

D89ECAPC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

CAPITOL RECORDS, LLC,

Plaintiff,

v.

12 CV 95 (RJS)

REDIGI INC.,

Defendant.

-----x

August 9, 2013

10:11 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN LIEBOWITZ & LATMAN
Attorneys for Plaintiff

BY: RICHARD MANDEL
JONATHAN KING

DAVIS SHAPIRO & LEWIT LLP
Attorneys for Defendant

BY: GARY ADELMAN
SARAH MATZ

D89ECAPC

1 (In robing room)

2 (Case called)

3 THE COURT: All right. We're here in connection with
4 the plaintiff's contemplated -- well, I guess their
5 contemplated motion to amend. So I've gotten letters from both
6 of you on this. And there's a couple of issues.

7 In terms of amending out certain claims, I assume you
8 don't care?

9 MR. ADELMAN: Nope.

10 THE COURT: So that's fine.

11 In terms of the additional song titles, I think we
12 certainly contemplated that. And I think, you know, certainly
13 with respect to reproduction, that that's -- I mean, that's
14 what the whole opinion I wrote was about. So I don't think it
15 all turns on distribution, which is what was allowed for the
16 focus of your letter.

17 MR. ADELMAN: Correct.

18 THE COURT: I just want to be clear. You're talking
19 about adding song titles of recordings that were reproduced
20 into the cloud and then offered for sale?

21 MR. MANDEL: Correct.

22 THE COURT: Not merely ones that may have been
23 reproduced by a Redigi customer who wanted to just use it for
24 storage?

25 MR. MANDEL: Correct. Every one of the recordings was

D89ECAPC

1 offered for sale, according to defendant.

2 THE COURT: So I think that's fair game here. If it
3 was the other, I think there's a fair use. There would be a
4 fair use defense. I don't have a rule on that, but I think it
5 will be if we just store it, I don't think that -- reproduction
6 is probably not appropriate in this case. But for what you
7 just said, then I think then I'm inclined to allow it. I think
8 that is fair game, in light of my opinion.

9 And then the last bit is with respect to amending to
10 name two new defendants, individual defendants. And so let's
11 think about this. I do think that my opinion referenced these
12 individuals in some cases explicitly. So I think that there's
13 reason to believe that these guys could be added, and there
14 could be liability against them. I don't know if there needs
15 to be additional facts developed, though. I mean, if amending
16 to add them is not going to require any additional discovery,
17 then I think I probably will allow it. But if it's going to
18 require additional discovery, then I'm not so sure.

19 MR. MANDEL: We don't --

20 THE COURT: You don't think it will?

21 MR. MANDEL: We don't think so. We think that the
22 evidence we've gotten from the depositions as to their
23 participation, some of which is even referenced in your Honor's
24 summary judgment opinion, is sufficient to establish
25 individual.

D89ECAPC

1 THE COURT: Yes, no question about that. Do you think
2 it's going to need more discovery?

3 MR. ADELMAN: No, I do not.

4 THE COURT: Okay. Well, that's -- I mean, I
5 appreciate your candor, then. Then I think I am going to allow
6 it. This will, of course, lead to, I'm assuming, an inevitable
7 second summary judgment motion with respect to the individuals,
8 right?

9 MR. MANDEL: We could talk about that. I mean, I
10 guess that entitles him to sort of where we'd go from here.

11 THE COURT: Where are we going from here? Let's put
12 on our practical shoes.

13 MR. MANDEL: You know, we'd like to get to trial.

14 THE COURT: Trial on damages?

15 MR. MANDEL: On damages. So, I mean, we'd be prepared
16 to try the issue of their individual liability without doing a
17 separate summary judgment motion because, I mean, I think
18 legally, in terms of the infringement being established, I
19 don't think there's going to be any question under the opinion.
20 So the only issue is going to be --

21 THE COURT: You'd be moving basically for a directed
22 verdict after you closed.

23 MR. MANDEL: I think the only defense that could
24 potentially be available is that somehow they don't have enough
25 personal involvement to be individually liable. And, frankly,

D89ECAPC

1 I mean, I think we probably are entitled to summary judgment on
2 that, but, you know, to move things along, we could try that I
3 think, you know, at the same time.

4 THE COURT: Is there a dispute on the damages?

5 MR. MANDEL: I think there's a dispute as to the
6 amount, because we're seeking statutory damages and, you know,
7 so I guess --

8 THE COURT: Well, you're seeking statutory damages,
9 and so that is just a number of song titles and the number of
10 infringing acts, I guess, right?

11 MR. MANDEL: Right. There's the issue of how many,
12 you know, works are involved, and then there's the range of
13 damages that it's in the Court's discretion to award.

14 One of the things I think we've been thinking about --
15 and, you know, we're reading in Professor Nimmer's treatise
16 that for statutory damages, sometimes these things can be done
17 on affidavits, and it doesn't require as much of a full-blown
18 procedure. I mean, we'd be open to talking about whether a
19 paper trial to set the damages is appropriate, because,
20 frankly, I don't think the facts are much in dispute. I think
21 we've got --

22 THE COURT: That's what it seems to me. I mean, you'd
23 want to appeal this thing, obviously.

24 MR. ADELMAN: Correct. However, just to address that
25 one thing, our clients definitely want to have their say in

D89ECAPC

1 court as to damages. It's not as cut and dry as Mr. Mandel is
2 saying.

3 THE COURT: I'm not assuming it's cut and dry, but --

4 MR. ADELMAN: There are definitely factors involved in
5 the --

6 THE COURT: Bench trial or jury trial?

7 MR. ADELMAN: I would have to discuss that with my
8 client, but I think they wanted a jury trial. But I'll --

9 MR. MANDEL: I mean, well, it is a bench trial as to
10 Redigi, because there's never been a jury demand. I guess as
11 to the individual defendants who were just coming in, I suppose
12 they would have a right to a jury trial, you know. So I don't
13 know how that would complicate things.

14 THE COURT: That's interesting. That might actually
15 factor into whether you want to -- since he just indicated he
16 thinks probably a jury trial.

17 MR. ADELMAN: I mean, I've never actually had that
18 conversation with the clients because, obviously, we just got
19 the amended complaint. It wasn't one of the top level things
20 that they were concerned about at the time.

21 THE COURT: I mean, look, I think it's just worth
22 thinking about. I think, you know, it would be an interesting
23 trial, but it's a trial really about damages, unless you amend
24 and decide to forego summary judgment.

25 MR. MANDEL: I mean, I guess if they're going to seek

D89ECAPC

1 a jury trial on the individuals, we probably would want to move
2 for summary judgment on the individual liability. I was
3 assuming the whole thing was going to be a bench trial because
4 Redigi hadn't sought a jury trial and --

5 THE COURT: So that might be worth chatting about.

6 MR. ADELMAN: Yes. I think that's a good idea.

7 THE COURT: Obviously it's your client's call, but I
8 think that's worth thinking about. So I am going to allow you
9 then to amend. I don't think there's any reason not to.

10 MR. MANDEL: Is the procedure then should we file -- I
11 think we have to make a couple of corrections to the recording
12 list, so can we just do that and then file an amended
13 complaint.

14 THE COURT: Let's set a date by which you can do that.
15 When do you want to do it by?

16 MR. MANDEL: We can probably do it by the end of next
17 week.

18 MR. KING: The only caveat I make is that you had some
19 further information for me about --

20 MR. ADELMAN: Why don't you give us a little more
21 time.

22 MR. KING: It was logistically a nightmare, weaving
23 through which tracks had been uploaded.

24 THE COURT: How much time?

25 MR. KING: If we get that list, what do you need, two

D89ECAPC

1 weeks?

2 MR. ADELMAN: In all candor, so my client is actively
3 seeking an answer to some of the questions that the plaintiff
4 has asked. And he actually e-mailed me last night and asked
5 them to give him another week. So I think that maybe a week
6 after that.

7 MR. MANDEL: Could we maybe say the end of August?

8 THE COURT: End of August is fine. Why don't we do
9 this, then: You're going to file your amended complaint by the
10 end of August. And then can I give you a date in September by
11 which you folks send me a joint letter telling me how you want
12 to proceed on jury versus bench, whether there's going to be
13 motions for summary judgment. Those are really the issues I
14 think, right? Anything else?

15 MR. MANDEL: I guess the only other issue would be if
16 there is some openness to doing a sort of paper trial instead
17 of a full-blown --

18 THE COURT: A bench trial would be -- I think my rules
19 for a bench trial are generally more of a paper trial, where I
20 don't do directs. The directs would be on the affidavits.

21 MR. MANDEL: Okay.

22 THE COURT: Stipulate to all the exhibits you want,
23 and so that would be much faster.

24 MR. MANDEL: And then there's just cross-examination.

25 THE COURT: Cross-examination for -- if you want it.

D89ECAPC

1 You don't have to do it.

2 What I generally require is identifying your witnesses
3 that you intend to rely on. Put in your cases in chief. And
4 then the other side looks at that list and says, okay, I'm
5 going to want to cross him, him and him. And often it is the
6 case that, you know, there might be 12 witnesses that I'm going
7 to hear from on affidavits, but only three crosses, because
8 most of the declarations are not really contested. So that
9 would be more efficient. Not as fun, frankly. Juries are fun,
10 but more work for me, because I have to write. But, you know,
11 at this stage it probably makes more sense that you're seeking
12 statutory damages.

13 In any event, your call. Just let me know, then. If
14 I then ask you to get back to me by September 15th, two weeks
15 after the complaint --

16 THE LAW CLERK: That's a Sunday.

17 THE COURT: 16th. It's great that she's got amazing
18 knowledge of the calendar.

19 MR. KING: And that's for --

20 THE COURT: Christmas, 2016?

21 THE LAW CLERK: Friday.

22 MR. KING: So you want us to propose a procedure for
23 how we take care of all this?

24 THE COURT: Just tell me how you want to do it. I
25 think it will make it easier at that stage. Depending on what

D89ECAPC

1 you tell me, then I'll issue an order that sets a schedule.
2 Tell me how long you think the trial will be, and that will
3 turn on what kind of a trial. And you might want to propose
4 dates, though I'll tell you, I have a very jam-packed fall. So
5 I'd love to get this done before the end of the year. And my
6 hunch is that some of the trials that I've got scheduled will
7 go away, but at least for now everybody is insisting that
8 they're going. So I only have probably a few open days here
9 and there.

10 So let me know what dates you would propose. I'll see
11 how that jives with my schedule, then I'll issue an order
12 setting a date and setting dates for submissions.

13 MR. MANDEL: That sounds good.

14 THE COURT: So the 16th for that letter, and
15 August 31st.

16 THE LAW CLERK: Saturday.

17 THE COURT: It's a Saturday. She's like Rain Man.

18 So August 30th, then you'll file the complaint. All
19 right. So that sounds like a plan.

20 Anything else we should talk about today?

21 MR. MANDEL: I don't think so.

22 THE COURT: No? All right. Great. Well, it is good
23 to see you. I did certainly enjoy this case. I have enjoyed
24 it. The lawyering has been very good, and it's certainly an
25 intriguing set of issues.

D89ECAPC

1 Good to see you. Enjoy the rest of the summer. Let
2 me thank the court reporter, as always. If anybody needs a
3 copy of the transcript, you can take that up with her now. I
4 guess we have a little bit of time.

5 (Adjourned)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25