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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,

Plaintiff,

v.

12 CV 00095 (RJS)

REDIGI, INC.,

Defendant.

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New York, N.Y.
October 5, 2012
10:22 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN, PC

Attorneys for Plaintiff

RICHARD S. MANDEL

JONATHAN Z. KING

DAVIS SHAPIRO LEWIT & HAYES, LLP

Attorney for Defendant

GARY ADELMAN

ALSO PRESENT: SARAH MATZ

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1 (In open court)

2 (Case called)

3 THE COURT: Good morning. Have a seat.

4 MR. MANDEL: Richard Mandel, Cowan, Liebowitz and
5 Latman for the plaintiff, Capitol Records.

6 THE COURT: Okay. Mr. Mandel, good morning.

7 MR. MANDEL: Good morning, your Honor.

8 MR. KING: Jonathan King, also with Cowan, Liebowitz
9 and Latman.

10 THE COURT: All right. Mr. King, good morning to you.

11 MR. ADELMAN: Gary Adelman, Davis, Shapiro, Lewit and
12 Hayes for the defendant, and with me is my non-admitted
13 associated. With your permission, your Honor, I'd like her to
14 help me at the table today and --

15 THE COURT: And that is? Her name?

16 MR. ADELMAN: Sarah Matz, M-a-t-z.

17 THE COURT: Okay. Good morning, Miss Matz. Have a
18 seat. I gather we have some interested parties or people who
19 just like to see lawyers go at it. So I think you'll get your
20 money's worth. Welcome. It's a public courtroom. Everybody
21 is welcome here. The issues that we're going to be discussing
22 today are very interesting ones, I think.

23 I want to thank the parties for their briefs. I
24 thought they were very well written and helpful to me. There's
25 a lot of stuff here. There are two motions. They are really

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1 cross motions for summary judgment. Each party believes that
2 there are no issues that are disputed, no fact that would be
3 disputed that would require this to go to a trial or a fact
4 finder; so that each should win as a matter of law, since there
5 are undisputed facts. And, yet, you seem to dispute facts. So
6 we'll talk about that.

7 I guess I should be clear on a couple of things.
8 There are a lot of people who are very interested in what the
9 law should be and what would be a wise way to arrange ourselves
10 with respect to this kind of technology and having access to
11 music or other things like this digital recordings.

12 That's a fascinating issue in its own right, but
13 that's not really what we're here to decide today. We're here
14 today to decide what the law is and what is the proper
15 application of that law. And so certainly I think the law
16 ought to be different, but if the law is clear and the
17 application is obvious, then that's what we're going to do.

18 So I think there are honest disagreements as to what
19 the law says and how it ought to be applied, but I want to make
20 it very clear that just sort of broad policy arguments about
21 what -- in an ideal world what we ought to do is not really
22 relevant, at least not for this forum. Okay?

23 So each of you has a motion. I thought we'd start
24 with the plaintiffs, since it's their case. And so they'll
25 start, and then we'll go to the defense. And I'll allow each

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1 of you to respond to the other. I'm in no terrible rush, but I
2 don't want to be here all day either. So you're going to carry
3 the ball for your team --

4 MR. MANDEL: Yes.

5 THE COURT: -- Mr. Mandel?

6 MR. MANDEL: Your Honor, Capitol believes that it is
7 entitled to partial summary judgment with respect to its
8 copyright infringement claims that turn on violation of the
9 right of reproduction and the right of distribution. I just
10 point out, at the outset, the motions are not perfect mirror
11 images in that we haven't moved on the performance and display
12 portion of the case; so I just want to make that clarification.

13 There's no dispute with respect to ownership. It's
14 not disputed on its motion. It's been admitted in the 56.1
15 statement that Capitol owns valid copyrights in the sound
16 recordings, both under federal law with respect to the
17 post-1972 recordings and state law with respect to the pre-'72
18 recordings. And the issue, really, and I think what this case
19 turns on, is their an infringement of the exclusive rights
20 under 106 of the Copyright Act.

21 I'll start, if I may, with the reproduction, which is
22 in 106.1 and grants the copyright owner the exclusive right to
23 reproduce the copyrighted work in copies or phono records and
24 in this case, of course, dealing with sound recordings, it's
25 phono records that are applicable.

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1 THE COURT: It's such a quaint term. I love it.

2 MR. MANDEL: I know. It's interesting, and I think
3 the first time, throughout the PI we talked about copies
4 because there's a tendency to lump them together. They do have
5 the same definitional effect, but phono records is the precise
6 term for purposes of the material object that embodies sounds,
7 which is what we're talking about here.

8 And picking up on your Honor's statement, we believe
9 that the issues are clear under existing law, and we actually
10 think that much of what Redigi spends its time arguing on are
11 broad policy items. They think the law should be a certain
12 way. They think the Copyright Act should, in effect, be
13 amended. These are the same arguments that were put before
14 Congress and that were the subject of a report at Congress'
15 request by the copyright office to decide that issue.

16 But the reality is, that Congress had the opportunity
17 to amend the copyright law. Congress specifically had a
18 statute, actually, that was under consideration at the time of
19 the Digital Millennium Copyright Act that would have changed
20 the law with respect to first set. So it chose not to do that
21 and, instead, to send it out to the copyright office for its
22 report, which the copyright office issued.

23 THE COURT: Right, but they choose not to do a lot of
24 stuff. That's another story.

25 MR. MANDEL: But beyond not amending it, they

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1 actually, in the statute, said that they wanted further
2 certificate, enact a pretty significant statute in the Digital
3 Millennium Copyright Act. It was designed to bring us into the
4 digital age, and they did choose to act in certain respects,
5 but on the question of the first sale doctrine, they didn't
6 and, instead, said we'd like to see a report on this. And they
7 sent it to the copyright office.

8 I think the copyright office report is very
9 significant because what the copyright office did, it looked at
10 the existing law, and there really wasn't much debate about
11 what the existing law was. The whole report was really focused
12 on whether a change should be made, and the copyright office
13 made arguments, from a policy perspective, as to why it didn't
14 think an amendment was a good idea. And Congress chose not to,
15 in fact, enact an amendment in any of the ten years since then
16 or more than ten years.

17 But in the report, it talks about, although it's a
18 report on the first sale doctrine and distribution, it explains
19 why you would need an amendment. And the reason is because the
20 first sale doctrine does not apply if there's been a
21 reproduction. You can't claim a first sale defense if you
22 actually reproduce the copyrighted work, and the work that's
23 being distributed or the phono record that's being distributed
24 is not the particular phono record with which you start.

25 So it's not just a report on distribution. It's a

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1 report that looks at the reproduction right, and it explains in
2 very clear terms why there is a reproduction, by necessity, in
3 a digital transmission.

4 THE COURT: Can I ask you a question, though, because
5 last time we were here for the preliminary injunction, maybe it
6 was the pre-motion conference, I forget which, but I asked you
7 if I could sell my iPod to somebody and you said I could.

8 MR. MANDEL: Yes, and you know, it's interesting you
9 say that because I would actually have to say that I think that
10 answer probably was not a correct one. I think that part of
11 the problem, you know, with the hypotheticals, to be frank,
12 it's tough, you know. I was reading an article in the past few
13 weeks about an actual dispute on a similar issue with Bruce
14 Willis and Apple are disputing whether Bruce Willis would have
15 the right to bequeath his collection of iTunes recordings,
16 which is apparently quite extensive, as part of his will and
17 apparently that's a subject for litigation. So my initial
18 reaction on that might not have been correct because the
19 problem with the iPod is, you know, that there's copy thereto.

20 THE COURT: Right, that's where I was going. It seems
21 to me it's been copied to get to the iPod.

22 MR. MANDEL: Right. And, you know, fortunately, I
23 think the answer is none of it is, I think, very difficult in
24 the context of this case and the issues that are here. You
25 know, we've been playing with hypotheticals a lot in the

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1 context of this case because it is interesting to think about
2 all the ramifications and what would happen in this case and
3 what would happen in that one. And I guess the Bruce Willis
4 example highlights that you could probably have other very
5 interesting litigations about some of those issues as well.

6 But in terms of the issue that we're here to decide
7 today, I think it's pretty clear, and it's largely governed by
8 the statutory definitions in the Copyright Act itself, what a
9 phono record is, and what's involved in the process of upload
10 in order for a Redigi user to be able to sell their recording.
11 And if I can turn --

12 THE COURT: There is a dispute on that, isn't there?
13 What is involved in the process of uploading, it's sort of
14 obviates a dispute between defendant's first set of papers and
15 their latter set of papers, but there is a dispute as to
16 whether it's copying or migrating, which all sounds like
17 semantics on some level.

18 MR. MANDEL: And I think that is my answer to it. I
19 think it is semantics. It's semantics because here's what's
20 not in dispute. When a user for Redigi starts with is a sound
21 recording on their home computer and has to upload it to get to
22 the Redigi cloud in order for it to be sold. There's no
23 dispute that there are two separate material objects there.
24 There is the computer hard drive, where that sound recording
25 sits at the beginning of the process, and then there's the

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1 Redigi server out in Arizona, where the sound recording ends up
2 before it can be distributed.

3 If you look at the statutory definitions under the
4 Copyright Act of what a phono record is, those are two
5 different phono records. And they -- our position is that if
6 you look at what the right of reproduction is, as it's been
7 explained in the House and the Senate report, and really, as
8 very basic copyright law, Professor Nimrick describes it as
9 anytime you create a new phono record, that is a reproduction.

10 THE COURT: I guess they're saying it's not a copy,
11 right? They're saying that it's transported from one place to
12 another, and it's sort of schuu -- like that.

13 MR. MANDEL: I think --

14 THE COURT: Let the record say I said "schuu."

15 MR. MANDEL: I'm not quite sure what they're saying in
16 terms of technologically. I don't think they're really saying
17 it flies through the wire. I mean, they're kind of a little
18 vague about that, but here's what they can't dispute and what
19 the facts say, and that is undisputed. There's no dispute that
20 there are two different material objects here, that there is a
21 server in Arizona, the Redigi cloud, as it were; there's a
22 server on which the user first has that sound recording
23 embodied, and that there are two different phono records.

24 THE COURT: But I think that there are -- I assume
25 you're going to dispute that, right?

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1 MR. ADELMAN: Yes, absolutely, your Honor.

2 THE COURT: I kept thinking about this, but -- I'm not
3 a Trekkie, but I kept thinking it's the difference from Captain
4 Kirk going from the Enterprise to the planet through that
5 transporter thing, where he's not duplicated, to the cloning
6 where there's a good and a bad Captain Kirk where they're both
7 running around. I think one is a copy and the other is -- the
8 other was transported and it's only one Captain Kirk.

9 MR. MANDEL: Right. And, you know, that's part of the
10 problem we have at a basic level because it's not Star Trek
11 here, and I don't think they're really saying --

12 THE COURT: Wouldn't it be cool if it were?

13 MR. MANDEL: I know. It would be exciting and maybe
14 it would require a whole other Copyright Act, but, you know,
15 that's not where we are. And they don't quite say that because
16 they can't say that. And, you know, the dispute between --
17 it's not just a dispute between their prior papers and their
18 current papers. It's a statement that appears in a number of
19 different contexts. It's a statement that appears in their
20 answer, where they admit that -- and state clearly that they
21 delete the existing file.

22 Well, obviously, if you have to delete the original
23 file on the user's hard drive, then, obviously, there's a copy.
24 You know, that's what they said in their answer. It still
25 stands. It's there. They said it in a sworn declaration that

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1 Mr. Rudolph submitted to this Court, and they, frankly, said it
2 a number of times at the deposition. If you look at
3 Mr. Rudolph's testimony at Page 132 and 236, I believe it is of
4 his deposition, these are pretty clear questions. Mr. King was
5 very precise in the questions he put to them, and he said to
6 them the first time, we need to be precise. I'm talking about
7 the original file. That's the lead in. The answer is yes.

8 The second time, at Page 236, they're talking about
9 specifically the declaration. Mr. King is going over the
10 language of the declaration and, again, it says, okay, that
11 file, we're talking about the file itself, the original file.
12 That's the lead in. The answer is yes. So you have that
13 admission in their answer, in deposition testimony, in the
14 declaration.

15 You also have an admission in the preliminary
16 injunction brief in absolutely crystal clear terms that we
17 submit it should be binding and should be a judicial admission.
18 And while they dispute that, they don't dispute that it's
19 appropriate legally for that to constitute an admission. They
20 just say the statement is not sufficiently clear, that it's
21 ambiguous, and therefore, you shouldn't construe it as a
22 binding judicial admission.

23 But if you look at that statement, it's absolutely
24 crystal clear. I mean, their explanations to try to argue
25 around that, frankly, just make no sense. They say, well, you

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1 know, it's a colloquial usage. People can say copies and be
2 using it colloquially, but that's not the context. This is a
3 legal brief talking about the Copyright Act, introducing an
4 argument as to why it's permissible and saying, okay, the only
5 copying that occurs is in this context. That copying is
6 excused by the fair use doctrine. That's not colloquial usage.
7 That's legal terminology. That's --

8 THE COURT: All right. I'm sorry to interrupt you,
9 but the process of just using the cloud for storage, not
10 resale, but storage, is that a violation of the Copyright Act?

11 MR. MANDEL: The simple act of storing?

12 THE COURT: Yeah.

13 MR. MANDEL: It's certainly not something we challenge
14 in this case.

15 THE COURT: Okay. But why not? If copying is going
16 on, why not?

17 MR. MANDEL: Because in a case of pure storage, there
18 probably is a fair use defense. If that's all we're talking
19 about, we wouldn't have brought this lawsuit. The problem with
20 these storage situations is they're all different business
21 models that involve different things and do different things.

22 In this context, the business model is quite clearly
23 not about storage. It's about a marketplace, and it's about --

24 THE COURT: I get that, but I just, I'm thinking poor
25 Bruce Willis who spent so much time and money on his

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1 collection. I remember a friend of mine years and years ago
2 took all his records and converted them to reel-to-reel, great
3 period sound, all in one spot, I'm sure he regrets it now, but
4 spent a lot of time and money doing that. If he sold his
5 reel-to-reels, would that be a violation?

6 MR. MANDEL: I'm sorry, if he sold his?

7 THE COURT: He took all his records, and then he
8 trans -- he recorded it on reel-to-reel all the songs, I guess,
9 he liked, in the he order he liked them.

10 MR. MANDEL: And then he sold them? I think it would
11 be a violation.

12 THE COURT: Okay. But just having them in on the
13 reel-to-reel would not be?

14 MR. MANDEL: Right. And that's the distinction, and
15 they really walked away from that. I mean, that was their
16 argument at the preliminary injunction stage. They basically
17 asserted fair use with respect to the upload process. They
18 haven't even done that here, I mean, because I think they
19 recognize how weak the fair use argument is under the four
20 factors, and so they've adopted the recharacterization
21 approach.

22 They haven't even attempted to posit this case as
23 being about storage, and if you read Mr. Ossenmacher's
24 deposition testimony, he was quite clear that this business
25 model is not even viable as a storage option. The only way

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1 they make money is by taking commission on sales.

2 So this is not about storage. This is about a
3 marketplace in which Redigi profits by having sales of the
4 recordings made. That's what it's in business to do. That's
5 what we're seeking to enjoin. The fact is that most people,
6 according to the data we receive to bring it up to the cloud,
7 do sell it, or at least offer it for sale because that's what
8 they're doing here. They're saying take your old, unwanted
9 recordings, make some bucks at it or, you know, buy some other
10 music out of it, turn it into something profitable. That's
11 what they're pitching. That's what they have built a business
12 on. That's what we say is illegal. That's why we filed this
13 lawsuit.

14 So I think storage really was a red herring, and I
15 think that's why they moved away from it, frankly, because they
16 know that defense isn't going to work. It's not going to get
17 it done for them. So what have they done? They've basically
18 decided to walk away from their own statements, recharacterize
19 everything and adopted a new approach.

20 Now, the problem with that is, even apart from the
21 fact that we say you can't do that, that you're bound by your
22 judicial admissions, and we think that's a separate independent
23 ground for summary judgment, the definitional argument still,
24 from our perspective, also defeats their position. Because you
25 can call it whatever you want, you know, you can pretend that

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1 we're in a new century and it's Star Trek now, but it doesn't
2 change the fact that there are two different phono records.

3 A phono record is a material object in which sounds
4 are fixed and from which they can be perceived, reproduced or
5 otherwise communicated. The electronic file, in and of itself,
6 is not a phono record.

7 In fact, the undisputed evidence shows that while this
8 process of upload is taking place, you can't access that
9 recording, you can't perceive it, you can't hear it. It's just
10 data that's being copied, we say. They would say transmitted
11 or moved, migrated, but whatever you want to say, there's no
12 dispute that you -- it can't be a material object as a
13 definitional matter.

14 I mean that's a legal dispute, I guess, but we think
15 that it's pretty clear that if you can't perceive it, you can't
16 access it, you can't hear it, that's not a material object.
17 And so you have created a new material object, and the process
18 of creating -- and I should really say a phono record to be
19 more precise.

20 THE COURT: So what is the phono record? The phono
21 record is the server in Arizona?

22 MR. MANDEL: Yes. The phono record is the server in
23 Arizona, which now has digital sequence magnetically encoded on
24 it. So that from that server, you can play it, you can
25 reproduce it, you can do all the things that you were able to

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1 do when it was on the user's home drive -- home computer, which
2 is a separate phono record, a different material object.

3 And that's what we think controls this case, as a
4 matter of statutory definitions, and why they can call it
5 whatever they want, they can say whatever they want, but it is
6 reproduction. It's a violation of the reproduction right, as
7 it's always been understood in its most fundamental
8 application, the right to create a new phono record. You need
9 some defense to be able to do that.

10 Now, they talk about, well, then if you move it on
11 your hard drive, that would be a problem under my
12 interpretation because that's a new phono record. Well, even
13 if it is, there are lots of things that may be technically a
14 violation of the reproduction right, which would have a valid
15 defense. Nobody is challenging the ability to move it among
16 your files on your hard drive. Nobody would be -- anybody
17 would be crazy to bring a case like that. Obviously, you have
18 a fair use right to do that, but it doesn't change the fact
19 that there may be a reproduction.

20 Certainly there is in the context where we're talking
21 about two different servers. We're talking about two different
22 computers. We're talking about a material object that the user
23 has, and we're talking about a material object that exists
24 somewhere out in Arizona. And that, by definition, is the
25 reproduction of the copyrighted work in a new phono record in

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1 violation of the reproduction right in the absence of some
2 defense; so....

3 THE COURT: No, but I see why you want to back off the
4 statement you made the last time about selling the iPod because
5 it seems to me that if the copy is made to your iPod or to your
6 computer, you download it, and then you allow someone else
7 access to your computer, do you sell the computer or the iPod
8 or you sell them the right to come onto your computer iPod and
9 listen? That would basically seem to be the same thing that
10 Mr. Adelman is saying goes on in Arizona. Right?

11 MR. MANDEL: Well, I don't know if it's the same
12 thing. I guess if you sold your iPod, you're saying --

13 THE COURT: Well, I guess what it would really be is I
14 got my iPod at home, and I allow my law clerk to go to my home
15 and listen to it. He's saying that Redigi is about making --
16 getting the recording, the phono record in Arizona and allowing
17 it to be accessed by someone other than the person who bought
18 it.

19 MR. MANDEL: Nobody is saying that you can't in your
20 home, you know, play something that's on your iPod and have
21 somebody -- you could have somebody over and you could be
22 playing recordings and give them access, in a sense, to the
23 iPod. I mean, that would --

24 THE COURT: Right, but what if you charged them for
25 it?

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1 MR. MANDEL: Right.

2 THE COURT: I have twins. They each have an iPod, and
3 I can certainly imagine charging the other two to listen to
4 their songs.

5 MR. MANDEL: Well, I think that's the point. At some
6 point, when you move into the commercial realm, the facts do
7 change under, you know, what you might have a right to do, you
8 don't have a right to do. That's why you can play with kind of
9 fun hypotheticals.

10 But in this context, it's not that you're just giving
11 access. I mean, you are basically selling and distributing
12 that recording. And in order to do that, you'd have to make a
13 copy, and that is a violation of the reproduction right that
14 has no defense. And, really, that has been admitted, in
15 effect, in their papers, in their answer, in their deposition
16 testimony.

17 I can address the technological issues, as well.
18 They're not part of our motion. I don't think it's necessary
19 to reach them in order to grant us summary judgment. We didn't
20 put them into issue in this case. We have raised them in
21 response to their motion. It might be more appropriate to
22 discuss those at that time, but it depends on how your Honor
23 wants to --

24 THE COURT: I'll give you a chance to respond to
25 Mr. Adelman, but I just want to make sure that I've heard you

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1 with respect to Redigi 2.0.

2 MR. MANDEL: Okay. With respect to Redigi 2.0. I
3 think with respect to Redigi 2.0, our basic position is that is
4 not this case. Redigi 2.0 did not exist when this lawsuit was
5 filed. It wasn't something that we thought about, knew about,
6 challenged in the complaint that we filed. It's not something
7 that's raised in their answer. It's not something that they
8 brought a declaratory judgment on.

9 THE COURT: So you're not seeking to --

10 MR. MANDEL: No.

11 THE COURT: -- enjoin that?

12 MR. MANDEL: No.

13 THE COURT: And you're not seeking damages off of
14 that?

15 MR. MANDEL: No, not in this case. Frankly, we don't
16 even know, at this point, whether Capitol Recording has ever
17 been the subject of a sale through Redigi 2.0. It's something
18 that was unveiled nine days before the close of discovery that
19 we learned about -- when I say unveiled, it was implemented
20 nine days before the close of discovery that we learned about,
21 for the first time -- a day before the close of discovery.

22 We haven't had an adequate opportunity to consider all
23 the facts that are necessary to address that. And we, frankly,
24 think it would be an advisory opinion to get into at this
25 point. It's not the case we brought about, and it's not the

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1 subject of our motion, certainly. So that's my position on it,
2 most fundamentally.

3 THE COURT: All right.

4 MR. MANDEL: Let me briefly talk about the
5 distribution right. Some of it is encompassed within the
6 discussion of the reproduction right for the reasons that I
7 said. You know, the basic issue on distribution is, is there a
8 first sale defense? And our response on that is, no, there
9 isn't because the first sale doctrine, as enacted now, the
10 existing law, is very clear that you have the owner of a
11 lawfully made phono record, of a particular lawfully made phono
12 record, has the right to dispose of possession of that phono
13 record.

14 The reason that Congress was considering at the time
15 of the Digital Millennium Copyright Act implementing a first
16 sale doctrine that would work in the digital context was
17 because it recognized that the existing law wouldn't allow
18 that. They decided not to do it. Sent it out to the copyright
19 office to prepare a report, which the copyright office did.
20 The copyright office recommended not amending. Congress has
21 not amended.

22 And the bottom line is that there is no existing
23 defense that would allow you, in the context of a digital
24 transmission, to claim a first sale defense because you are not
25 distributing the phono record, the same particular phono record

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1 with which you began.

2 And, you know, again, they talk about their
3 technology. One of the things that I think is interesting is
4 that Mr. Rudolph admitted at the deposition, they haven't
5 invented a new way of upload; this is, in fact, he says, a very
6 old way of doing it. And that's important because, at the time
7 that the -- what the copyright office was actually considering
8 was some of the same kind of basic technology. There's not
9 something new that Redigi invented by their own admission.

10 If you look, I think it's at Page 82 of the copyright
11 office report, they actually talk about, quote, unquote, "move
12 technology"; so that was kind of one of the proposals. They
13 talk about move or forward and delete. Now, they use that
14 terminology, both of them, at Page 82, move or forward and
15 delete. So, you know, this is the same thing that was being
16 considered. It's -- and it's borne out by all the evidence.

17 THE COURT: How can I include that now? You didn't
18 call an expert, right?

19 MR. MANDEL: Well, we do have an expert in response,
20 who explains it. I think if you look at what's undisputed,
21 even between their experts, you can tell that, but again, it's
22 really simpler than that. I think the argument on reproduction
23 basically defines the argument on distribution because if you
24 accept, which we think is right under the statute, that in
25 order to effect that upload, you have created a new phono

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1 record. You have, in effect, you've reproduced it, by
2 definition, when you create a new material object.

3 THE COURT: What you're saying is a phono record is
4 that is my hard drive laptop, and then the new phono record is
5 a new server in Phoenix.

6 MR. MANDEL: Correct. And because of that, you have
7 not met the requirements of Section 109 of the Copyright Act
8 because you have not disposed of the particular phono record
9 with which you began.

10 And the copyright office is instructive because it's
11 basically explaining why it is that -- it doesn't spend a lot
12 of time on it because, frankly, it was pretty much a given that
13 digital transmissions are not covered by the first sale
14 doctrine. It was analyzing the question of whether it should
15 be. But the discussion is useful in terms of that -- making
16 that point that you can see why it is the case, and it really
17 is just, again, a question of statutory language.

18 It's not the same phono record that's being
19 distributed in a digital context because it does have to be
20 embodied or fixed in a new fixation on a new phono record in
21 order for it to be perceived or reproduced. It can't be
22 perceived or reproduced during the upload process, only when it
23 hits the hard drive of -- not the hard drive, the server in the
24 Redigi cloud, and that's a new phono record. It's not the same
25 phono record with which you started, and for that reason, the

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1 first sale doctrine does not apply. And that's basically why I
2 think reproduction is at the heart of this because if we're
3 correct about reproduction, we're also correct about
4 distribution for the same reason.

5 THE COURT: All right.

6 MR. MANDEL: Unless your Honor has any other
7 questions, I think that is the gist of our motion.

8 THE COURT: No, I'll let you respond to Mr. Adelman
9 when he's wrapped up. Okay. Thank you, Mr. Mandel.

10 Give me one second, Mr. Adelman.

11 MR. ADELMAN: Your Honor, with your indulgence, I was
12 just going to ask if I could go to the men's room for a second.

13 THE COURT: Okay. That's fine. Why don't we come
14 back in five minutes. If anyone else needs to use the
15 restroom, they can do that. Five minutes.

16 (Recess taken)

17 THE COURT: All right. Is it Adelman or Adelman?

18 MR. ADELMAN: Adelman.

19 THE COURT: Okay. Mr. Adelman.

20 MR. ADELMAN: Thank you, your Honor. This case is
21 really not about a definitional issue. It's about an
22 evidentiary issue, which is what most cases should be about.
23 It's about plaintiff having the burden of proof, demonstrating
24 that there's a violation of one of his exclusive rights.

25 The purpose of the Copyright Act, essentially, is to

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1 accept somebody's creation, to serve the ultimate goal of
2 promoting broad public availability of literature, music and
3 other arts. Copyright laws' limited scope of protection
4 reflects the balance between the two competing claims. As
5 noted in 20th Century Music Corp. v Aiken, the Copyright Act
6 does not give the copyright control over all uses of his
7 copyrighted work. Instead, it enumerates several rights that
8 are made exclusive to the holder of the copyright.

9 The two rights that Mr. Mandel discussed today were
10 the reproductive right and the distribution right. Now, as far
11 as the reproduction right is concerned, plaintiff has the
12 burden of proof of demonstrating that there was an actual
13 reproduction, and within the papers itself there is no evidence
14 that Redigi ever reproduced any of Capitol's files.

15 THE COURT: What are the phono records? I mean,
16 that's the language of the statute, right?

17 MR. ADELMAN: Right.

18 THE COURT: I mean, we all feel sheepish saying it
19 because we know what it means, those vinyl things.

20 MR. ADELMAN: I actually like it. I'm old school. I
21 still have vinyl.

22 THE COURT: The phono record is the material object in
23 which sounds are affixed by any method, now known or later
24 developed -- how's that for broad -- and from which the sounds
25 can be perceived, reproduced or otherwise communicated, either

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1 directly or with the aid of a machine or a device.

2 So what are the material objects here? Mr. Mandel is
3 saying that the material object that is my laptop, and there's
4 a separate material object that is, you're calling it a cloud,
5 which makes it sound like it's etherial.

6 MR. ADELMAN: It's a hard drive.

7 THE COURT: It's a hard drive?

8 MR. ADELMAN: Yes, absolutely.

9 THE COURT: It's in Arizona. Isn't that a separate
10 phono record?

11 MR. ADELMAN: No, it's the same phono record.

12 THE COURT: How can it be the same phono record?

13 MR. ADELMAN: In our papers, we cited CM Paula, and CM
14 Paula goes through the process and CM Paula stands for the
15 fact --

16 THE COURT: There are a lot of people here; so tell
17 them what that case is about. It's not about records.

18 MR. ADELMAN: No, it's not about records.

19 THE COURT: It's about greeting cards --

20 MR. ADELMAN: Yes.

21 THE COURT: -- or plaques or something.

22 MR. ADELMAN: Exactly. What happened was that
23 defendant in that action purchased 100 greetings cards with a
24 copyrighted design on it, and they used the chemical process to
25 lift the ink, the copyrighted picture, off of the greeting

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1 cards and placed them on tiles. They transferred the
2 copyrighted material from the greeting cards to the tiles, and
3 then they sold those tiles. Then they sold those tiles, and
4 the owner of the copyright to that design brought an action
5 against them for reproduction and distribution. And, in fact,
6 the Court found that it was not a reproduction.

7 THE COURT: Right. And what lofty court found this
8 and what year?

9 MR. ADELMAN: It was -- I believe it was 19 --

10 THE COURT: 1973.

11 MR. ADELMAN: '75?

12 THE COURT: 1973, the Northern --

13 MR. ADELMAN: 1973.

14 THE COURT: The Northern District of Texas.

15 MR. ADELMAN: That's true.

16 THE COURT: Not the Supreme Court, not the Second
17 Circuit, not one of my colleagues here, but some guy in Texas.
18 I don't mean to disparage him. He might have had great wisdom,
19 but it's certainly not controlling precedent.

20 MR. ADELMAN: No, it's not, but it stands for the
21 logic with which we stand here today, which is Redigi has
22 developed technology which does ostensibly the same thing. And
23 what CM Paul, the judge in CM Paul was saying is is that -- he
24 wasn't talking about phono records, but what he is saying is
25 you're not changing the phono record.

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1 What he said, in order to get a hundred tiles, you
2 must have purchased a hundred greeting cards and, therefore,
3 the plaintiff in this case has extinguished his right. He's
4 gotten the benefit of that right and, thus, the distribution
5 right has now been extinguished. And, therefore, the defendant
6 was entitled to sell that copyrighted material on the tiles.

7 THE COURT: But the deference difference is that the
8 process there, by necessity, only allowed you to do one of
9 these at a time, right?

10 MR. ADELMAN: It's the same thing with Redigi.

11 THE COURT: Oh, no. You could easily do a gozillion
12 of these at one shot. You've just chosen not to.

13 MR. ADELMAN: No.

14 THE COURT: You've designed it so that it doesn't do
15 more than one, but if you wanted to do a million, you could do
16 a million like that.

17 MR. ADELMAN: Right. Well, that's what file-sharing
18 services do and that is specifically what Redigi wanted to
19 prevent. They wanted to make sure that they followed the
20 copyright law. They designed a system specifically to protect
21 the rights of the copyright owner and facilitate a sale of the
22 109, the first sale voucher. They went to great lengths to
23 make sure that their process worked perfectly, in that it
24 migrates the file from one hard drive --

25 THE COURT: What does it mean, it migrates the file?

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1 MR. ADELMAN: It's like a train, as we said in our
2 paper, your Honor. It grabs the file on the hard drive, the
3 ones and zeros, and it pulls it in a matter of seconds to the
4 cloud hard drive.

5 THE COURT: It pulls it one little one and then a zero
6 right behind it?

7 MR. ADELMAN: Yes. Actually, it goes in reverse, to a
8 certain degree, but again, that's exactly what it does. That's
9 the technology, like you had said earlier about Star Trek.

10 THE COURT: Right.

11 MR. ADELMAN: I mean 40 years ago --

12 THE COURT: I'm going to regret that one. I know
13 every blog in America is going to go with that. I didn't even
14 like the show.

15 MR. ADELMAN: It has some truth in. I mean, one of
16 the examples I was thinking of was Willy Wonka. Remember when
17 they put Tommy on the stage. They beamed him, and you saw the
18 particles go across the top and, boom, there he was,
19 miniaturized, but still him in that TV. What's so hard to
20 believe?

21 No, but seriously, as far as data is concerned, why is
22 it so hard to believe that that occurs? Because it does. I
23 mean, they filed a patent on it. Now, I agree, it's a little
24 farfetched for human beings, but for physical objects, in this
25 computer world, when 20 years ago, would you believe that data

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1 could sync or migrate through the air from your computer to a
2 handheld device? I mean, did you even believe that you could
3 take a handheld device and walk around and type to your friends
4 or make phone calls? No. Technology changes. Technology
5 improves. We have very smart people. This has happened.

6 THE COURT: Okay. Well, look, the difference between
7 migrating and copying could be significant. Earlier I heard
8 you talking about migrating and using other analogies to
9 describe the process, and we're all groping for analogies, it
10 seems.

11 MR. ADELMAN: It's true. But, actually, I mean, I
12 object to the use of the word copying because in the case law
13 it's reproduction, and that, I believe, is different than
14 copying, but nevertheless --

15 THE COURT: But, again, it's the material object that
16 is the phono record, right?

17 MR. ADELMAN: Yes.

18 THE COURT: So you've got a material object that is my
19 laptop, and material object that is the server, and it's not
20 the code. The fact that my code got sucked out of this and put
21 someplace else, I don't think is really the issue, right? It's
22 the material object is the phono record.

23 MR. ADELMAN: Well, the thing is, I think London-Sire
24 also addressed this, is that -- well, they addressed one other
25 point, which was that the material object does not have to

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1 exist throughout the entire process to distribute a phono
2 record, but --

3 THE COURT: Well, I understand that. I'm not sure why
4 that's either here or there, at least for this case.

5 MR. ADELMAN: Well, they're also -- I mean, part of
6 their reproduction right is that it's not perceivable, and they
7 clearly say that it doesn't have to be during the transaction
8 process, that transitory three seconds.

9 But as far as the material object is concerned,
10 there's no question, I think if you follow the logic of CM
11 Paula and what they were trying to say, that it's perfectly
12 permissible. It is that same unique file, and isn't that
13 what's important?

14 What's important in copyright law is that iTunes --
15 Capitol, through iTunes, sold a unique file. They certainly
16 say they're selling music tracks. They sold a file. Me, as a
17 consumer, I have purchased that file. I am entitled to the
18 rights associated to that file. That is property for me, okay?

19 Now, under 109, once I purchased that file, the
20 distribution rights of Capitol, they're extinguished. And,
21 now, I have the right to sell, dispose or destroy. It's my
22 choice. But what Capitol is saying, you don't have that right.
23 You only have the right to destroy it. You don't have the
24 right to sell, and that's -- that's the antithesis of what 109
25 is about. 109 --

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1 THE COURT: Can I -- It seems to me Redigi 2.0 is
2 basically saying we've got this code. You've purchased the
3 access rights to that code, but before it gets downloaded on
4 your hard drive, it's going to get sent someplace else so that
5 the only phono record, under 2.0, is going to be sitting on a
6 server in Phoenix.

7 MR. ADELMAN: That's correct.

8 THE COURT: And so Mr. Mandel said, that's not his
9 case. He's not pushing that case now, but that's where you
10 have moved to. Isn't that where we ought to be focused?

11 MR. ADELMAN: Well, I think that's part of it,
12 absolutely. And as their technology develops, it's going to
13 get stronger and stronger. But certainly, this was part of the
14 plan from the beginning, which was cloud storage is where it's
15 at. It's what everybody is moving to.

16 Everybody wants stuff in their cloud. They want to
17 access it everywhere. In fact, iTunes and Capitol, they have a
18 whole section of their agreement which focuses on cloud
19 service, and it allows all of those things that we've been
20 discussing to happen, move the files to the cloud service.

21 THE COURT: I know that. I get all that. If we're
22 looking at the language of section 106 and 101, which is where
23 the definition of phono records is, I mean, it seems to me that
24 what we're dealing with there is a very antiquated provision,
25 which limits the focus to material objects in which sounds are

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1 fixed, which requires a process of taking code, putting it on a
2 server someplace, and that is the phono record.

3 MR. ADELMAN: Correct, your Honor. And in 2.0, that's
4 what Redigi does. The user, instead of it coming directly onto
5 the user's hard drive, it's just directed to the user's Redigi
6 cloud. So that's the first time that it's fixed and --

7 THE COURT: Right. I think you've got a great
8 argument under 2.0. I think you've got a much tougher argument
9 under the original, classic version of Redigi. Because it
10 seems to me what you're talking about is the process. The
11 migration is not really any different than my playing my record
12 here, putting the phone next to it and having somebody record
13 it at the other end of the phone.

14 MR. ADELMAN: No, it's.

15 THE COURT: Let me finish.

16 MR. ADELMAN: Sorry, your Honor.

17 THE COURT: The phono record is here, and there's a
18 new reproduction of the phono record at the other end of my
19 phone.

20 MR. ADELMAN: It's not. It's the same data that was
21 on the hard drive.

22 THE COURT: It's the same data that's basically coming
23 off of my record player.

24 MR. ADELMAN: You know, what's not on the recording on
25 your phone? The metadata that's encircled in that. That's one

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1 thing.

2 THE COURT: But the statute doesn't say anything about
3 metadata.

4 MR. ADELMAN: No, what I'm saying is --

5 THE COURT: It just says sounds.

6 MR. ADELMAN: Yes, I understand, your Honor.

7 THE COURT: It could be a crappy recording, and it's
8 still a copyright.

9 MR. ADELMAN: That's a copy. What Redigi is doing
10 technologically is not a copy. It is actually taking the
11 unique file that you purchased from iTunes and moving it from
12 the computer's hard drive to the cloud's hard drive.

13 THE COURT: I get that, but I'm not sure it isn't
14 still a new phono record, a reproduction phono record because
15 the way the statute is set up is it focuses on the material
16 objects in which the sounds are fixed.

17 You are focused on the immaterial, the code that is in
18 the ether, and I don't think that's what the Copyright Act is
19 about. Now, again I think Redigi 2.0 may have made all of this
20 obsolete.

21 MR. ADELMAN: The copyright, well, reproduction is not
22 defined in the Copyright Act. The case law indicates that
23 reproduction, in essence, is two files existing at the same
24 time, and that never happens with Redigi. There's only one
25 file existing at one time; so therefore, it's the same material

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1 object. It's just in a different place.

2 THE COURT: But it's sort of like if I combined my
3 photocopier and my shredder so that I made a photocopy and the
4 original, instead of coming out of the bin where I can pick it
5 up, goes straight to the shredder. The two don't exist at the
6 same time, but it seems to me the other one is still a copy.

7 MR. ADELMAN: They actually do exist at some point
8 together, in your scenario.

9 THE COURT: No, they don't. No, they don't. It takes
10 a minute for that image to get transported from the original to
11 the copy, and if in the interim, while that is taking place,
12 the transfer to the second page is taking place, the original
13 is getting shredded, then they don't both exist at the same
14 time.

15 MR. ADELMAN: But in Redigi's technology, there's no
16 copy. They're pulling the exact file from the hard drive.
17 There's no copy; so there's nothing to be shredded. There's
18 nothing to be deleted. There's no shredding or delete. This
19 is not a forward and delete situation.

20 THE COURT: I guess I'm not buying necessarily the
21 argument that, as long as the two don't exist at the same time,
22 then the second one is not a copy. I think you could use that
23 argument --

24 MR. ADELMAN: Right.

25 THE COURT: -- to justify the photocopy I just talked

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1 about not being a copy; so I don't think that's what the
2 language of the statute is.

3 MR. ADELMAN: Yes, but the -- Well, I don't think the
4 language -- I think the language of -- As the case law has come
5 down, that's basically what's been intimated, that a copy is
6 like the file sharing. You have a copy on your file sharing,
7 and then you down load millions of copies to all types of
8 people. That's reproduction. There's no question about that.

9 But Redigi is not copying or reproducing at all. It's
10 how their technology works. We spent a lot of time with
11 declarations trying to explain exactly how it works, that there
12 is no copying involved whatsoever. There's no deleting. It is
13 the actual file that is being transported like in your Star
14 Trek example or migrating.

15 THE COURT: Or your Willy Wonka.

16 MR. ADELMAN: Or my Willy Wonka.

17 THE COURT: Nicely done.

18 MR. ADELMAN: That's migrated. That's how the
19 technology works. That's what the evidence says. There's no
20 rebuttable evidence in this case that says it doesn't work that
21 way. And that's what -- that's actually, I think, the heart of
22 the case, is that there's no two copies ever at the same time.
23 That's reproduction.

24 There's no reproduction. Capitol only has a
25 reproduction right. They don't have a copying right. Copying

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1 is not in the statute. Reproduction is what's been defined as
2 the right, and there is no reproduction of the file in the
3 Redigi system ever.

4 THE COURT: Now, we haven't talked about it in the
5 papers, spent a lot of time on this, is that certainly
6 previously your client, through different counsel, has made
7 statements that copying does take place. The only copying
8 which takes place in the Redigi service occurs when a user
9 uploads music files to the Redigi cloud. Thereby storing
10 copies thereof in the user's personal cloud locker.

11 Now, I know you've worked hard to make that an
12 ambiguous statement, but, boy, that seems pretty emphatic.
13 Maybe that's why he is no longer counsel of record. I don't
14 see how you get past that.

15 MR. ADELMAN: Well, there are a number of ways to get
16 past that. First of all, in the answer we've clearly denied
17 copying.

18 THE COURT: Well, you can deny copying, but then when
19 you say that, it sure looks like you just admitted certain
20 facts that are going to be fatal.

21 MR. ADELMAN: It's not what's actually happening,
22 though. That's the first thing. The second thing is, it's
23 taken out of context.

24 THE COURT: What is it taken out of context?

25 MR. ADELMAN: The only copying that takes place when a

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1 user uploads music to a Redigi cloud. It is like we explained
2 in our files, it was not explained in the PI hearing papers.
3 We have explained --

4 THE COURT: Thereby storing copies thereof in the
5 user's personal cloud locker. This sentence says that what
6 what's in the cloud locker is a copy. That's what it says.
7 And it says it's a copy that results from the Redigi service
8 and the user uploading music, right?

9 MR. ADELMAN: No. I mean, it's -- The way that cloud
10 locker storage works is that people put copies up into the
11 cloud. Redigi is not copying. It's not a judicial admission.
12 It's within PI papers. In the answer they clearly said they
13 were not copying.

14 It's very difficult, especially in a preliminary
15 injunction situation, technology is often very hard to
16 describe. It's often very hard when you just met your lawyer,
17 you're putting together papers in a very quick scenario. I had
18 the ability to spend weeks with the plaintiffs discussing their
19 technology, understanding their technology, understanding what
20 they were doing, and understanding what it did. That is why
21 our motion papers look the way they do.

22 It's unfortunate that we have to explain this away
23 because we shouldn't have to because no copying occurs on the
24 system. The only copy that they were talking about here was an
25 archival copy that was -- that, in the event that there was no

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1 other copies on the system, they would place an archival copy
2 on the system in the --

3 THE COURT: Look, that's not -- That is just not what
4 this statement says. I think that's said.

5 MR. ADELMAN: It's the essence of what it means, your
6 Honor.

7 THE COURT: No. Look, you may have changed your
8 theory. You may have come to a deeper understanding of the
9 technology, but there's no way that statement is referring to
10 an archival copy. That's just -- I mean, that is -- you can't
11 defend it as that. You can't do it.

12 MR. ADELMAN: Well, your Honor, they don't copy. It's
13 a colloquial use of the word. It just doesn't reflect what was
14 happening with the system.

15 THE COURT: Well, I mean, you're moving for summary
16 judgment too. It would seem to me, at the very least, based on
17 the statements that were made that I just recited, there is a
18 disputed fact between your former lawyer and your current
19 expert as to what exactly goes on with this process.

20 Should I make a credibility finding as to whether your
21 expert is making sense, or whether the more accurate statement
22 is the one that was previously made on your client's behalf?

23 MR. ADELMAN: I don't think that you would have to do
24 that. I think that, based on that there's no other evidence
25 other than declarations from the people who have put together

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1 the technology stating, under oath that this is the way it
2 works, that your Honor can rely on it.

3 There's no opposing -- There's nothing from Capitol
4 saying it doesn't work that way. They didn't look at the
5 technology. They had the opportunity to look at the
6 technology. The only evidence in the record is that no copying
7 takes place. That is the evidence before you, your Honor.

8 THE COURT: I mean -- All right. And Mr. Mandel can
9 respond to that. All right. There are other points you want
10 to hit on? What about 2.0. Mr. Mandel says we're not here to
11 talk about 2.0.

12 MR. ADELMAN: We are here to talk about Redigi and
13 Capitol's claim that they violate the reproduction right. If
14 Capitol -- and the distribution right.

15 On top of that, what Capitol is trying to claim, which
16 I think is ridiculous, that the first sale doctrine does not
17 apply to digital goods. Certainly 2.0 is in play here.

18 THE COURT: 2.0 didn't come out until -- is a
19 Johnny-come-lately in terms of this case, right?

20 MR. ADELMAN: No. I'm sorry.

21 THE COURT: When was this disclosed in this discovery,
22 that 2.0 was coming out?

23 MR. ADELMAN: That 2.0 was already out.

24 THE COURT: When was 2.0 disclosed as part of
25 discovery?

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1 MR. ADELMAN: Probably, you know, within two or three
2 weeks before the end of discovery.

3 THE COURT: All right. I mean, it's not supposed to
4 work that way, but the case has radically changed because since
5 the filing of the papers, you are have changed your technology
6 in a significant way. I don't think it's appropriate to say
7 that they're locked into the discovery deadline that prevents
8 them from assessing this technology when a your argument is now
9 different than what it was at the time you --

10 MR. ADELMAN: It's not the argument that's different.
11 It's the technology -- the technology has improved to the point
12 where it fits in, even with what the plaintiffs are saying.

13 THE COURT: But it's certainly different. I mean, it
14 has an impact on Mr. Mandel's arguments. It may not make a
15 difference as far as you're concerned, but Mr. Mandel's
16 arguments are premised not on 2.0, but on classic.

17 MR. ADELMAN: I agree. But what I'm saying is even
18 under Mr. Mandel's arguments, 2.0 is perfectly proper.

19 THE COURT: Well, Mr. Mandel is saying 2.0 is not his
20 complaint, and it's not been tee'd up in this action. You're
21 saying it is tee'd up in this action. And I'm asking you,
22 well, if it is tee'd up in this action, don't I have to allow
23 additional discovery?

24 MR. ADELMAN: Well, what -- I'm -- No because the --
25 We gave them the opportunity to look at the technology. The

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1 technology for 2.0 was already in place. It just wasn't
2 released yet.

3 THE COURT: Well, you said in two weeks --

4 MR. ADELMAN: I'm sorry. Wait. Your Honor, I
5 apologize.

6 THE COURT: No.

7 MR. ADELMAN: I came onto this case on April 24th.

8 THE COURT: Okay.

9 MR. ADELMAN: And one of the first things that I
10 discussed with plaintiff's counsel was the technology and
11 looking at it. That was two months before the end of
12 discovery. Redigi 2.0 -- we're calling it 2.0, but it's just
13 all part and parcel to the same system. It just has different
14 effects, okay -- was readily available for them to look at at
15 that time.

16 Because of marketing efforts, it wasn't released until
17 the end of May. And they chose not to take the depositions of
18 my clients until the middle -- until the middle, late end of
19 May. I understand the discovery schedule was short, and I was
20 only on this case for less than a minute, you know. And we put
21 it together. But nevertheless, they had their opportunities.
22 And, in fact, when they wrote you somewhere around June 20th,
23 they already knew about Redigi 2.0 but did not make the
24 request.

25 THE COURT: But it's their complaint, right?

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1 MR. ADELMAN: I agree it's their complaint.

2 THE COURT: So if they want this to be about Redigi
3 classic, I mean, why do you get to say no, no, no, I've decided
4 this is about something else?

5 MR. ADELMAN: Well, it's not necessarily about
6 something else. It's still the same law, and we're arguing the
7 same arguments. What we're just saying is, hey, you know, even
8 if what you say is correct, Redigi 2.0 complies with that.

9 THE COURT: Well, I'm not --

10 MR. ADELMAN: So I hear what -- I'm sorry.

11 THE COURT: I'm not sure they're disagreeing. I'm not
12 sure Mr. Mandel wants to engage on that right now. Is that
13 right, Mr. Mandel?

14 MR. MANDEL: No. Actually, we do disagree, and we did
15 brief, after our other arguments, as to why we think Redigi 2.0
16 also is a violation on the limited information we had.

17 THE COURT: But I asked you a minute ago, and you said
18 it's not this case.

19 MR. MANDEL: We don't think it's this case, but
20 obviously, they made a motion, and I don't know what your Honor
21 is going to say is a part of this case or not. If you're going
22 to consider it and think we're not entitled to discovery, we do
23 have an argument as to why we think it's a violation. But our
24 basic position is, no, it's not part of this case. Certainly,
25 if it is going to be part of this case, we have to have an

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1 opportunity for further discovery.

2 THE COURT: Okay. Mr. Adelman?

3 MR. ADELMAN: Yes, your Honor.

4 THE COURT: Any other points you wanted to make?

5 MR. ADELMAN: Since you asked us not to make policy
6 arguments, if you wouldn't remind if I just reviewed my notes
7 for a second.

8 THE COURT: Sure. Take your time.

9 MR. ADELMAN: If I could just address the DMCA report
10 for a second. Our response to that is that the DMCA report is
11 not binding. It's only entitled to get more deference based on
12 the power to persuade, and the Second Circuit has already
13 declined to follow this report's interpretation concerning
14 duration or requirements in cartoon networks.

15 The one part that I want to address about the report
16 is that Mr. Mandel said that they talked about moving, and the
17 technology was already available. I didn't see anywhere in the
18 report that it discussed moving. What it discussed was forward
19 and delete. And, actually, it did say that --

20 THE COURT: What did say?

21 MR. ADELMAN: That the report did say that the -- that
22 their findings were premised on the fact that technology was
23 not available in 2001 to be able to effectuate Section 109, and
24 the report itself conceded that if the right technology was
25 available, it may be conceivable. So I think that that rebuts

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1 Mr. Mandel's arguments on that point.

2 Unless your Honor has any other questions....

3 THE COURT: No, I don't think I do. I'll give
4 Mr. Mandel an opportunity to respond, if he wants.

5 MR. ADELMAN: Thank you, your Honor.

6 THE COURT: Okay. Thank you, Mr. Adelman.

7 MR. MANDEL: Your Honor, you know, Mr. Adelman talks
8 about they filed a patent, but I think it's important to point
9 out the patent they filed is not on this so-called Star Trek
10 technology that we're hearing about today. In fact, if you
11 look at the language of the patent, which was put in our
12 papers, what it actually says is for a digital media object,
13 which is a music file, to be offered for sale. It is first
14 copied to a remote server, and served on the disk.

15 That's the way they described their technology in the
16 patent they applied for, which Mr. Adelman just said is the
17 patent that they have. There's nothing about some migration
18 process that, apparently, now they've decided is what truly the
19 technology is. And while, for all the reasons I've said, I
20 don't think it's necessary to delve into the technology.

21 I do think that even if you look at it at the
22 technological level, based on the evidence before your Honor,
23 that it is clear that they delete the file. Because what are
24 our expert said in response, they said this in paragraph 14 of
25 his declaration and it's not disputed in the reply

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1 declarations, that basically they use a function called set and
2 defile. At least that's what they use in the Windows
3 environment.

4 And what that does is effectively truncates the
5 original file that's on the user's hard drive in pieces; so as
6 each piece is read into memory, they truncate that original
7 file so it gets smaller and smaller until, by the end, it's of
8 zero length and it no longer has the recording there.

9 Now, our expert said, and don't dispute this, that the
10 only reason that's there -- that has nothing to do with getting
11 the file to the cloud. That's there for one reason and one
12 reason only, to make sure that that file that existed on the
13 hard drive can no longer be accessed and that the original file
14 is no longer on the user's hard drive.

15 So if that didn't exist, if they weren't using that
16 truncate function to set and defile, you could do everything
17 they do. Take it in reverse order, read it in pieces, and
18 nobody would be disputing that there's a copy because that
19 would just be a basic upload, like any other upload, that ends
20 up with two copies. One here, the original, and one in the
21 cloud.

22 Now, obviously, they didn't want that to happen; so
23 they had to figure out a way to make sure. It wasn't good
24 enough to just read it in reverse order and send it up that
25 way, because you'd still be left with two, and that would

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1 defeat their argument on reproduction. So they have this
2 additional function, set and defile.

3 THE COURT: You think that's just a shredder?

4 MR. MANDEL: Exactly. That's what it is. It serves
5 no purpose in terms of making sure that it's duplicated. It's
6 there only to be shredded. Now, they say there's no evidence
7 in the record, but there's the evidence of their own
8 admissions, and not just in the brief. There's the statement
9 in the answer, upon the upload of an eligible file to the
10 cloud, such file is deleted. Such file and all other copies.
11 That's their language. That's how they affirmatively described
12 it, and now they say, well, "such file" means the archival copy
13 that we were making temporarily.

14 That's preposterous. I mean, that's not what it says.
15 It says such file in reference to the eligible file is deleted.
16 And they said it again in their deposition on two occasions
17 when they confirmed that that statement was accurate, and
18 that's a statement that they made in a sworn declaration. So
19 there is evidence that comes right from them that unequivocally
20 establishes that there is a deletion, and that we're only
21 talking about characterization.

22 And in terms of the copyright office report, if I can
23 just read from Page 81, what it says, they're talking about the
24 proposals.

25 THE COURT: Page 81 of?

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1 MR. MANDEL: Of the DMCA report that the copyright
2 office did, and they're talking about the similarities between
3 a physical transfer and the technological process that's going
4 to happen online. And they say, "Some of these proposals would
5 enhance the similarity by requiring the use of technological
6 measures, in some cases referred to as 'move' or 'forward and
7 delete' technology that will disable access to or delete
8 entirely the source file upon transfer of a copy of that file."

9 So it is the same thing they were talking about, and
10 Redigi has said, we didn't invent something new. It's not like
11 we came up with a new way to do uploads. In fact, we're using
12 a very old way, and, in fact, they admitted that they delete
13 the file.

14 Now, Mr. Adelman says, why is it so hard to believe?
15 I mean, one of the reasons it's hard to believe is that if you
16 really had this new technology and you were coming into court
17 to defend a preliminary injunction, where you claim your whole
18 business is at stake, I think that might be front and center.
19 It might be one of the first things he said. Oh, by the way,
20 our technology doesn't make a copy. But they didn't say
21 anything close to that.

22 In fact, they admitted, clearly and unequivocally, in
23 the brief that they made a copy. They admitted in the
24 declaration and in the answer, that they delete, and they
25 acknowledge that it at the deposition. So the evidentiary

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1 record is absolutely clear on this point, and there is a
2 violation of the reproduction right.

3 And, in essence, all we have is what they're trying to
4 say, what they're straining to say, well, but there's not two
5 copies at the same time; so therefore, it shouldn't be a
6 reproduction. But that's not what it means. I mean, I -- for
7 the reasons that your Honor said. I mean, if I stood at my
8 photocopy machine and page by page copied it and shredded the
9 page that I copied, there's no dispute that you wouldn't have
10 two at the same time, but what you'd end up with is a copy.

11 The fact of the matter is, the Copyright Act does not
12 permit you to reproduce the work and sell the reproduction.
13 Even if you destroyed the original. Whatever you do with the
14 original is irrelevant. Now, I think that really disposes of
15 the reproduction right, and with it, the first sale defense, as
16 well.

17 And I just want to such briefly on the first sale
18 defense. Mr. Adelman talks about London-Sire, and the fact
19 that a material object doesn't need to exist throughout the
20 process, but London-Sire is a distribution case. London-Sire
21 is not analyzing a first sale defense to decide whether the
22 particular phono record, which they used to begin, is what's
23 been sold. They were just analyzing whether there's a
24 violation of the distribution right, and they reached the
25 sensible conclusion, the same conclusion the Supreme Court

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1 reached in Tasini, that, yes, that's a violation of the
2 distribution right. You are distributing with a phono record.

3 If you end up one here and you end up with one at the
4 other end of the process, that's a violation of the
5 distribution right. But that's not the question that you have
6 to look at for first sale. For first sale purposes, it has to
7 be the particular phono record, and if you look at London-Sire,
8 even they were very careful in a passage that really didn't
9 matter for purposes of the issue they were deciding, but is
10 critical in the context of this case. They said, or more
11 precisely, when they were describing what the phono record is,
12 it's the electronic file or more precisely the segment of the
13 hard drive on which the electronic file can be found.

14 And that really is the point, that it's not the
15 electronic file, the data floating in the air that's the
16 material object. It is the hard drive, and for those reasons,
17 the distribution right is violated, but there is no first sale
18 defense. There's no inconsistency between those two positions
19 because you're interpreting different statutory language that
20 applies in each case. Phono record is the same, but the rest
21 of those provisions is not the same.

22 The last point I want to just briefly talk about is
23 Redigi 2.0.

24 THE COURT: I thought you didn't want to talk about
25 that.

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1 MR. MANDEL: Well, I want to talk about where it fits,
2 and since your Honor has asked about it and is interested; so I
3 want to explain our position on that clearly.

4 First of all, Redigi 2.0, according to the deposition
5 testimony, was implemented on June 11th, 2012. We didn't take
6 the depositions in late May. We took the deposition of their
7 witnesses June 20th, I believe the 20th and the 19th, right at
8 the close of the discovery period, literally the day the
9 discovery period was closing.

10 And that's when we found out about it, in a
11 deposition, when -- it wasn't something that anybody was even
12 focusing on or new existed. It came up in answer to a question
13 that, oh, we do it this way now. So, you know, it's clear that
14 we didn't have an adequate opportunity to fully flush this out
15 and figure out what's involved. And that is the reason why,
16 first of all, we say it would be an advisory opinion, it's not
17 an issue here. And, secondly, certainly if it's going to be
18 considered, there has to be a full opportunity for discovery.

19 Now, the discussions with counsel, and I think this is
20 an important point, part of the problems we had, to be honest,
21 is we were shooting at a moving target. You know Mr. King had
22 discussions with their prior counsel in which he frankly said,
23 look, we don't think we need to look at your technology if the
24 position you're taking is that it's a copy, and that's conceded
25 as you said in your preliminary injunction papers. And he

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1 said, yeah, that's our position, and that's not in dispute.

2 We also submitted two case management plans to your
3 Honor, including one after Mr. Adelman was substituted in, that
4 specifically said the parties believe that the issues can be
5 resolved on summary judgment following fact discovery, and
6 that's why we're asking that you put off expert disclosures,
7 put off expert discovery until after the summary judgment
8 dates.

9 Now, we still believe that, based on the arguments we
10 made, but the fact of the matter is, they changed completely
11 the position that they were asserting. A part of our reason
12 for believing that was we thought we were all in agreement
13 that, of course, a copy is made and a deletion has occurred, as
14 they had said repeatedly. So to now try and say, by the way,
15 we implemented a new technology that was not the subject of
16 your complaint, that was not disclosed in any documents we
17 produced, that was revealed for the first time in a deposition
18 the day before discovery closed or perhaps the day discovery
19 closed, and now it's tee'd up for decision I think is just not
20 fair, and it violates basically Rule 56D and the reason you
21 have that there. That if you need an opportunity for further
22 discovery, you should be given that.

23 So our position is it's not part of this case. If it
24 is part of this case, we should have some discovery on it. But
25 finally, if your Honor disagrees with us on those two points,

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1 and says, yes, it is part of this case, we don't agree that
2 it's not a violation. And we've explained that in our
3 opposition brief.

4 And the reason for that is it's not the case that this
5 is just limited to the Redigi cloud. I think the deposition
6 testimony that Mr. Ossenmacher offered when he first told us
7 about this technology, was that the file appears in two places
8 virtually simultaneously, in the Redigi cloud and also on the
9 user's hard drive; so that there are two copies. So it's not
10 the case that there's one copy that's delivered just to the
11 Redigi cloud, and more fundamentally, it's not the case that
12 Redigi has any right to intervene in the relationship here and
13 deliver it in a different manner.

14 Certainly that's part of the Capitol/Apple
15 transaction. I mean, Capitol and Apple are not agreeing that,
16 by virtue of this, that the downloads can appear in a non-Apple
17 environment. That's not what the agreement says; so there are
18 issues there that would really need to be thought about,
19 developed and further looked at.

20 By no means do I want to say today that we concede
21 that Redigi 2.0 is okay. We don't concede that point, but we
22 just don't think this is the appropriate vehicle, this motion,
23 to actually resolve that question. And the question that
24 brought us to court, and what is at the heart of this case, is
25 that they were setting up a used marketplace that would cover

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1 all kinds of existing music that's already been purchased from
2 iTunes that's on users' hard drives that they would now be able
3 to resell.

4 What's going to happen in the future with respect to
5 if somebody who buys something in June has decided, you know,
6 they want to resell that, that's for another day, but that's
7 not what caused this lawsuit to be filed. And that's what
8 we're seeking relief against. That's why we're here, and
9 that's what we think is really at the heart of this case.

10 THE COURT: All right. Thank you.

11 Mr. Adelman, anything you want to say in response?
12 Any last words?

13 MR. ADELMAN: Yes, some short comments. All right.
14 So one point that I want to just address was that Mr. Mandel
15 said earlier that he said that files moving within the same
16 hard drive must be okay, but I think one of the things with
17 Redigi 2.0 is we have to know what uses fall within this
18 statute and what uses fall without. Why is it okay to move
19 files on my own hard drive and that doesn't violate the
20 production, but to move my file to a cloud does violate
21 reproduction? It doesn't seem to make sense to me.

22 THE COURT: But wait, isn't that the same difference?
23 Just if I record my album to my cassette, and then put it in my
24 walkman, which I had 20 years ago, but are you suggesting that
25 is a violation or is not a violation?

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1 MR. ADELMAN: No. What I'm saying is that the
2 computer itself moves the file around, through certain actions,
3 to make things more efficient, et cetera. And Mr. Mandel said
4 earlier that that would be ridiculous, that wouldn't be a
5 violation, but the file is clearly moving. It's clearly moving
6 around the hard drive.

7 So what I'm saying is, there's no difference between
8 the file moving around a hard drive and the file moving to a
9 cloud drive. It's the same file is what I'm saying.

10 I just want to clarify that the patent that Mr. Mandel
11 was just referring to is not the patent that I was talking
12 about. There's a second patent. The patent that Mr. Mandel
13 was talking about is a business model patent that Redigi filed
14 early on. The patent that I'm talking about is a process
15 patent, which specifically discusses the migration process.

16 THE COURT: And when was that filed?

17 MR. ADELMAN: That was filed within the last month or
18 two.

19 THE COURT: Okay. But why wouldn't you be also held
20 accountable to what you say in your patents, you know, as a
21 business model?

22 MR. ADELMAN: I think we do, but there's a difference
23 between a process patent and a technology patent. A
24 business -- a process patent and a business model patent.
25 There's differences. And taking what Mr. Mandel just said out

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1 of context is not necessarily the whole of what the patent
2 stands for.

3 There's no question that on our computers we do
4 delete. Though, I don't like the word delete because nobody
5 really deletes. I mean, when you delete something off your
6 computer, it goes into the trash. It's not really deleted.
7 When you move it from the trash, it's still not really deleted
8 because anyone whose hard drive has crashed and has gone to the
9 genius bar knows that sometimes they can recover it.

10 THE COURT: Right.

11 MR. ADELMAN: In this case, it's not deleted because
12 it's not there anymore. This end truncates the argument that
13 their supposed expert, which -- who's only in security and not
14 really in computer science, said it's just not the way it
15 works. The way it works is the way it's described in our
16 papers, the way it's described in the declarations, and the way
17 I've described it today, is that the file actually moves,
18 leaves no data. The only thing that's left when the file moves
19 is the name of the file.

20 THE COURT: Okay.

21 MR. ADELMAN: A couple other points. You mentioned
22 the London-Sire point. That was actual reproduction. It's a
23 file sharing case. That's what -- that two different files at
24 two different places because there was a reproduction. In this
25 case, it is the particular phono record that Redigi is selling.

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1 It is the particular phono record that they're migrating from
2 the hard drive to the cloud.

3 THE COURT: Wait, wait, wait. They're migrating the
4 phono record?

5 MR. ADELMAN: They're migrating the unique file. The
6 unique file that they purchased from iTunes is my --

7 THE COURT: The phono record is not the file. The
8 phono record is the material thing that allows a listener to
9 hear sounds, right?

10 MR. ADELMAN: Right.

11 THE COURT: And so it's when you have that piece of
12 code, the file, on a particular material thing, which is, in
13 this case, a hard drive; it's no longer in the turntable --

14 MR. ADELMAN: Right.

15 THE COURT: -- that's the phono record, right?

16 MR. ADELMAN: That -- Yes. It's the same phono record
17 in the cloud, though. It is.

18 THE COURT: Well, how is it the same phono record?
19 Phono record is a material thing. So how can you say that
20 what's in the cloud is the same as the thing that's on my desk?

21 MR. ADELMAN: Because you can perceive it and listen
22 to it.

23 THE COURT: But that's -- It's material. Listening to
24 something doesn't make it material, right?

25 MR. ADELMAN: No.

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1 THE COURT: A material -- I listen to the radio all
2 the time. The radio is material; the songs aren't.

3 MR. ADELMAN: The ability to hear it, though.

4 THE COURT: The ability to hear it makes it material?

5 MR. ADELMAN: Without the material object, there could
6 be no ability to hear it.

7 THE COURT: But that is the point. That is what the
8 phono record is. It is a material object in which sounds are
9 fixed, and so the argument of the plaintiffs is that the phono
10 record is the file on a hard drive.

11 MR. ADELMAN: The hard drive --

12 THE COURT: And that you, therefore -- that to have
13 the same thing, the same original in Phoenix is a non sequitur,
14 right, if the hard drive is still on my lap?

15 MR. ADELMAN: It's just the same as in CM Paula.

16 THE COURT: But that's a 1973 case involving greeting
17 cards and somebody taking stencils and putting them on top of
18 greeting cards.

19 MR. ADELMAN: The logic still applies.

20 THE COURT: But that logic is -- I'm not bound by that
21 logic.

22 MR. ADELMAN: No, you're not. I'm trying to persuade
23 you to that.

24 THE COURT: All right. So then you're really relying
25 on the Northern District of Texas. That is your case.

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1 MR. ADELMAN: That's a small point. We're saying
2 there's no reproduction; so you're right.

3 THE COURT: Okay. But it seems to me you keep going
4 back to the suggestion, which is appealing to the casual
5 observer, that what you own is the sounds, but you don't. When
6 you buy these things, what you own is the piece of code that's
7 on your hard drive or your iPod.

8 MR. ADELMAN: Yes.

9 THE COURT: That's the phono record.

10 MR. ADELMAN: You own that particular copy. Okay?
11 Having -- It would flip the law on its head if the law said
12 that in order to sell that phono record, I had to sell my hard
13 drive. If I wanted -- I own that track. For \$1.29, I
14 purchased a music track from iTunes. iTunes delivered it to
15 me. Whether it's in my cloud, they delivered it to me, or on
16 my hard drive, it's mine. I now own it. It's a sale. It
17 says --

18 THE COURT: Now, I think you're moving into policy
19 arguments. Now, I think you're arguing and there's some great
20 arguments there. They're not for me, though. They're really
21 for Congress, right?

22 MR. ADELMAN: No. They're actually for you.

23 THE COURT: We the people make the laws. You're
24 asking me to basically take over the drafting, and I guarantee
25 I can do it better than Congress will, but I don't have that

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1 authority.

2 MR. ADELMAN: I think you do. But I mean, Section 109
3 was created from Bobbs-Merrill. Bobbs-Merrill was court's law.
4 Before Bobbs-Merrill there were some cases about first sale,
5 but it really didn't exist in the way it does today.
6 Bobbs-Merrill, in essence, codified first sale, and Congress
7 took Bobbs-Merrill and said, yes, this is what we want to do
8 now. So, yes, I think you have the absolute right and power to
9 do so because I think --

10 THE COURT: That's another conversation about courts
11 and their authority.

12 MR. ADELMAN: I know, your Honor, but if I could just
13 say I think what Redigi is doing is perfectly proper under the
14 copyright law and, therefore, the arguments we're making are,
15 while may be policy, are founded in at least some law and, you
16 know, the arguments against the policy are nowhere. There's no
17 evidence of it.

18 THE COURT: Well, I think the argument is against the
19 policy having been made. I don't think Mr. Mandel --

20 MR. ADELMAN: I have not. I don't mean the policy. I
21 mean, the definitional issue about -- I mean, we argued it; so
22 I'm not going to reiterate it.

23 So the last two things. One is that Mr. Mandel didn't
24 point out the page and section, but Mr. Ossenmacher in his
25 deposition never said that there are two copies. He never

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1 said. He described the technology exactly the way I've been
2 describing it today, the way we described it in our papers.
3 It's completely consistent.

4 And the last thing, his comment about iTunes. iTunes
5 does not tell you you cannot -- where to put the file. You
6 know, by default they put a file in a certain place; so that
7 the files get delivered all into the same folder. But you
8 could put that folder anywhere, and there's nothing in the
9 terms -- A, there's nothing in the terms of service that says
10 you can't put that folder into the cloud.

11 In fact, Apple actually encourages you to put it into
12 their cloud or put it into, you know, any other space.
13 Nevertheless, Apple isn't here. Apple isn't objecting to
14 Redigi putting the files into the cloud, and I don't think
15 that's an issue here. Thank you very much, your Honor.

16 THE COURT: Okay. All right. Let me thank all the
17 lawyers, those who argued and those who participated in
18 briefing and preparing for the arguments. It really was very
19 exceptionally well done. I thought the briefs were terrific.
20 I don't always get briefs of this caliber on a subject that's
21 very interesting in which, you know, obviously, the lawyers
22 have to educate the Court. So that's, I think you did a good
23 job of that each of you so thanks.

24 I'm going to reserve. I have a lot to think about. I
25 know this is an important issue for both of your clients and

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1 beyond that. There's a large public and other interests that
2 are very focused on this. It's not lost on me, but again, I
3 want to just temper everyone's expectation to acknowledge that
4 we're in a court of law here. We're not making policy on a
5 blank slate, and so ultimately, what this is about is
6 interpreting and applying an existing statute. And where I end
7 up on that will make some people happy and some people unhappy,
8 but it's -- you know, don't confuse what I'm doing with what
9 the folks in Congress will be doing, where they will be
10 balancing different policy arguments and reaching conclusions
11 based on the strength of those arguments. And so that's
12 something that eventually is going to have to happen and
13 probably is already happening.

14 Great. Thanks a lot. Let me thank the court
15 reporter, who has worked feverishly the whole time and we
16 really benefit greatly from her skills and talents. Although,
17 the technology is truly not that advanced. It hasn't changed
18 that much in 50 or 60 years. Okay. Thanks. Have a good day.

19 (Adjourned)
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