UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CAPITOL RECORDS, LLC, No. 12-cv-0095 (RJS) (AJP)

Plaintiff,

-against-

REDIGI INC.,

Defendant.

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DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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POINT I

PLAINTIFF HAS NOT MET THE EXTRAORDINARY BURDEN REQUIRED TO OBTAIN A PRELIMINARY IN.JUNCTION

A preliminary injunction "is an extraordinary remedy that should not be granted as a routine matter." JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 80 (2d Cir. 1990). A plaintiff seeking a preliminary injunction has the burden of demonstrating that (1) it will suffer irreparable harm absent injunctive relief *and* (2) either (a) that it is likely to succeed on the merits of the action, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly in the plaintiff's favor. Salinger v. Colting, 607 F.3d 68, 79 (2d Cir. 2010).

The Court must also (3) consider the balance of hardships between the plaintiff and defendant -- even if the plaintiff demonstrates a likelihood of success -- and may issue a preliminary injunction *only if* the plaintiff demonstrates that the balance of hardships tips in the plaintiff's favor, and (4) "pay particular regard for the public consequences in employing the extraordinary remedy of injunction" and may issue a preliminary injunction *only if* the plaintiff demonstrates that the "public interest would not be disserved" by the issuance of such relief. eBay, Inc. v. MercExchange, 547 U.S. 388, 391, 126 S.Ct. 1837, 1839 (2006). The plaintiff's burden is to make "a clear showing that [it] is entitled to such relief." Winter v. Natural Resources Defense Council, 555 U.S. 7, 22, 129 S.Ct. 365, 376 (2008).

POINT II

PLAINTIFF HAS FAILED TO DEMONSTRATE IRREPARABLE HARM

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that ... applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp., 719 F.2d 42, 45 (2d Cir. 1983). There is no presumption of irreparable harm. eBay, supra, 547 U.S. at 392-93, 126 S.Ct. at 1840. The Court "must … consider the injury the plaintiff will suffer if it loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the 'remedies available at law, such as monetary damages, are inadequate to compensate for that injury.' " Salinger, supra, 607 F.3d at 80; Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) (irreparable harm is "an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation"). "A mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1995).

It is evident that this is about nothing but money for the Plaintiff, and that if they were to win on the merits an award of statutory damages would more than make them whole.

Plaintiff *speculates* that they might not be able to calculate their damages. That is what copyright statutory damages are for.

Plaintiff's admitted speculation -- that ReDigi "presumably erases the 'cloud' copy once a second user 'buys' that track from the 'cloud'" -- cannot legally support its motion and, in any event, has no basis in reality. As set forth in the accompanying Declaration of Larry Rudolph, aka Lawrence S. Rogel ("Rudolph Dec."), the file in the ReDigi Cloud is not touched,

let alone erased, in connection with a resale transaction. Rudolph Dec. ¶ 30. Moreover, no copies of an Eligible File are made in connection with a resale transaction. When such a file is purchased by another user, the file pointer associating the file with the seller's Cloud Locker is modified to associate the file with the purchaser's Cloud Locker. In such a transaction only the pointer is changed; the file remains in the same location in the ReDigi Cloud and is not copied. Rudolph Dec. ¶ 10.

Moreover, Plaintiff will not be prejudiced by denial of its motion, as ReDigi keeps detailed records of all purchase and sale transactions, including buyer and the seller, date and time of the transaction, and metadata of the music file, including title, artist, album, owner (seller), store identification, original store, and hash of the acoustics. So Plaintiff would be able to identify each infringed work, and if it can prove liability and damages by reason of those transfers, it would be entitled to calculate its damages and if it chooses it could opt for statutory damages instead.

Plaintiff cites Salinger, supra, for the proposition that "market confusion" can qualify as irreparable damage. In Salinger, the defendant wrote an unauthorized sequel to the plaintiff's novel that the court found substantially similar to the plaintiff's work. Salinger, 607 F.3d at 83. Unlike Salinger, there is no possibility here of market confusion, and certainly none that could last beyond the resolution of this case on the merits. There is no claim that ReDigi markets pre-owned digital music files as new or not previously owned. Indeed, the homepage of ReDigi's website, www.redigi.com, welcomes visitors to the "Online Marketplace for Pre-Owned Digital Music" (the "ReDigi Marketplace") and offers "previously listened to songs at used prices." Nor is there any claim that files offered for sale on ReDigi contain inaccurate artist, title or label information. The files for sale on the ReDigi Marketplace have the same

content as those available on iTunes because that is where they originated and because ReDigi's technology monitors, and prevents, any alteration.

Moreover, Plaintiff has not proven that denial of a preliminary injunction would cause irreparable damage to its business.

Plaintiff's frivolous claim of irreparable damage is also severely undercut by Plaintiff's delay in seeking a preliminary injunction. Plaintiff has been in communication with ReDigi, and has known about, and even encouraged, ReDigi's business model for two (2) years. At some point last Fall, Plaintiff presumably changed its mind. In a letter dated November 10, 2011, the Recording Industry Association of America ("RIAA"), a trade association representing Plaintiff, asserted that ReDigi was infringing its members' copyrights and demanded that ReDigi shut down its service. Plaintiff, however, did not seek a preliminary injunction until the afternoon of January 19, 2012 when it advised ReDigi's attorneys that Plaintiff's attorneys would appear in Court the next day in connection with the instant motion.

Plaintiff's papers are remarkably silent as to why Plaintiff waited more than two months before seeking a preliminary injunction or why it did not make its motion when it commenced this case. Nor is any reason given why Plaintiff moved by Order to Show Cause rather than by Notice of Motion, other than an admitted desire to circumvent the Court's Individual Practices requiring a pre-motion conference letter. See Mandel Dec., ¶ 3.

As stated by the Second Circuit,

> [T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury[.] … [If not] explainable, delay alone may justify denial of a preliminary injunction.

Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 968 (2d Cir. 1995). An unexplained delay therefore "justifies denial of [a] preliminary injunction on the basis of lack of irreparable harm." Two Kids From Queens, Inc. v. J&S Kidswear, Inc., 2009 WL 5214497 at *4 (E.D.N.Y. Dec. 30, 2009) (citing Tough Traveler, supra, 60 F.3d at 968). Indeed, "courts typically decline to grant preliminary injunctions in the face of unexplained delays of more than two months." Gidatex. S.R.L. v. Campanielio Imports. Ltd., 13 F. Supp.2d 417 (S.D.N.Y. 1998) (emphasis added). See Century Time Ltd. v. Interchron Ltd., 729 F.Supp. 366, 368 (S.D.N.Y.1990) (preliminary injunction denied where plaintiff waited more than two months to seek such relief).

Plaintiff's unexplained delay of more than two months in making the instant motion is further reason to deny such relief, especially since Plaintiff has known about ReDigi's business for the last two years.

Even where a plaintiff shows some irreparable harm, the Court's consideration of whether such harm warrants the discretionary relief of a preliminary injunction cannot occur in a vacuum; the Court must also "assess the balance of hardships between the plaintiff and defendant. Those two items, both of which consider the harm to the parties, are related." Salinger, supra, 607 F.3d at 81 (emphasis added). As discussed in Point IV *infra*, this balancing decidedly favors Defendant. If Plaintiff gets an injunction, ReDigi is out of business. If Plaintiff is denied an injunction, and all of its meritless "irreparable harm" arguments are credited … Plaintiff loses some money. By itself, however, Plaintiff's failure to make a clear showing of irreparable harm compels denial of Plaintiff's motion.

POINT III

PLAINTIFF HAS FAILED TO DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON THE MERITS

On this motion, Plaintiff bears the burden of establishing a *prima facie* case of copyright infringement (the same burden it would have at trial). Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429, 126 S.Ct. 1211, 1219 (2006). Plaintiff must therefore "show (1) ownership of a valid copyright and (2) violation by the alleged infringer of at least one of the exclusive rights granted to copyright owners by the Copyright Act." UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1178 (9th Cir. 2011); 17 U.S.C.A. § 501(a). As shown below, Plaintiff has not sustained this burden and its motion for a preliminary injunction must be denied.

A. ReDigi Has Not Infringed Any Public Performance or Display Rights

To prove a copyright infringement claim based on an unauthorized public performance or display, a plaintiff must establish, inter alia, 1) public performance or display of the work for profit, and 2) the defendant's lack of authorization from the plaintiff or plaintiff's representative to perform or display the work publicly. Broadcast Music, Inc. v. 315 West 44th St. Rest., 1995 WL 408399 at *2 (S.D.N.Y. Jul 11, 1995).

i. The 30-Second clips are not streamed by ReDigi, and the links to the clips are pursuant to license; the cover artwork is not hosted by ReDigi and is likewise pursuant to license

Plaintiff alleges that the 30-second clips of songs accessible through the ReDigi website constitute an unauthorized public performance of its works under 17 U.S.C. 106(6) and that the associated cover artwork on the website constitutes an unauthorized public display under 17 U.S.C. 106(5). McMullan Dec., ¶¶ 15, 16. These allegations are completely baseless. In the

first place, contrary to Plaintiff's speculation, there is no streaming of the clips by ReDigi; the clips are streamed by Rdio, Inc. ReDigi merely posts hyperlinks, pursuant to license agreement. (See Declaration of John Ossenmacher ("Ossenmacher Dec.") ¶¶ 7, 17 and Exhibit B thereto). In the second place, the artwork is not hosted by ReDigi but likewise consists of hyperlinks posted pursuant to the Rdio license agreement. Id.

ii. A User's Streaming of Music Files from His or Her Cloud Storage Locker Is Not A Public Performance

Furthermore, the personal streaming by a ReDigi user of music files stored in his or her Cloud Locker does not infringe any public performance rights of Plaintiff because those files can be accessed and streamed *solely* by that user. To perform a work "publicly" means:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) *to transmit or otherwise communicate a performance* or display of the work to a place specified by clause (1) or *to the public, by means of any device or process*, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (emphasis supplied).

In Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008), cert. denied 129 S.Ct. 2890 (2009), the Second Circuit had to determine whether streaming content from a remote cloud storage system analogous to the ReDigi Cloud violated the plaintiff's public performance rights. A cable subscriber using defendant Cablevision's "RS-DVR" system could cause programming to be recorded and stored in the remote storage medium, and could later stream the programming back to his or her cable box and television for viewing with functionality similar to that of a DVR or TiVo. Significantly, the stored

programming was accessible *only* by the subscriber who caused the program to be stored in the first place, and the streaming transmission emanated from a distinct, unique copy produced by that subscriber.

The Court rejected the argument that streaming the recorded programming back to the subscriber is a public performance. Whether a transmission is made to the public depends on "who is 'capable of receiving' the performance being transmitted." Cartoon Network, supra, 536 F.3d at 134 (citation omitted).

> [B]ecause each RS–DVR transmission is made using a single unique copy of a work, made by an individual subscriber, one that can be decoded exclusively by that subscriber's cable box, only one subscriber is capable of receiving any given RS–DVR transmission. This argument accords with the language of the transmit clause, which, as described above, directs us to consider the potential audience of a given transmission.
>
> * * *
>
> Because each RS–DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances "to the public," and therefore do not infringe any exclusive right of public performance.

Cartoon Network, supra, 536 F.3d at 135, 139 (citation omitted).

As with the remote storage system in Cartoon Network, the streaming of files from a ReDigi user's Cloud Locker does not infringe any public performance right because such streaming is transmitted not to the public but solely to that particular user.

After a user uploads an Eligible File to his or her Cloud Locker, the user can listen to the file by streaming it from the Cloud Locker to an internet-connected device using the user's secure login password to access his or her ReDigi account. Rudolph Dec. ¶ 9. Section 5(c) of the ReDigi terms of service require that each user

> (i) keep [the user's] password secure and confidential, (ii) not permit others to use [the user's] account, (iii) refrain from using other users' accounts, (iv) refrain from selling, trading, or otherwise transferring [the user's] account to another party.

See Exhibit C to Ossenmacher Dec. The requirement of using a password to gain access to a user's account and ReDigi's terms of service prohibiting users from sharing their passwords or allowing other to use their accounts ensure that files in a particular Cloud Locker will be streamed only to the user associated with that Cloud Locker rather than to "the public." Cartoon Network, supra, 536 F.3d at 137 ("any factor that limits the potential audience of a transmission is relevant").

Based on the foregoing, there is no likelihood that Plaintiff can succeed on its claims based on purported infringement of its performance and display rights.

B. There Is No Infringement Of The Reproduction Right

i. Uploading Of Files To, And Downloading Of Files From, A User's Cloud Storage Locker Is Non-Infringing Fair Use

The only copying which takes place in the ReDigi service occurs when a user uploads music files to the ReDigi Cloud, thereby storing copies thereof in the user's personal Cloud Locker, or downloads music files from the user's Cloud Locker, thereby placing copies of the files on his or her computer.[1] Such copying is paradigmatic noncommercial personal use excepted from copyright infringement liability under by the Fair Use Doctrine.

The Fair Use Doctrine allows a holder of the privilege to use copyrighted material in a reasonable manner without the consent of the copyright owner. Weissmann v. Freeman, 868

[1] Contrary to Plaintiff's unfounded speculation, the licensed 30-second song clips are stored on Rdio's servers; no copies are stored on ReDigi's servers. See Rudolph Dec., ¶ 13. Moreover, Plaintiff mischaracterizes the "memory bank" referred to in the tutorial video. See McMullan Dec., ¶ 15. What users store in this "memory bank" are not copies of the 30-second clips but simply hyperlink bookmarks that allow users to quickly locate those song clips and stream them from Rdio's servers. See Rudolph Dec., ¶ 13.

F.2d 1313, 1323 (2d Cir. 1989); Italian Book Corp. v. American Broadcasting Companies, Inc., 458 F.Supp. 65, 69 (S.D.N.Y. 1978). The doctrine balances the exclusive right of copyright owners against "society's competing interest in the free flow of ideas, information, and commerce." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429, 104 S.Ct. 774, 782 (1984); 17 U.S.C. 107.

As the Supreme Court stated in Sony, "[a]ny individual may reproduce a copyrighted work for a 'fair use'; the copyright owner does not possess the exclusive right to such a use." Sony, supra, 464 U.S. at 433, 104 S.Ct. at 784. Among the reasons for which copyrighted material may legally be copied under the Fair Use Doctrine are time-shifting and space-shifting. In Sony, the Supreme Court held that time-shifting – the copying of entire copyrighted programs for viewing at a later time – is a personal, non-commercial use protected by fair use. Sony, supra, 464 U.S. at 449-50, 104 S.Ct. at 792 (acknowledging that fair use of time-shifting necessarily involved making a full copy of a protected work).

Likewise, space-shifting – the copying of a copyrighted file from one storage medium to another for personal, noncommercial use – is a protected fair use. Recording Industry Association of America v. Diamond Multimedia Systems, Inc. ("Diamond"), 180 F.3d 1072, 1079 (9th Cir. 1999). In Diamond, the plaintiff claimed that music files copied from a computer to a portable external storage drive, the Rio MP3 player, were infringing copies. The court held that the Rio merely space-shifted files that a user already had on his or her hard drive, and that this was a non-commercial, personal use that did not create infringing copies under the Copyright Act.

> The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Cf. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (holding that

> "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.

Diamond, supra, 180 F.3d at 1079. See also Sony BMG Music Entertainment v. Tenenbaum, 672 F.Supp.2d 217, 220-21 (D. Mass. 2009) ("space-shifting to store purchased music" may "offer a compelling case for fair use") (emphasis added).

Space-shifting of music files "fueled the growth of the portable music industry and the creation of the iPod, one of the most beloved and successful consumer electronics devices in history." See Comments of Public Knowledge, Copyright Office, Dec. 1, 2011, p.6, *available at* www.copyright.gov/1201/2011/initial/public_knowledge.pdf.

Space-shifting is widely accepted not only by the public but by the recording industry in general, and Plaintiff in particular. Indeed, Plaintiff in this case was one of the plaintiffs in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. ("Grokster"), 545 U.S. 913, 928, 125 S.Ct. 2764, 2775 (2005). In the oral argument of the Grokster case before the Supreme Court, Plaintiff's counsel assured the Supreme Court that space-shifting, including the making of "multiple unauthorized copies", had Plaintiff's support.

> The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod.

See Transcript of Oral Argument in Grokster, supra, p. 12 (excerpt annexed as Exhibit B to the Declaration of Ray Beckerman ("Beckerman Dec.")). Significantly, Plaintiff's counsel told the Court that space-shifting was "perfectly lawful," not that the record companies had granted the public a license or "authorization" to engage in space-shifting.

The functionality of uploading and downloading music files to a user's personal Cloud Locker in ReDigi's remote storage medium is the same as if the user were to copy such files to an external storage drive such as the iPod referred to in the Grokster oral argument or the Rio MP3 player in Diamond. Indeed, such uploading and downloading is no different than that which occurs when consumers use other cloud storage providers, such as Apple iCloud, Google Music, Amazon Cloud Drive and Player, Microsoft LiveMesh & SkyDrive, Apple MobileMe, Amazon AWS, Google Docs / GMail Drive, and a dozen others. The only difference between ReDigi's cloud storage, and any other cloud storage system of which we are aware, is that ReDigi's proprietary technology takes the additional step of searching for and removing, or causing to be removed, any other instances of the file which may be found on the drive from which the file is removed.

Moreover, the space-shifting occurring in the instant case, as in Diamond, does not involve simultaneous distribution of copyrighted material to the general public; uploaded files are stored in the uploading user's personal Cloud Locker, and the files stored in a particular user's Cloud Locker may only be streamed or downloaded by that user.[2]

If Plaintiff were to prevail in claiming that a ReDigi user infringes copyright by the acts of uploading and downloading files to and from the user's personal Cloud Locker, the consequences would be drastic and far reaching. It would mean that consumers who use the other cloud storage providers mentioned above also infringe copyright, which would put the future of all cloud storage services in doubt. There is no reason for such an economically and

[2] Plaintiff's citation to Warner Bros. Records, Inc. v. Walker, 704 F. Supp. 2d 460 (W.D. Pa. 2010) in its January 24th response to ReDigi's request for a pre-motion conference concerning its summary judgment motion is wholly inapposite. The downloader in Warner Bros. engaged in peer-to-peer file sharing and did not own the files he downloaded. Here, all files downloaded from a user's Cloud Locker are owned by, and accessible only by, that particular user.

technologically disruptive outcome, as space-shifting for personal, noncommercial use [3] is clearly protected by the Fair Use Doctrine.

ii. Uploading Of Files To, And Downloading Of Files From, A User's Cloud Storage Locker Is Likewise Covered By The Essential Step Defense

In addition, such uploading and downloading is also non-infringing based on the Essential Step Defense of 17 U.S.C. 117(a), which provides in relevant:

> Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaption provided:
>
> (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or …..

11 U.S.C. 117(a); Krause v. Titleserv, Inc., 402 F.3d 119, 130 (2d Cir. 2005) (affirming grant of summary judgment based on Essential Step Defense).

In the instant case, an mp3 is a computer program. It is an "essential step in the utilization of the computer program in conjunction with a machine" to make a copy in RAM. I.e., the main thing one does with an mp3 is play it, and the only way to do that is to upload a copy into RAM. The only difference, from a reproduction perspective, between playing the mp3 on one's machine, and successfully uploading it into storage onto ReDigi's storage system, is that in

[3] Plaintiff cannot escape the Fair Use Doctrine by arguing that the copies made during uploading and downloading are made by ReDigi rather than by its users. Such an argument was considered and rejected by the Second Circuit in Cartoon Network, supra. Although Cablevision designed, housed, and maintained the RS-DVR remote storage system (discussed earlier), the Court held that the "copies produced by the RS–DVR system are 'made' by the RS–DVR customer, and Cablevision's contribution to this reproduction by providing the system does not warrant the imposition of direct liability." Cartoon Network, supra, 536 F.3d at 133.

the upload case the RAM copy is uploaded to the user's Cloud Locker, and the copy from which it was made was actually deleted from the user's machine.

iii. No copying occurs during a resale transaction on the ReDigi Marketplace

ReDigi's structure ensures that no copies of an Eligible File are made when one ReDigi user sells an Eligible File stored in the user's Cloud Locker to another ReDigi user through the ReDigi Marketplace. Ossenmacher Dec., ¶ 6. When such a file is purchased by another user, the file pointer associating the Eligible File with the seller's Cloud Locker is modified to associate the file with the purchaser's Cloud Locker. In such a transaction only the pointer is changed; the Eligible File remains in the same location in the ReDigi Cloud and is not copied. Rudolph Dec., ¶¶ 10, 30.

Because a ReDigi user's actions in uploading and downloading his or her music files is non-infringing, and no copying occurs during sale of such files in the ReDigi Marketplace, there is no infringement of the reproduction right for which ReDigi could be liable secondarily, let alone directly. Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 780 F.Supp. 1283 (N.D. Cal. 1991) ("Fair use is a privilege against a direct infringement claim (17 U.S.C. § 107), and is a privilege held in the first instance by the alleged direct infringer -- i.e., by the person playing the video game. Just as application of the fair use doctrine in Sony resulted in substantial economic gain for Sony and other VCR manufacturers, the fair use doctrine applied to this case will benefit [the alleged secondary infringer]"), aff'd, 964 F.2d 965 (9th Cir. 1992), cert. denied 507 U.S. 985, 113 S.Ct. 1582 (1993). Clearly, Plaintiff has not shown any chance of prevailing on its reproduction right claim, let alone a likelihood of success, as required for the issuance of a preliminary injunction.

C. There is No Infringement of the Distribution Right

Plaintiff repeatedly concedes that the digital music files uploaded by users to the ReDigi Cloud are not "material objects",[4] yet bizarrely accuses the ReDigi Marketplace of infringing Plaintiff's distribution right. The "distribution" right is defined in the Copyright Act as being applicable only to "copies" and "phonorecords" which are themselves defined as being "material objects". Since the distribution right is limited to material objects, and digital files are not material objects, Plaintiff's distribution right does not implicate the exclusive right to transfer ownership of digital files. And even if the distribution right extended to the transfer of digital files, ReDigi's sale process is clearly protected by the First Sale exception.

i. Digital Files Are Not Material Objects Subject to the Distribution Right

Plaintiff's misguided attack on the transactions in the ReDigi Marketplace as violations of the distribution right must likewise fail, for a number of reasons. Among them is the fact that a digital file, as distinguished from the material object in which the digital file is fixed, does not fit in the distribution right section of the Copyright Act.

"Copies" are defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed." 17 U.S.C. 101 (emphasis supplied)

"Phonorecords" are defined as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known

[4] See Plaintiff's Memorandum of Law, p. 6 ("No tangible, material object is or could be physically transferred to the ReDigi 'cloud' "), p. 15 (noting the "physical impossibility of transferring a material object over the Internet").

or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed." 17 U.S.C. 101 (emphasis supplied)

I.e., a CD, which contains music (or other sound) files, is a "phonorecord" under the Copyright Act, since it is a "material object" in which sounds "are fixed", and from which "the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device", but the files fixed in the CD are not, since they are not "material objects".

The Copyright Act does not have a broad, generic "distribution" right: it is a narrowly and clearly defined right, set forth in 17 U.S.C. 106(3), and subject to the exceptions provided in sections 107 through 122, including the "first sale" (17 U.S.C. 109(a)) and "essential step" (17 U.S.C. 117(a)) defenses discussed *infra*:

> Subject to sections 107 through 122 the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
> ….. (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending[.]

17 U.S.C. 106(3). The statute is quite plain. It is clear that digital music files, which are not material objects, are therefore neither copies nor phonorecords, hence not subject to the distribution right. If they were to be considered material objects, copies, or phonorecords within the meaning of 17 U.S.C. 106(3), they would also have to be considered material objects, copies, or phonorecords within the meaning of 17 U.S.C. 109(a), hence exempt anyway – in ReDigi's case – under the First Sale Doctrine (discussed *infra*).

It is fundamental that for a violation of the distribution right to occur, a "material object" must have changed hands. Cf Agee v. Paramount Communications, Inc., 59 F.3d 317, 325 (2d Cir. 1995). There must be an actual dissemination of either "copies" or "phonorecords". Atlantic Recording Corp. v. Howell, 554 F. Supp. 2d 976, 984 (D. Ariz. 2008) and cases cited. Plaintiff's reliance on New York Times, Inc. v. Tasini ("Tasini"), 533 U.S. 483, 498, 121 S.Ct. 2381, 2390 (2001) is misplaced, as the principal distribution in Tasini (a) was the sale of CD's and discs, which we concede are "material objects", and (b) involved copying, Tasini, supra, 533 U.S. at 498, 121 S.Ct. at 2390, neither of which has any place in the ReDigi online marketplace, and the issues the Court was deciding did not include whether a digital file is a 'material object'. Plaintiff's reliance on *dictum* in a district court decision, Arista Records LLC v. Usenet.com, Inc., 633 F.Supp. 2d 124 (S.D.N.Y. 2009) (Baer, J.), granting a default judgment based on spoliation of evidence and discovery misconduct, is nothing if not pathetic.

As Plaintiff concedes that the files in the ReDigi Cloud (and thus in the ReDigi Marketplace) are not material objects, the transactions that take place there cannot infringe its distribution right.

ii. Alternatively, the Resale of Digital Music Files Through the ReDigi Marketplace Is Protected by the First Sale Doctrine

Even if digital music files were material objects such that their sale or transfer implicates the distribution right, the resale of such files through the ReDigi Marketplace is non-infringing and protected under the First Sale Doctrine.

The Copyright Act provides that the copyright holder of a sound recording has the exclusive right to "distribute copies or phone records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. 106(3). This right

to distribute, however, is limited by the First Sale Doctrine, a common law doctrine recognized in Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350, 28 S.Ct. 722, (1908). This doctrine is now codified at 17 U.S.C. 109(a), which provides in relevant part:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy … lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy ….

17 U.S.C. § 109(a) (emphasis added). This codification does not limit the broad scope of the common law doctrine. See Quality King Distributors, Inc. v. L'anza Research International, Inc., 523 U.S. 135, 152, 118 S.Ct. 1125, 1134 (1998) ("[t]here is no reason to assume that Congress intended either § 109(a) or the earlier codifications of the doctrine to limit its broad scope").

The First Sale Doctrine "allows an individual who legally acquired a lawfully made copy of a copyrighted work to sell or otherwise transfer that particular copy as he or she wishes." Manco v. University of the Sciences-Philadelphia, 2005 WL 1828547 at *6 (D.N.J. Jul. 29, 2005). The rationale is as follows:

> The limited monopoly created by copyright law is needed to promote the creation of new works and ensure that the creator is properly compensated for this effort. Once a copyright holder has consented to distribution of a copy of that work, this monopoly is no longer needed because the owner has received the desired compensation for that copy. The first sale doctrine ensures that the copyright monopoly does not intrude on the personal property rights of the individual owner, given that the law generally disfavors restraints of trade and restraints on alienation.

Brilliance Audio, Inc. v. Haights Cross Communications, Inc., 474 F.3d 365, 373-74 (6th Cir. 2007) (citations and internal quotations omitted).

"To come within the scope of Section 109(a), a copy ... must have been 'lawfully made under this title,' though not necessarily with the copyright owner's authorization." H.R.Rep. No. 94-1476, at 79 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5693, quoted in Parfums Givenchy, Inc. v. C & C Beauty Sales, Inc., 832 F.Supp. 1378, 1387 (C.D.Cal. 1993).

As shown in Part III(B)(i) and (ii), supra, the copies stored in a user's Cloud Locker following an upload were lawfully made and acquired under the Copyright Act in accordance with the Fair Use Doctrine and the Essential Step Defense.

Moreover, all music files on a ReDigi user's computer that are eligible for upload to ReDigi, and all copies thereof stored in a user's Cloud Locker as a result of uploading, are "owned" by the user, as required for the First Sale Doctrine to apply. This is because (a) the only files eligible for upload to and storage on ReDigi are those originally lawfully acquired and downloaded from iTunes, and (b) unlike the terms of service for Amazon's online music store, the iTunes Terms of Sale ("iTunes TOS") formally provide that *title* to music files downloaded from iTunes *passes to the consumer*.

> All transactions on the iTunes Service are governed by California law, without giving effect to its conflict of law provisions…. *[T]itle for all electronically delivered transactions pass to the purchaser* in California upon electronic transmission to the recipient. No Apple employee or agent has the authority to vary this Agreement.

iTunes TOS, p. 8 (italics added) (Exhibit A to Beckerman Dec.). Moreover, the iTunes TOS contains "Sale" in its name, and repeatedly refers to the transactions as *sales and purchases.* See iTunes TOS, p. 1 ("All *sales* … of products are final"); p. 3 ("In order to *purchase* and download iTunes Products from the iTunes Service …") (italics added). In addition, there is no language in the iTunes TOS characterizing the transaction as a mere license.

The terms of the iTunes TOS providing for ownership are consistent with the philosophy expressed by Apple's late founder, Steve Jobs, in 2003. "They're going to want to buy downloads. People want to *own* their music." See "Steve Jobs: The Rolling Stone Interview," Rolling Stone Magazine, Dec. 3, 2003 (italics added) (excerpt annexed as Exhibit D to Beckerman Dec.). Because title formally passes to purchasers of iTunes files, it is unnecessary to determine whether in the absence of such transfer of title a purchaser "exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy." Krause v. Titleserv, Inc., 402 F.3d 119, 124 (2d Cir. 2005).

The resale in the ReDigi Marketplace of Eligible Files in a ReDigi user's Cloud Locker -- uploaded from files legally purchased from iTunes and *owned* by the user, and then lawfully copied to the user's Cloud Locker -- falls squarely within the First Sale exception to Plaintiff's distribution right.

It should be noted that, contrary to the baseless speculation of Plaintiff's counsel, the resale by consumers of their used digital music files through the ReDigi Marketplace does not and could not contribute to viral distribution of multiple unauthorized copies on the Internet. The "distribution" that occurs in a ReDigi resale transaction transfers ownership of a *single* file to a *single* purchaser, terminates all access that the seller formerly had to stream or download the file, and goes the extra mile by ensuring that all copies that the seller may have made are destroyed. I.e., it ensures a *one-to-one ratio* between (a) the file that the seller initially purchased from iTunes and (b) the file transferred to the purchaser in the resale transaction in the ReDigi Marketplace. Moreover, since this system creates a resale value for lawfully acquired files, it acts as a deterrent, not as encouragement, to unauthorized file sharing.

Plaintiff's reliance on the "DMCA Section 104 Report" issued by the U.S. Copyright Office in August 2001 (the "Copyright Office Report") is unwarranted for several reasons. First, the Copyright Office Report is inapposite since, as previously discussed, no copies are made during a resale transaction in the ReDigi Marketplace. In such a transaction only the file pointer signifying the owner of the file is changed; the File remains in the same location in the ReDigi Cloud and is not copied.

Second, no deference is accorded to the views of the Copyright Office where, as here, a question of first impression is raised. It is well established that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 946-47 (2d Cir. 1975) (footnotes omitted); Elektra Entertainment Group, Inc. v. Barker, 551 F.Supp.2d 234, 242 n.7 (S.D.N.Y. 2008) ("[T]he Court is unpersuaded by Plaintiffs' suggestion that the opinion of Marybeth Peters, the Register of Copyrights, should influence the Court's interpretation of Section 106(3). The Second Circuit has made it clear that 'the Copyright Office has no authority to give opinions or define legal terms, and its interpretation on an issue never before decided should not be given controlling weight' ") (quoting Bartok, supra, 523 F.2d at 946-47).

Third, the Copyright Office Report, issued in 2001, is based on the premise that software could not be developed that deletes a file from a user's computer in connection with uploading or copying the file to another storage medium. As shown in paragraphs 6-8 of the Rudolph Dec. and in the pending patent application (Exhibit B to Rudolph Dec.), eleven years later that is no longer the case.

Based on the foregoing, Plaintiff cannot demonstrate a likelihood of succeeding on its claim of infringement of the distribution right.

D. Plaintiff's Failure To Comply With The Notification Requirements of the Digital Millennium Copyright Act Bar Its Claims

Even if Plaintiff could show that one of its exclusive rights had been infringed, its claims would still be barred by its failure to comply with the notification requirements of the Digital Millennium Copyright Act ("DMCA"). Plaintiff makes no showing of having provided a notice providing the salient details mandated under the DMCA such as

> (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site. (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material. (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted. (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law. (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

17 U.S.C. 512(c)(3)(A); see e.g., Capitol Records, Inc. v. MP3tunes, LLC, ___ F.Supp.2d ___, 2011 WL 5104616 at *11 (S.D.N.Y. Oct. 25, 2011). Indeed, no DMCA notice could have been drafted, because Plaintiff demonstrates in its moving papers that it in fact has no evidence of any copyright of any work being infringed.

POINT IV

THE BALANCE OF THE EQUITIES FAVORS DEFENDANT NOT PLAINTIFF

Plaintiff cannot show that the balance of hardships tips decidedly in its favor. In fact, such balancing and the equities decidedly favor Defendant.

Plaintiff is a long established giant in the recording industry. A fairly small number of its mp3 recordings, and only those lawfully purchased through iTunes, on which plaintiff has already received compensation in the neighborhood of 70% of the retail price of each file, are being sold through the ReDigi Marketplace. ReDigi is careful to protect the plaintiff's right not to have multiple copies floating around, and to protect against any form of unregulated copying. Ossenmacher Dec., ¶ 15.

ReDigi is a fledgling startup employing fewer than 15 people in a new industry. The cloud of plaintiff's "cease and desist" letter and lawsuit, needless to say, is already making it difficult or impossible for ReDigi to enter into new relationships with other companies and investors that would enable ReDigi to grow its business. An injunction would put ReDigi out of business. Ossenmacher Dec., ¶¶ 13, 15.

The balancing of the equities favors Defendant, and Plaintiff's motion should be denied.

POINT V

A PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST

Plaintiff cannot demonstrate that the "public interest would not be disserved" by issuance of the preliminary injunction it seeks. Promoting the development of new technologies and encouraging innovation in existing ones are among the societal values at work in the

Copyright Act. See Grokster, supra, 545 U.S. at 928, 125 S.Ct. at 2775. See also Health Grades, Inc. v. Robert Wood Johnson University Hosp., Inc., 634 F.Supp.2d 1226, 1237 (D.Colo. 2009) ("the fundamental purpose of copyright … is "[t]o promote the Progress of Science and useful Arts") (quoting U.S. Const. art. I, § 8, cl. 8). The relief sought by Plaintiff would conflict with these important values.

Moreover, public policy favors competition, especially "where a preliminary injunction could be very harmful to a small company and reduce the number of options for consumer." OG Intern., Ltd. v. Ubisoft Entertainment, 2011 WL 5079552 at *11 (N.D.Cal. Oct. 26, 2011) (denying injunction). See also M. & G. Products, Inc. v. R.E.F. Golf Co., 1994 WL 653531 at *4 (N.D. Ohio Jun. 21, 1994) ("public interest is also served by promoting competition. To jeopardize the existence of a company by the issuance of a preliminary injunction, where, as here, there are serious questions about the validity of the patent and where there is no irreparable injury, is plainly contrary to public policy"); SRI Int'l. v. Acoustic Imaging Techs. Corp., 1993 WL 356896 at *4 (N.D. Cal. Sept. 3, 1993) (same).

Here, granting the relief Plaintiff seeks would devastate ReDigi, effectively shutting it down, and most certainly putting it out of business before this case can be resolved on the merits. This would wrongfully deny the public a much needed new source of lawful competition for the purchase and sale of legally acquired music digital music files. In the days of brick and mortar record stores, consumers not only could buy new records and CDs from dozens of record store chains, but also had the option of buying and selling the music they no longer wished to keep in a thriving secondary market of used record stores. Today, most legally

acquired music is downloaded online[5] in a highly concentrated market involving a very few players, such as iTunes, Amazon and Google. For the first time, ReDigi gives consumers access to a new legitimate secondary market for the resale of their own legally acquired digital music files, with a significantly higher degree of protection against unlawful copying than is available in the used CD market. The relief sought by Plaintiff would imperil the fledgling secondary market, possibly forever. The public interest would be best served by deciding this case on its merits, rather than by short-circuiting such a decision with an unwarranted preliminary injunction that would force ReDigi to close its doors at the outset of this litigation.

CONCLUSION

Based on the foregoing, the Court should deny Plaintiff's motion for a preliminary injunction. The within motion should be denied in its entirety.

Respectfully submitted,

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[5]See The Nielsen Company & Billboard's 2011 Music Industry Report, January 5, 2012 ("For the first time, digital music sales are larger than physical sales; accounting for 50.3% of all music purchases in 2011") (See excerpt annexed as Exhibit C to Beckerman Dec.).