaming website, is directly relevant to, *inter alia*, Escape’s central defense in the New York
15 State Action that it is entitled to the “safe harbor” from claims of copyright infringement
16 afforded to internet service providers such as Escape under the Digital Millennium Copyright
17 Act, 17 U.S.C. § 512 (“DMCA”). DMN has refused to comply with the Subpoena, without
18 legitimate basis.

19 Escape has corresponded directly with DMN regarding its refusal to comply with the
20 Subpoena, through letters exchanged with Mr. Resnikoff. Escape also received a purported
21 Motion to Quash the Subpoena from Mr. Resnikoff, although he apparently failed to file that
22 motion, no record of which exists in the Los Angeles courts. In his correspondence and
23 “motion,” Mr. Resnikoff has asserted that he is privileged to refuse compliance with the
24 Subpoena pursuant to *Cal. Const.* art. I § 2(b) (the “California Shield Law”) and the First
25 Amendment to the United States Constitution. As discussed below, Digital Music News is not
26 entitled to the referenced legal and constitutional protections in respect of the Anonymous
27 Comment, and possesses no cognizable basis to refuse compliance with the Subpoena.

28 ///

1 The California Shield Law protects a journalist's ability to research, draft and publish a
2 news story utilizing anonymously supplied information. It does not apply to "casual" internet
3 posts¹ by visitors to a "news" website, such as the Anonymous Comment. The Shield Law is
4 intended to protect a journalist from forced disclosure of anonymous sources accessed by him or
5 her *while compiling* a story. Anonymous comments posted *subsequent* to the publication of an
6 article are, by their very nature, exogenous to the journalistic process, *i.e.*, they are crafted and
7 edited by the users themselves, not by a "journalist" protected by the Shield Law, and are mere
8 ruminations by the website's readers on subjects of their choosing, sometimes wildly off-topic.
9 As such, the Shield Law does not permit DMN's failure to comply with the Subpoena.

10 DMN's reliance on the First Amendment to avoid disclosure is similarly misplaced.
11 While the First Amendment does afford a limited right to speak anonymously, its protections are
12 qualified, particularly when applied to the sort of purely commercial speech reflected in the
13 Anonymous Comment. The limited First Amendment protection of anonymous speech is
14 balanced in such cases against a party's need for information concerning the identity of the
15 speaker. The First Amendment does not excuse Mr. Resnikoff's compliance with the Subpoena
16 where, as here, the information sought is critical evidence that is highly relevant, *inter alia*, to
17 Escape's defense under the DMCA, and Escape is unable to obtain that evidence elsewhere.
18 Moreover, as the First Amendment may not be used to shield unlawful conduct, its protections
19 do not extend to the false and defamatory Anonymous Comment.

20 Because access to the information requested in the Subpoena is crucially relevant to
21 Escape's defenses in the State Court Action and is not privileged from disclosure, Escape
22 respectfully requests that this Court enter an Order requiring DMN's immediate compliance with
23 the Subpoena, *inter alia*, by producing all information in its possession concerning the identity
24 of the author of the Anonymous Comment.

25 ///

26 ///

27
28 ¹ See O'Grady v. Superior Court, (Cal. Ct. App. 2006) 44 Cal. Rptr. 3d 72.

II. FACTUAL BACKGROUND

Grooveshark and the DMCA

Escape developed, owns and operates the Internet service “Grooveshark,” which is accessible on the World Wide Web at www.grooveshark.com (“Grooveshark”). Through Escape’s Grooveshark service, third-party internet users may upload files containing audio recordings to the Grooveshark site, including (as is true with the widely used YouTube website) the users’ self-produced recordings of their own works. The resulting archive of sound recordings - - consisting of recordings added by thousands of Grooveshark users - - is searchable through the Grooveshark website, thus allowing users to locate particular recordings on the site and “stream” them over the Internet, *i.e.*, play them (without making copies) through their individual computers.

Grooveshark represents a new form of music distribution at the forefront of digital innovation. Escape has obtained licenses or other contractual authorization for its Grooveshark service from a number of major entities in the record business and many other copyright owners, and Escape also operates within the bounds of the DMCA, 17 U.S.C. § 512. The DMCA provides a “safe harbor” under which an internet service provider (“ISP”), assuming compliance with certain conditions and procedures set forth in the statute, is protected against liability for copyright infringement, *inter alia*, for the “storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.” *Id.* § 512(c).

Thus, the DMCA safe harbor protections apply to ISPs, like Escape (or YouTube), “who furnish[] a platform on which its users post and access all sorts of materials as they wish, while the provider is unaware of its content, but identifies an agent to receive complaints of infringement, and removes identified material when he learns it infringes.” Viacom Int’l Inc. v. YouTube, Inc., (S.D.N.Y. 2010) 07 Civ. 2102 (LLS), 2010 U.S. Dist. LEXIS 62829, at *37. Consistent with DMCA procedures, Escape, *inter alia*, requires that any users who wish to upload recordings to Grooveshark confirm that they are the owners or authorized licensees of the copyrights in those recordings; scrupulously complies with “takedown” requests submitted by

1 copyright owners; and denies uploading privileges to all identified infringers.

2 The New York State Action

3 UMG, one of the world's largest owners and exclusive licensees of musical recordings,
4 commenced the State Court Action against Escape in 2010. In the New York State Action,
5 UMG alleges two New York common law causes of action, for copyright infringement and
6 unfair competition, focused exclusively on sound recordings available through the Grooveshark
7 service that were created prior to February 15, 1972. (Giger Decl., Ex. "G.") UMG's restriction
8 of its claims in the State Court Action to infringement of pre-1972 recordings, which receive
9 unique treatment under the Copyright Act, reflects an attempt to avoid Escape's asserted DMCA
10 "safe harbor" defense, which UMG has moved to dismiss. (Giger Decl. ¶¶ 14 - 17 & Ex. "H.")
11 While the Court has not yet issued a decision on UMG's motion, a recent decision of the United
12 States District Court for the Southern District of New York, Capitol Records, Inc. v. Mp3tunes,
13 LLC, (S.D.N.Y. 2011) 07 Civ. 9931 (WHP), 2011 U.S. Dist. LEXIS 93351, undermines UMG's
14 motion and directly supports Escape's assertion of its DMCA defense in the New York State
15 Action. In that regard, the Capitol Records Court specifically held - - consistent with Escape's
16 own arguments in opposition to UMG's motion - - that "[t]he plain meaning of the DMCA's safe
17 harbors, read in light of their purpose, covers both state and federal copyright claims," *i.e.*, the
18 DMCA is applicable to state common-law claims for alleged infringement of pre-1972 sound
19 recordings. Id. at *27.

20 Escape thus relies in the New York State Action on its DMCA defense, a core defense in
21 that action, which provides a "safe harbor" for compliant internet service providers who allow
22 copyrighted materials to be added to their computer systems by internet users. (Giger Decl., Ex.
23 "H.") Escape's DMCA defense may well not apply, however, to the sort of conduct falsely
24 alleged in the Anonymous Comment - - *i.e.*, the alleged encouragement and support of direct
25 uploading of copyrighted materials, without a license, by Escape's own employees.²

26
27 ² In November of 2011, UMG (later joined by certain other record labels) filed a second
28 lawsuit against Escape in the United States District Court for the Southern District of New

1 The Subpoena

2 In light of the foregoing, the Anonymous Comment is directly relevant to Escape's
3 DMCA defense in the State Court Action and will undoubtedly be relied upon by UMG in
4 furtherance of its efforts to defeat that defense. Accordingly, on or about January 9, 2012,
5 Escape issued the narrowly tailored Subpoena to DMN, seeking two principal categories of
6 information that are needed to assist Escape in defending against UMG's claims and exposing
7 the baseless (and possibly fraudulent or collusive) nature of the Anonymous Comment. (See
8 Giger Decl., Ex. "A.")

9 Specifically, in the Subpoena, Escape seeks documents concerning the identity of the
10 author of the Anonymous Comment. (Id. at 5.) In addition, in furtherance of Escape's efforts to
11 discover the provenance of the Anonymous Comment and UMG's own efforts (if any) to
12 determine its veracity, the Subpoena also seeks any recent correspondence between DMN and
13 UMG concerning Escape, Grooveshark or the Article, as well as any documents concerning the
14 same. (Id.)

15
16 **III. ARGUMENT**

17 As set forth above, the information sought in the Subpoena concerning the Anonymous
18 Comment is highly relevant, *inter alia*, to Escape's DMCA defense in the State Court Action.
19 DMN and Mr. Resnikoff, however, have refused to comply with the Subpoena. Mr. Resnikoff
20 has asserted in correspondence with counsel for Escape (and in his unfiled Motion to Quash) that
21 he is protected from releasing the identity of the anonymous commenter by both the California
22 Shield Law and a purported privilege under the First Amendment to decline to reveal the identity
23 of anonymous speakers. These supposed privileges and protections are inapplicable to the

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26 York, asserting claims for federal copyright infringement (the "Federal Court Action").
27 UMG's claims in the Federal Court Action adopt the defamatory substance of the
28 Anonymous Comment and repackage it as allegations that Escape directed its employees to
upload thousands of UMG's unlicensed sound recordings to the Grooveshark system. (Giger
Decl., Ex. "I.") The sole basis set forth in UMG's Complaint for this allegation is the
Anonymous Comment. (Id.)

1 defamatory Anonymous Comment posted on DMN's website, and there is no legitimate basis for
2 DMN and Mr. Resnikoff to refuse to comply with the Subpoena.

3
4 **A. CALIFORNIA'S JOURNALIST SHIELD LAW IS INAPPLICABLE.**

5 Several states, including California, have enacted "Shield Laws" protecting journalists
6 from having to disclose sources or information used by them in compiling news for publication.
7 California's Shield Law provides, in relevant part, that a person "connected with or employed
8 upon a newspaper, magazine, or other periodical publication...cannot be adjudged in
9 contempt...for refusing to disclose...the source of any information procured while so connected
10 or employed for publication in a newspaper, magazine or other periodical publication, or for
11 refusing to disclose an unpublished information obtained or prepared in gathering receiving or
12 processing of information for communication to the public." *Cal. Evid. Code* § 1070(a); see also
13 *Cal. Const. Art. I § 2(b)*.

14 In his unfiled motion, Mr. Resnikoff asserts that, as a "blogger," he is a journalist and is
15 thus protected by the California Shield Law. But this assertion begs, rather than resolves, the
16 question. Escape does not argue that the Shield Law may not apply under proper circumstances
17 to industry focused internet blogs such as DMN; nor does Escape challenge that, in appropriate
18 circumstances, the Shield Law may protect an anonymous source upon which a journalist relies
19 while procuring information for his or her story. Those issues are not implicated here, where an
20 anonymous comment was posted on an online message board subsequent to an article's
21 publication, as such *post-facto* commentary is not the type of journalistic activity that
22 California's Shield Law protects.

23 It is undisputed that DMN did not use or even obtain the Anonymous Comment in
24 procuring information for Mr. Resnikoff's blog entry. Rather, Mr. Resnikoff published an
25 article on DMN about Grooveshark (and the musical group King Crimson), and upon publication
26 of his story, supplied a message board available for any type of comments, on any subject, that
27 DMN's readers might choose to post. The author of the Anonymous Comment used this
28 message board to disseminate his or her own post-publication comments to Mr. Resnikoff's blog

1 entry. Simply stated, California's Shield Law does confer a journalistic privilege upon such
2 comments by readers of a story that were not a part of the journalistic process through which the
3 story itself was researched and written.

4 In his correspondence and his unfiled motion, Mr. Resnikoff repeatedly cites to O'Grady
5 v. Superior Court, (Cal. Ct. App. 2006) 44 Cal. Rptr.3d 72, as primary support for his contention
6 that the Anonymous Comment is protected by California's Shield Law. The O'Grady case
7 actually undermines DMN's purported reliance on the Shield Law. Although the O'Grady court
8 held that bloggers may be considered "journalists" under the Shield Law, the court was careful
9 to distinguish between a journalist's posting of an online article based on anonymous
10 information, and (as was true in the present case) an anonymous commenter posting his or her
11 own comment that appears "more or less immediately" *after* the publication of an article. Id. at
12 91. Such comments, the court in O'Grady offered, do not reflect the "kind and degree of
13 editorial control that makes them resemble a newspaper or magazine." Id.³ Here, because the
14 anonymous commenter wrote and posted the defamatory statements, without the participation of
15 the DMN staff - - *i.e.*, DMN did not exercise "editorial control" over them - - those comments
16 are not entitled to protection under California's Shield Law.⁴

17
18 ³ The O'Grady court also noted that it was the newspaper staff in that case, "and no one
19 else, who 'posted' the content," which rendered the content subject to California's Shield
20 Law protection. Id. at 92.

21 ⁴ Legal commentary on the issue (on which Mr. Resnikoff also mistakenly relies)
22 similarly confirms that the Shield Law is inapplicable in this case. For example, *Blogging*
23 *and Journalism: Extending Shield Law Protection to New Media Forms* confirms that the
24 O'Grady case "suggested that those individuals who are 'casual visitors' to newsgroups, chat
25 rooms, or discussion groups would likely not be protected, as this most likely would not be
26 considered news." Sharon Doctor, *Blogging and Journalism: Extending Shield Law*
27 *Protection to New Media Forms*, 54(4) *Journal of Broadcasting & Electronic Media* at 599
28 (2010). In the instant case, the unidentified individual who posted the defamatory
Anonymous Comment, claiming (Escape believes falsely) to be an employee of Grooveshark
while hiding behind anonymity, can hardly be said to be anything more than a "casual
visitor."

1 Courts in other jurisdictions similarly have recognized that after-the-fact commenting on
2 online news articles is not the type of journalistic activity that state shield laws were intended to
3 protect. In 2011, the Supreme Court of New Jersey held that, “online message boards” are not
4 sufficiently similar to the news entities listed in the state’s Shield Law to fall within the
5 protections of that law. Too Much Media, Inc. v. Hale, (N.J. 2011) 20 A.3d 364. Instructively,
6 in reaching that decision, the New Jersey Supreme Court, citing O’Grady, noted that California’s
7 Shield Law was less expansive than its New Jersey statutory counterpart, and that the O’Grady
8 court had “pointedly contrasted” news oriented websites with entities akin to message boards.
9 Id. at 379-380. In addition, the Indiana Court of Appeals recently rejected the claim that
10 anonymous posters were “confidential sources” within the meaning of the state’s journalist
11 shield provision. Miller v. Junior Achievement, (Ind. Ct. App. Feb. 21, 2012) 2012 Ind. App.
12 LEXIS 64 at *35(“we hold that to be considered ‘the source of any information’, one must
13 provide information that is then *interpreted* by the news organization.”) (emphasis added).

14 As the O’Grady Court observed, and as Courts outside of this jurisdiction have
15 confirmed, journalist shield laws simply do not afford protection to anonymous commentators
16 who offer their *post-facto* views on articles that have already been published. The rationale for
17 this rule is both manifest and self-evident, *i.e.*, journalist shield laws are designed to protect
18 sources who are relied upon by journalists in researching and writing their stories, not
19 individuals who elect to anonymously inject themselves into a debate after an article has been
20 published. The “author” of the Anonymous Comment falls squarely in the latter category, *i.e.*,
21 he or she is not a source in any sense of a news article, and, as such, the California Shield Law
22 provides no basis for DMN to resist compliance with the Subpoena. Accordingly, this Court
23 should direct DMN to comply with the Subpoena in its entirety.

24
25 **B. THE FIRST AMENDMENT RIGHT TO ANONYMOUS SPEECH DOES**
26 **NOT JUSTIFY DMN’S NON-COMPLIANCE WITH THE SUBPOENA.**

27 Based on Mr. Resnikoff’s prior correspondence and DMN’s unfiled motion to quash,
28 Escape anticipates that DMN will also assert a supposed First Amendment privilege to justify its

1 non-compliance with the Subpoena. As will be further explicated below, particularly in light of
2 the central relevance of the matters addressed in the Anonymous Comment to Escape's defenses
3 in the New York State Action, the limited First Amendment protections afforded to commercial
4 speech plainly do not permit DMN to avoid compliance with the Subpoena.

5 The widespread availability of internet forums (such as DMN's blog comment board) has given
6 rise to "the ability to commit certain tortious acts, such as defamation . . . entirely online" while
7 acting "pseudonymously or anonymously" or giving "fictitious or incomplete identifying
8 information." Columbia Ins. Co. v. Seescandy.com, (N.D. Cal. 1999) 185 F.R.D. 573, 578. In
9 light of this reality, courts have recognized that "[t]hose who suffer damages as a result of
10 tortious or other actionable communications on the Internet should be able to seek appropriate
11 redress by preventing the wrongdoers from hiding behind an illusory shield of purported First
12 Amendment rights." In re Subpoena Duces Tecum to Am. Online, Inc., (Va. Cir. 2000) 52 Va.
13 Cir. 26, 35. To rule otherwise would leave such parties "virtually defenseless to this potentially
14 virulent hazard." Id. at 36.

15 In light of these serious concerns, the First Amendment "right to participate in online
16 forums anonymously or pseudonymously" must be balanced against "the need to provide injured
17 parties with an forum [sic] in which they may seek address for grievances." Seescandy.com, 185
18 F.R.D. at 578; see also In re Subpoena Duces Tecum to Am. Online, Inc., 52 Va. Cir. at 34-35
19 ("The protection of the right to communicate anonymously must be balanced against the need to
20 assure that those persons who choose to abuse the opportunities presented by this medium can be
21 made to answer for such transgressions."). In this way, the First Amendment privilege to speak
22 anonymously on the Internet "is not unlimited . . . and the degree of scrutiny varies depending on
23 the circumstances and the type of speech at issue." In re Anonymous Online Speakers, (9th Cir.
24 2011) 661 F.3d 1168, 1173.

25 It is well established that commercial speech, such as that at issue here, enjoys "*less* First
26 Amendment Protection" than non-commercial speech, such as literary, religious or political
27 speech. Lefkoe v. The Doe Client, (4th Cir. 2009) 577 F.3d 240, 248 (noting that commercial
28 speech "is subject to modes of regulation that might be impermissible in the realm of non-

1 commercial speech.”); see also In re Anonymous Online Speakers, (9th Cir. 2011) 661 F.3d
2 1168, 1173 (noting that commercial speech enjoys “a limited measure of protection,
3 commensurate with its subordinate position in the scale of *First Amendment* values”). Indeed,
4 the limited First Amendment protections afforded to commercial speech only apply when “the
5 communication is neither misleading nor related to unlawful activity.” In re Anonymous Online
6 Speakers, 661 F.3d at 1173; Beauharnais v. Illinois, (1992) 343 U.S. 250, 266, 72 S. Ct. 725, 735
7 (defamatory statements are not entitled to First Amendment protection).

8 Victims of anonymous online defamatory comments may overcome the limited First
9 Amendment protection for commercial speech by “demonstrat[ing] a sufficient need for the
10 discovery to counterbalance that infringement.” In re Anonymous Online Speakers, 661 F.3d at
11 1174 (affirming a district court order to disclose the identity of three anonymous online bloggers
12 accused of “orchestrat[ing] an Internet smear campaign via anonymous postings and videos
13 disparaging [company] and its business practices”). Stated another way, in the context of
14 commercial speech, the “claimed *First Amendment* right to anonymity is subject to a substantial
15 governmental interest in disclosure so long as disclosure advances the interest and goes no
16 further than reasonably necessary.” Lefkoe, 577 F.3d at 249. Where (as here) the identification
17 of an anonymous commenter “could be relevant and useful” to the defendant, the requisite
18 “substantial government interest in providing [the defendant] a fair opportunity to defend itself
19 in court is served by requiring the [anonymous commenter] to reveal its identity and provide the
20 relevant information.” *Id.*

21 Consistent with the foregoing, courts that have weighed the right to speak anonymously
22 against the need for third-party discovery to support claims or defenses in a pending action, have
23 applied a four-part balancing test: “(1) the subpoena seeking the information was issued in good
24 faith and not for any improper purpose, (2) the information sought relates to a core claim or
25 defense, (3) the identifying information is directly and materially relevant to that claim or
26 defense, and (4) information sufficient to establish or to disprove that claim or defense is
27 unavailable from any other source.” Doe v. 2TheMart.com, (W.D. Wash. 2001) 140 F. Supp.
28 2d 1088, 1095; Breslin v. Dickinson Township, (M.D. Pa. May 19, 2011) 09-CV-1396, 2011

1 U.S. Dist. LEXIS 54389, at *5. Application of these factors to the present case, cognizant of the
2 limited protection afforded the commercial speech at issue, mandates the disclosure of the
3 requested information possessed by DMN concerning the anonymous commenter.

4 First, the Subpoena was clearly “issued in good faith and not for any improper purpose.”
5 The Subpoena is narrowly tailored to uncover the identity of the anonymous commenter, his or
6 her motives in publishing the defamatory Anonymous Comment and the purported basis for his
7 or her knowledge of the allegations set forth therein. Such information is critical in order to
8 prove those allegations false and advance Grooveshark’s defenses in the New York State Action.

9 Second, the requested information plainly relates to a “core defense” of Escape in the
10 New York State Action. The Anonymous Comment alleges that Grooveshark directed
11 infringing uploading of copyrighted songs by its own employees, as opposed to third-party users
12 of the Grooveshark service. Because Escape’s DMCA defense is predicated upon content added
13 by third-parties, and might well not apply to alleged infringement actively encouraged by the
14 company, the allegations made by the Anonymous Comment, if true, would significantly impair
15 Escape’s ability to defend in the New York State Action. The information sought by the
16 Subpoena thus relates directly to Escape’s “core” DMCA defense, *i.e.*, Escape’s assertion relates
17 to “safe harbor” protection under the DMCA.

18 Third, the information requested by the Subpoena is thus not only relevant to Escape’s
19 defenses in the New York State Action, but it is essential to Escape’s ability to prove that the
20 Anonymous Comment is false and defamatory. Escape denies the serious allegations made in
21 the Anonymous Comment and suspects that the author of that Comment (who avers that he or
22 she is a former Escape employee) is a third-party motivated by ulterior motives, perhaps
23 associated with, or otherwise providing assistance to, the record labels that have commenced
24 lawsuits against Escape. But unless Escape is able to ascertain the identity of the author of the
25 Anonymous Comment, it will be unable to disprove the allegation that he or she is an Escape
26 employee and the concomitant inference that he or she has some basis for the defamatory
27 statements contained in the Anonymous Comment.

28 ///

1 Fourth, there is no practicable means by which Escape may learn the identity of the
2 anonymous commenter except through the Subpoena. The anonymous commenter has already
3 refused to reveal his or her identity in the Anonymous Comment itself, in response to a request
4 for such a revelation posted on the DMN comment message board. (Giger Decl., Ex. "B" at 17.)
5 Escape presently has absolutely no knowledge of the source of the comment: no user name, real
6 name, email address, ISP or any other fragment of information with which to even begin
7 searching for the identity of the anonymous commenter. Under the circumstances, the only way
8 for Escape to even commence its search for the anonymous commenter is for DMN to respond to
9 the Subpoena by providing any and all information within its possession associated with that
10 individual.

11 In light of the limited First Amendment protections afforded to commercial speech such
12 as the Anonymous Comment; the critical relevance of information concerning the author of the
13 Anonymous Comment to Escape's defenses in the New York State Action; and the inability of
14 Escape to identify that individual by other means, this Court should find that the First
15 Amendment does not provide a basis for DMN's refusal to comply with the Subpoena.

17 **IV. CONCLUSION**

18 For the reasons set forth above, Escape's Petition to Enforce the Subpoena should be
19 granted, and DMN should be ordered to immediately comply with the Subpoena by producing all
20 documents requested therein.

21
22 DATED: March 20, 2012

McPHERSON RANE LLP
Edwin F. McPherson
Pierre B. Pine

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24
25 By: P. B. P.
26 PIERRE B. PINE
27 Attorneys for Defendant
28 ESCAPE MEDIA GROUP, INC.

DECLARATION OF MATTHEW H. GIGER

I, MATTHEW H. GIGER declares as follows:

1. I am a partner in the law firm of Rosenberg & Giger P.C., counsel for defendant Escape Media Group, Inc. ("Escape") in the referenced action pending in the Supreme Court of the State of New York, County of New York (the "New York State Action"). I respectfully offer this Declaration pursuant to Cal. Code Civ. Proc. § 2016.040, in support of Escape's Petition to Enforce the Subpoena issued in the New York State Action to Digital Music News LLC ("DMN"). The facts recited in this Declaration are based on my personal knowledge of and involvement in the matters described.

The Subpoena

2. On or about January 9, 2012, Escape served DMN with a Subpoena for Production of Business Records In Action Pending Outside California (the "Subpoena"), issued, in accordance with Cal Code Civ. Proc. § 2029.350, by a California licensed attorney who is an associate of Escape's California counsel, McPherson Rane LLP. A copy of the Subpoena is attached to this Declaration as Exhibit "A."

3. The Subpoena seeks two categories of information concerning an anonymous comment to an internet blog post on DMN's website (found on the World Wide Web at www.digitalmusicnews.com), which contains assertions that Escape avers are false and defamatory and that are directly applicable, *inter alia*, to Escape's defenses in the New York State Action (the "Anonymous Comment"). A copy of the subject blog posting, together with all comments (including the Anonymous Comment at pages 16 and 17), is attached to this Declaration as Exhibit "B."

4. Specifically, Escape seeks, in the Subpoena: (1) documents concerning communications between DMN and the plaintiff in the New York State Action, UMG Recordings, Inc. ("UMG"), concerning Escape's Groovespark website or the post that includes the Anonymous Comment; and (2) information possessed by DMN concerning the identity of the author of the Anonymous Comment.

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1 5. On January 20, 2012, Escape received an undated letter from DMN, in which Paul
2 Resnikoff, the self-described founder and publisher of DMN, acknowledged receipt of the
3 Subpoena by DMN and objected to it on a variety of grounds, including, principally, DMN's
4 misplaced contention that the Subpoena represents an "inappropriate encroachment on [DMN's]
5 journalistic rights." On that basis, DMN requested that Escape "withdraw" its Subpoena. In
6 addition to sending its January 20 letter to Escape, on that same day, DMN posted the letter to its
7 internet blog. A copy of DMN's January 20, 2012 letter to Escape is attached to this Declaration
8 as Exhibit "C."

9 6. Before Escape had the opportunity to respond to DMN's letter objecting to the
10 Subpoena, on or about January 30, 2012, DMN delivered to Escape's California counsel a
11 purported "motion" in which DMN averred that, "on March 27, 2012, at 8:30 a.m. ... before the
12 California Superior Court, Los Angeles County, West District, Santa Monica Courthouse ...
13 [DMN] will seek an Order Quashing or Providing Protection from the Subpoena" (the
14 "Purported Motion to Quash"). In the Purported Motion to Quash, DMN reiterated and
15 expanded upon its arguments concerning its supposed "journalistic rights," including under the
16 California "Shield Law" and the First Amendment to the United States Constitution. A copy of
17 the Purported Motion to Quash is attached to this Declaration as Exhibit "D."

18 7. On January 30, 2012, the same day that my office received a copy of the Purported
19 Motion to Quash, Escape responded to DMN's January 20 letter objecting to the Subpoena. In
20 its letter to DMN, Escape, *inter alia*, declined to withdraw the Subpoena; explained that DMN's
21 asserted positions are directly contrary to governing law (including the very legal authority relied
22 upon by DMN in its January 20 letter); and urged DMN to reconsider its refusal to comply with
23 the Subpoena. A copy of Escape's January 30, 2012 letter to DMN is attached to this
24 Declaration as Exhibit "E."

25 8. DMN never responded to Escape's January 30 letter, and the February 20, 2012
26 response deadline set forth in the Subpoena passed without any indication from DMN as to
27 whether it intended to comply with the Subpoena.

28 ///

1 9. On or about March 9, 2012, while in the process of preparing its papers in
2 opposition to DMN's Purported Motion to Quash (which Escape assumed had been filed, and to
3 which Escape thus assumed it must respond), Escape contacted this Court and learned for the
4 first time that DMN had never filed the Purported Motion to Quash with the Court, and that,
5 consequently, no hearing had been scheduled for March 27, 2012, or any other date.

6 10. Accordingly, on March 12, 2012, Escape sent another letter to DMN, reiterating its
7 entreaty that DMN reconsider its refusal to comply with the Subpoena and explaining again that
8 DMN's objections to the Subpoena set forth in its January 20 letter and Purported Motion to
9 Quash were not well founded. A copy of Escape's March 12, 2012 letter to DMN is attached to
10 this Declaration as Exhibit "F."

11 11. I also attempted unsuccessfully to contact DMN by telephone on multiple
12 occasions, including by leaving a voicemail message for Mr. Resnikoff on March 14, 2012 in
13 which I requested that he contact me to discuss a resolution of the apparent impasse between
14 DMN and Escape.

15 12. To date, DMN has not responded to *any* of Escape's repeated efforts to resolve its
16 dispute with DMN subsequent to DMN's delivery of its January 20 objection letter and the
17 unfiled Purported Motion to Quash.

18 *The New York State Action*

19 13. UMG, one of the world's largest owners and exclusive licensees of musical
20 recordings, commenced the New York State Action against Escape in early 2010, alleging two
21 New York common law causes of action, for copyright infringement and unfair competition,
22 focused exclusively on sound recordings available through Escape's Grooveshark service (found
23 on the World Wide Web at www.grooveshark.com) ("Grooveshark") that were created prior to
24 February 15, 1972. A copy of UMG's Complaint in the New York State Action is attached to
25 this Declaration as Exhibit "G."

26 14. In its Answer to UMG's Complaint, Escape has asserted, *inter alia*, a defense
27 arising under the Digital Millennium Copyright Act, 17 U.S.C. § 512 (the "DMCA"). A copy of
28 Escape's Amended Answer and Counterclaims in the New York State Action is attached to this

1 Declaration as Exhibit "H."

2 15. The DMCA provides a "safe harbor" under which an internet service provider
3 such as Escape, assuming compliance with certain conditions and procedures set forth in the
4 statute, is protected against liability for copyright infringement, *inter alia*, for the "storage at the
5 direction of a user [*i.e.*, not Escape] of material that resides on a system or network controlled or
6 operated by or for the service provider." 17 U.S.C. § 512(c).

7 16. Contending that the DMCA does not apply to pre-1972 sound recordings, UMG
8 has moved to dismiss Escape's asserted DMCA defense, which is central to Escape's defense of
9 the New York State Action. The Court has not yet issued a decision on UMG's motion.

10 17. Although UMG's motion to dismiss remains *sub judice*, a recent decision in the
11 United States District Court for the Southern District of New York, Capitol Records, Inc. v.
12 Mp3tunes, LLC, 07 Civ. 9931 (WHP), 2011 U.S. Dist. LEXIS 93351 (S.D.N.Y. 2011), held
13 - - consistent with Escape's own arguments in opposition to UMG's motion - - that "[t]he plain
14 meaning of the DMCA's safe harbors, read in light of their purpose, covers both state and
15 federal copyright claims," *i.e.*, the DMCA is applicable to state common-law claims for alleged
16 infringement of pre-1972 sound recordings. *Id.* at *27.

17 The New York Federal Action

18 18. In November of 2011, UMG filed a second lawsuit against Escape, in the United
19 States District Court for the Southern District of New York, for federal copyright infringement
20 (the "New York Federal Action"). In that action, UMG principally alleges that Escape, without
21 license or other authority, directed its employees to upload thousands of UMG's sound
22 recordings to the Grooveshark system. In an Amended Complaint, filed on or about December
23 15, 2011, additional record labels joined UMG as plaintiffs in the New York Federal Action. A
24 copy of the Amended Complaint in the New York Federal Action (without exhibits) is attached
25 to this Declaration as Exhibit "I."

26 19. Plaintiffs' allegations in the New York Federal Action that Escape directed and
27 encouraged its employees to upload plaintiffs' recordings are based on the Anonymous
28 Comment, which purports to have been authored by an individual claiming to "work for

1 Grooveshark” and falsely asserts, *inter alia*, that Escape employees are “assigned a
2 predetermined amount of weekly uploads to the [Grooveshark] system and get a small extra
3 bonus if [they] manage to go above that.”

4 20. The accusations against Escape in the Anonymous Comment (if true, which
5 Escape denies) may undermine the applicability of Escape’s core DMCA defense in the New
6 York State Action.

7 21. No prior application has been made for the relief sought in Escape’s present
8 Petition to Enforce the Subpoena.

9 I declare under penalty of perjury, under the laws of the State of New York, that the
10 foregoing is true and correct.

11 Executed this 20th day of March, 2012, in New York, New York.

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14 MATTHEW H. GIGER
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