**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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CAPITOL RECORDS, LLC,

Plaintiff,

Civil Action File No.
12 Civ 0095 RJS/AJP

-against-

REDIGI INC.,

Defendant.

**DECLARATION**

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**RAY BECKERMAN** declares under penalty of perjury:

1. I am associated with Ray Beckerman, P.C., attorneys for defendant.

2. The purpose of the within declaration is primarily to point out what the plaintiff's papers do NOT contain:

-any evidence of any act of copyright infringement;

-any affidavit or declaration of any witness to any act of copyright infringement;

-any explanation of why plaintiff waited two years since it found out about ReDigi's business to bring an application for a preliminary injunction;

-any explanation of why plaintiff waited two (2) and a half months since the cease and desist letter sent on its behalf to bring an application for a preliminary injunction;

-any explanation why plaintiff waited two (2) weeks after commencing its action to bring an application for a preliminary injunction;

-any affidavit or declaration of any person with personal knowledge;

-any proof that a money judgment would not afford an adequate remedy;

-any reason for proceeding by order to show cause other than the statement in Mr. Mandel's declaration that the reason was to avoid the Court's rule requiring a premotion letter and conference;

-any showing of irreparable harm;

-any showing of prejudice;

-any showing that defendant would not be prejudiced by the forced shutting down of its business;

-any showing that any of the song files stored or transferred on defendant's site derived from Amazon.com's site, the terms and conditions of which are cited by plaintiffs both in their complaint and in their preliminary judgment application, although entirely irrelevant to this proceeding since the only Eligible Files stored or transferred derive from iTunes, not Amazon;

-any showing of what the iTunes terms and conditions are (exhibit A hereto);

-any showing that the public would be better off without defendant's storage and used music market place;

-any showing that an injunction would help promote competition;

-a single allegation not already set forth in the complaint in virtually identical terms;

-any showing that a preliminary injunction would do anything other than put defendant out of business, thus drastically altering, rather than preserving, the status quo.

3. What the motion papers do contain is rank speculation, and vague, unsupported, and highly confused legal argument, unhampered by the usual courtesy of having at

least some *evidence* prior to bringing suit, and especially prior to seeking the drastic relief of an interlocutory injunction.

-In paragraph 7 counsel refers to iTunes and Amazon as "legitimate" sources of digital music, but in paragraph 20 seems to have forgotten about iTunes, citing only the terms and conditions of Amazon, speculating that Amazon is "a common source and *likely the origin* of many ReDigi uploads" (emphasis supplied); in fact, as set forth in the declarations of Mr. Ossenmacher and Mr. Rudolph, Amazon is the source of *no* ReDigi uploads at all. (A copy of the iTunes terms and conditions is annexed hereto as exhibit A).

-In paragraph 11 Mr. McMullan speculates:

> The track "stored" in and offered to consumers from ReDigi's "cloud" is of course an unauthorized copy of the user's original file, as no material object could be transferred to the ReDigi "cloud".

However, he produces no evidence that this is so, and no legal basis for suggesting that one needs 'authorization' to store a personal copy for personal use in a personal locker on a cloud drive.

-Although he argues in the same paragraph, this time correctly, that the file which is uploaded is not a "material object", he bizarrely accuses defendant of infringing plaintiff's distribution right, even though -- by its terms – the "distribution" right is defined as being applicable only to "copies" and "phonorecords" which are themselves defined as being "material objects".

-Also in paragraph 11 he speculates:

> ReDigi's claim that it instantaneously deletes the original file from the user's computer is impossible to verify....

In the first place, it is quite easy to verify that a file has been deleted. ReDigi's software does it

every day, and it could likewise be checked in countless other ways. In the second place, Mr. McMullan, although an attorney, seems to have forgotten that the burden of proof is on plaintiff, not on defendant. Since it is part and parcel of plaintiff's complaint, and its preliminary injunction motion, that ReDigi's software does not do what ReDigi has said it does, it is plaintiff's burden to demonstrate that it is in fact the case.

-He goes on to further argue that the deletion of the original file from the computer is "irrelevant" since "whatever the destiny of the original file, a *copy* of that file is what is transferred to and resides in ReDigi's storage medium". It borders on fantastic that he would say that the deletion of any multiple copies is irrelevant, since (a) the very leitmotif of his declaration is the false allegation that "*multiple* unauthorized copies" litter ReDigi's landscape, and (b) it is absurd for a plaintiff which claims to be interested in protecting its copyrights to say that it just doesn't matter that the defendant has devised a technology to ensure that there is a single unique instance, and not multiple instances, of a file.

-In paragraph 12 Mr. McMullan speculates that the "so-called sale...is accomplished by creation and transfer of another copy"; in fact, as set forth in the declaration of Mr. Rudolph, the sale is *not* accomplished by "creation and transfer of another copy", but by a transfer in ownership of the single unique file that was uploaded. The sale is accomplished by modifying a file pointer, which initially points to the seller as the owner; after the sale it points to the buyer rather than the seller. The music file is not copied, transferred, modified, or altered.

-Also again in paragraph 12 Mr. McMullan, incredibly, concedes that "*no material object* – like a CD or painting – passes from one user to another" (emphasis supplied), and yet *in the very same paragraph* states that "copies are.... *distributed*" (emphasis supplied),

thus once again, in one breath, negating any distribution right issue, and in the next breath accusing defendant of infringing plaintiff's distribution right.

-In paragraph 14 Mr. McMullan attacks the upload to cloud storage, saying that "Uploading, by its very nature, can only be accomplished by making an unauthorized copy", yet provides no basis for suggesting that the owner of a lawfully purchased iTunes file has any obligation to seek 'authorization' from anyone in order to store the file in an online personal storage locker. He should also explain what it is about ReDigi's cloud locker that poses such a grave threat, while the cloud storage lockers of Apple iCloud, Google Music, Amazon Cloud Drive and Player, Dropbox, Microsoft LiveMesh & SkyDrive, Apple MobileMe, Rackspace, Amazon AWS, Box.net, Google Docs / GMail Drive, ADrive, Mozy, Asus webstorage, iDrive, Bitspace, Maestro.fm, Mougg, MusicPlayer.fm, Deezer, and a host of others, do not (see articles in Ossenmacher declaration, exhibit A, discussing a few of the players in this burgeoning new field). If Capitol Records's animus against ReDigi is based upon the fact that it offers a used digital music market place, then it ought to confine its meritless attack to that, rather than repeatedly suggest that one needs "authorization" from the copyright holder to store one's own files.

-In paragraph 15 Mr. McMullan characterizes, without evidence, a user's personal streaming of a 30-second clip as an "unauthorized public performance" by ReDigi even though, as pointed out in the declaration of Mr. Ossenmacher, it is not provided by, or streaming on, ReDigi's site at all, but on that of a third party provider pursuant to license, something Mr. McMullan could easily have ascertained by clicking on a 30-second clip and observing the URL. A copy of the applicable license agreement is set forth as exhibit B to the declaration of Mr.

Ossenmacher. And Mr. McMullan falsely claims that the clips themselves are stored in users' "memory banks", when in fact all that is stored in the memory banks are bookmarks to Rdio's clips (See Rudolph declaration, ¶ 13)

-In paragraph 16 counsel falsely accuses ReDigi of displaying artwork in violation of plaintiff's copyrights; again he could have ascertained the falsity of his accusation quite easily, in this instance by right-clicking the artwork and ascertaining the link location. And again, as set forth in Mr. Ossenmacher's declaration, this too is pursuant to license.

-In paragraph 19 Mr. McMullan engages in more of his comical, entirely unsubstantiated, speculation:

> ReDigi promises that its "Verification Engine" analyzes each file to ensure that it was "legally downloaded" by the user in the first instance and thus "eligible for sale." Given the widespread piracy of sound recordings on the Internet – an issue with which we have been struggling for more than a decade – *it is questionable whether ReDigi can effectively determine whether files were lawfully obtained in the first instance.* (emphasis supplied)

I.e., because plaintiff is inept and has been wasting its money on frivolous litigation instead of the development of useful technology which protects copyright, therefore it is "questionable" whether ReDigi can have accomplished what plaintiff never could. Well it may be "questionable" to Mr. McMullan, but it is the fact. And he offers not a shred of evidence to the contrary. Again, it is plaintiff's, not defendant's, burden to prove the many frivolous and false allegations with which plaintiff's complaint and motion papers are littered.

-In paragraph 26, Mr. McMullan speculates that an injunction is needed because ReDigi's service is a "moving target". In fact, ReDigi isn't moving anywhere; it is in business, in Cambridge, Massachusetts, a number of people rely on it for employment, and it keeps careful

records, much likely more careful records than plaintiff. The fact is that (a) plaintiff has not shown any infringement, moving or not, and (b) as set forth in the accompanying declarations, there is a detailed record kept of each and every transaction, so that, in the unlikely event that plaintiff were to be able to prove an infringement, there would not be the slightest difficulty in finding the records upon which plaintiff would base its damage calculations.

-In paragraph 27 Mr. McMullan spuriously claims, again without any evidence, that "ReDigi is deliberately deceiving the public into believing that its conduct is legal and approved by record companies like Capitol". ReDigi has not stated anywhere that record companies, like Capitol, have "approved" of ReDigi. ReDigi does not need Capitol's approval for anything it is doing, and has never claimed to have had such approval. The only deception is that being practiced by plaintiff, in and out of court (the RIAA sent its frivolous, knowingly dishonest, so-called "cease and desist letter", which failed utterly to comply with the DMCA, to its friends in the press, three (3) or four (4) days prior to defendant's receipt of it; defendant only learned of the letter's existence from a reporter, and had to wait days before receiving a copy).

4. It is clear that plaintiff's entire case, including its preliminary injunction motion, is based upon a glance at the defendant's website, speculation as to possibly helpful but nonexistent facts, and a confused view of applicable law.

5. It appears that the real reason for plaintiff's lawsuit is fear of competition from used digital music sales. Mr. McMullan expresses in paragraph 31 of his declaration his fear that ReDigi sales might "supplant Capitol's market". Perhaps this is something which he should not fear, since the existence of a resale market enhances the value of the original merchandise, and since ReDigi has gone to great lengths to employ a technology which actually combats, rather

than encourages, infringement. But in any event, 'supplanting' a competitor's 'market' is pretty much what free enterprise is all about.

6. What is certain is that his client has no legal or factual basis for its motion, or for its case[1].

WHEREFORE it is respectfully requested that plaintiff's motion be in all respects denied.

Dated: Forest Hills, New York
January 26 2012

**RAY BECKERMAN**

[1] Attached hereto are the following exhibits, referred to in defendant's memorandum of law: Exhibit B: Plaintiff's counsel's admissions at oral argument in MGM v. Grokster, March 29, 2005; Exhibit C: Nielsen Company & Billboard's 2011 Music Industry Report, dated January 5, 2012; Exhibit D: "Steve Jobs: The Rolling Stone Interview," Rolling Stone Magazine, Dec. 3, 2003, excerpt (available at http://www.keystonemac.com/pdfs/Steve_Jobs_Interview.pdf)