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BY E-MAIL (sullivanysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan, District Judge
U.S. District Court, Southern District of New York
500 Pearl Street, Room 615
New York, NY 10007

Re: Capitol Records, LLC v. ReDigi Inc.
Case No. 12-cv-0095 (RJS) (AJP)

Dear Judge Sullivan:

We are the attorneys for defendant ReDigi Inc. (“ReDigi”) in the above-referenced case. In accordance with section 2(A) of Your Honor’s Individual Practices, we are requesting a pre-motion conference regarding a motion for summary judgment that we would like to file in this case.

ReDigi owns and operates an online cloud storage service (the “ReDigi Cloud”) that allows consumers to upload their own legally downloaded digital music files to individual personal storage lockers (“Cloud Locker”) in the ReDigi Cloud. A user who uploads and stores a music file in his or her Cloud Locker can then keep it in storage, listen to it by streaming it through a web browser, sell it to another user through ReDigi’s online used digital music marketplace, or download it.

Plaintiff Capitol Records, LLC (“Plaintiff”) claims that ReDigi’s cloud storage system and used digital music marketplace violates Plaintiff’s exclusive rights of performance, reproduction and distribution under 17 U.S.C. § 106. These claims reflect a profound misunderstanding of how ReDigi works and have no merit. The following is a summary of the facts, which are not disputable.

After installing ReDigi’s proprietary “Music Manager” software (“Music Manager”) and signing up for an account, a ReDigi user may upload eligible music files from the user’s computer to the user’s Cloud Locker. A user’s Cloud Locker consists of file pointers that associate particular files with a particular user’s account and indicate in which user’s Cloud Locker those files are located. Only digital music files originally and legally downloaded from

iTunes are eligible for upload (“Eligible Files”), thereby excluding music tracks copied from CDs, or downloaded from other online vendors or files sharers, or obtained from any other source. The terms and conditions used by iTunes do not in any way prohibit any part of ReDigi’s business model.

Music Manager forensically analyzes each music file that a user seeks to upload to determine that it was legally downloaded from iTunes. Upon uploading an Eligible File to a user’s Cloud Locker, the file and all copies thereof on the user’s computer, and on attached synchronization and storage devices, are deleted therefrom. If any storage or synchronization device is connected to the user’s computer subsequent to the upload, Music Manager automatically searches such devices for instances of the previously uploaded file. If a copy is detected, the user is prompted to authorize the deletion of such file from that device, and if the user fails to provide such authorization, the user’s ReDigi account is suspended. If a user later downloads a file from his or her Cloud Locker, the file in the Cloud Locker is deleted.

After uploading an Eligible File to a user’s Cloud Locker, the user can listen to the file by “streaming” it to an internet-connected device using the user’s secure login to access his or her ReDigi account. No copy of a music file so “streamed” is stored; rather it is loaded into RAM, and disappears when the song stops playing. Nor does such streaming implicate any public performance rights. Only the user associated with a particular Cloud Locker has access to its contents.

A user can choose to offer an Eligible File stored in his or her Cloud Locker for resale to other ReDigi users through the ReDigi used music marketplace. ReDigi’s structure ensures that no copies of an Eligible File are made when a resale transaction occurs in this online marketplace. When such a file is purchased by another user, the file pointer associating the Eligible File with the seller’s Cloud Locker is modified to associate the file with the purchaser’s Cloud Locker. In such a transaction only the pointer is changed; the Eligible File remains in the same location in the ReDigi Cloud and is not copied.

After such a transaction, the seller can no longer access the file, which the modified pointer now associates with the purchaser’s Cloud Locker. The purchaser can keep the file in his or her Cloud Locker for storage, streaming or further resale, or can download it to his or her computer, in which case the file is deleted from the purchaser’s Cloud Locker.

ReDigi’s website has links to 30-second clips which are streamed by a third-party source and to associated artwork maintained by that source, all pursuant to license. No copies of such clips are made or stored on ReDigi’s website or in the ReDigi Cloud, nor are any of the artwork files which are displayed on the website stored on the website or in the ReDigi Cloud.

Plaintiff's claims are meritless for a host of reasons, including the following:

1. **Performance right.** The only "public performance" on the site is the streaming of the 30-second clips by an outside, licensed provider. ReDigi has no public streaming of its own. If Plaintiff were able to have pointed to a public performance which does in fact infringe its copyright, it ought to have done so. Additionally, this claim would be barred by Plaintiff's failure to have even attempted to comply with the DMCA.

2. **Reproduction right.** No copying takes place in the resale process at all. The only copying which even arguably takes place is in the upload into the user's Cloud Locker, and the download from the user's Cloud Locker, both of which are obvious fair uses. The only difference between ReDigi's cloud storage, and any other cloud storage system of which we are aware, is that ReDigi's proprietary technology takes the additional step of searching for and removing, or causing to be removed, any other instances of the file which may be found on the drive from which the file is removed. Additionally the "essential step" defense would bar liability for this process, since an mp3 file is a computer program, and the only thing that can be done with such a file is to load it into RAM, usually to play it, but in this case to remove it to another location, and to remove the file from its initial location. Additionally, this claim would be barred by Plaintiff's failure to have even attempted to comply with the DMCA.

3. **Distribution right.** The distribution right applies only to "copies" and "phonorecords" which are defined as "material objects". A CD which contains digital files would be a "material object" but the digital files themselves are not. Even were one to disregard the statutory definitions, and consider digital files themselves to be "material objects", the particular resale process used by ReDigi falls squarely within the "first sale" exception to the distribution right which exempts the transfer of "a particular copy or phonorecord lawfully made". 17 U.S.C. § 109(a). Additionally, this claim would be barred by Plaintiff's failure to have even attempted to comply with the DMCA.

Respectfully,

s/Morlan Ty Rogers

Morlan Ty Rogers

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