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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 CAPITOL RECORDS, LLC,

4 Plaintiff,

5 v.

12 Civ. 95 (RJS)

6 REDIGI, INC.; JOHN
7 OSSENMACHER; and LARRY
8 RUDOLPH, also known as
9 Lawrence S. Rogel,

Defendants.

10 New York, N.Y.
11 December 2, 2013
12 6:10 p.m.

13 Before:

14 HON. RICHARD J. SULLIVAN,

District Judge

15 APPEARANCES

16 COWAN LIEBOWITZ & LATMAN
17 Attorneys for Plaintiff
18 BY: RICHARD S. MANDEL
19 JONATHAN Z. KING

20 ADELMAN MATZ
21 Attorneys for Defendant Redigi, Inc.
22 BY: GARY P. ADELMAN
23 SARAH M. MATZ

24 HAUSFELD, LLP
25 Attorneys for Defendants John Ossenmacher
and Larry Rudolph
BY: JAMES J. PIZZIRUSSO

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1 (Case called)

2 MR. MANDEL: Richard Mandel, Cowan Liebowitz & Latman.

3 MR. KING: Jonathan King, also from Cowan Liebowitz &
4 Latman.

5 THE COURT: Mr. King good afternoon to you. For the
6 defendants.

7 MS. MATZ: Sarah Matz for Redigi.

8 MR. ADELMAN: Gary Adelman also for Redigi.

9 MR. PIZZIRUSSO: Your Honor, James Pizzirusso for the
10 individual defendants, John Ossenmacher and Larry Rudolph.

11 THE COURT: You are for both of them. I thought we
12 were waiting on someone else.

13 MR. PIZZIRUSSO: Just me, your Honor. I was in your
14 other courtroom. This is my first time I've been here.

15 THE COURT: You were in 318 where I had the trial.
16 That's because the marshals told you to go there.

17 MR. PIZZIRUSSO: They did.

18 THE COURT: Sorry for all that.

19 Thank you all for your patience.

20 As Mr. Pizzirusso knows, I've got a criminal trial
21 going. It's an insider trading case. It's interesting, but
22 it's been time consuming. So whenever I let the jury go we
23 seem to have half a dozen things we need to talk about, which
24 is what happened today. My apologies to you. Thank you for
25 your patience.

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1 I asked you to come in because there is sort of a
2 barrage of letters going back and forth on a variety of issues,
3 including discovery issues. But it seems to me we should talk
4 about where we have been and where we are now. This is a case,
5 obviously, that has a fair amount of history. We also have a
6 situation where several months ago plaintiffs asked to amend
7 and that would have been up to me as to whether I would allow
8 an amendment and it is up to me. I allowed it.

9 But in part I allowed it because of the
10 representations made by Mr. Adelman. I'm not suggesting he was
11 making false statements, but they turn out not to be accurate
12 statements, not to have been accurate statements.

13 So my principal question was whether amending was
14 going to require additional discovery and a lot of additional
15 time and effort on a case where I had already ruled on a motion
16 for summary judgment on what are important issues and legal
17 issues that were well briefed and well argued.

18 And when I asked that question Mr. Adelman certainly
19 didn't think there was going to be any need for additional
20 discovery. Mr. Mandel agreed. And so on the basis of those
21 representations I allowed the amendment.

22 We have the amendment and it turns out that Mr.
23 Adelman and Ms. Matz are not representing the individual
24 defendants, so they have new counsel. And the individual
25 defendants are pursuing some of the same defenses and some new

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1 defenses and also are seeking discovery that is above and
2 beyond what was the subject up until the first summary judgment
3 motion. So that sort of prompts me to say, is this worth it.
4 The plaintiffs have wanted to amend had they known we were
5 going to go down this road.

6 Mr. Mandel.

7 MR. MANDEL: Yes. We do want to amend and we think we
8 have valid claims against the individuals. But unfortunately
9 what we think has happened is, new counsel has come into the
10 case and is using it as an opportunity to try and just invent
11 anything under the sun that they can unearth defenses out of,
12 many of which I think have already been ruled upon.

13 THE COURT: Some of which have been ruled upon. Fair
14 use is one I ruled upon.

15 MR. MANDEL: The first sale doctrine.

16 THE COURT: First sale doctrine. Those are the two
17 principal ones, right?

18 MR. MANDEL: Correct.

19 THE COURT: There are some additional defenses that
20 plaintiffs argue Redigi could have raised earlier and did not
21 and that the individual defendants should be foreclosed from
22 bringing those. And you cite cases from the Second Circuit and
23 elsewhere, principally the Second Circuit, In Re Teltronics and
24 Kreager.

25 I think the posture in those cases was a little

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1 different in that there was already was a judgment in those
2 cases as opposed to here where we don't have a final judgment.
3 We are doing discovery now on damages. And the thought was we
4 could do that pretty quickly and then tee this whole thing up
5 for the circuit sooner rather than later.

6 I think those cases are different. I think that the
7 reasoning might apply, but those are cases which involve
8 collateral estoppel where there has been a judgment. So that's
9 my reason for suggesting that probably had I started from
10 scratch and known this is where we are going, I would have
11 denied the motion to amend. You could have then filed against
12 the individual defendants, and we would have then gone forward
13 on two tracks. But I think the track against Redigi would be
14 almost done by now as opposed to us being kind of mired in
15 discovery disputes and motions practice.

16 MR. MANDEL: No. I understand. But I do think, your
17 Honor, that there is law that has applied collateral estoppel
18 to partial summary judgments. And I believe even if you look
19 beyond, even if you assume that these defenses are eligible to
20 be asserted, on the factual record that exists already, it
21 seems very plain that there is actually no possible basis for
22 any of them in terms of just what's already been found.

23 In terms of the DMCA defense, I think there is a
24 reason Redigi asserted that in the answer. We moved in our
25 partial summary judgment motion, actually addressed it in our

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1 moving papers. They didn't even see fit to address it in
2 response. That's how little they thought of that defense.

3 THE COURT: The fact that one defendant thinks little
4 of a defense and another thinks better of it is not
5 dispositive. I think if it's a frivolous motion, then I guess
6 there are repercussions that flow from that. At this point I
7 am not sure I'm prepared to say that.

8 And there is a motion to dismiss now that's pending.
9 And I am not supposed to be delving into the record with
10 respect to the motions to dismiss. You are talking about a
11 record with respect to Redigi which has already passed stage 1
12 of motions for summary motion. There is a contemplation of
13 additional summary judgment on the remaining issues, including
14 damages. But we are kind of moving on a different tract at
15 this point.

16 MR. MANDEL: I guess so. I guess what confusing me is
17 the factual record really is the same. These individuals, the
18 only question that's really left in terms of their individual
19 liability is whether they participated in this conduct that's
20 been found to be infringing.

21 THE COURT: That's what I thought the use was going to
22 be for purposes of the amended complaint against the
23 individuals and that's certainly what was represented to me.
24 And I can quote from the transcript if necessary.

25 The only defense that could potentially be available

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1 is somehow they didn't have enough personal involvement to be
2 individually liable. That's Mr. Mandel. I think Mr. Adelman
3 basically agreed with that, that that would be the issue. And
4 so that certainly I think would be relevant when we get to
5 summary judgment. Right now we are not at summary judgment.
6 We are at a motion to dismiss for the individual defendants.
7 They are seeking discovery with respect to other issues that
8 were not contested by Redigi, but I don't know, are they
9 estopped? I think part of it is a factual issue as to how much
10 of the individual defendants were involved in running the
11 Redigi litigation, right?

12 MR. MANDEL: I don't think there is much of a dispute
13 about that.

14 THE COURT: I don't know.

15 MR. MANDEL: They are the only witnesses who were
16 identified in initial disclosures. They are the people who
17 showed up at the preliminary injunction hearing, at every
18 deposition, at every mediation. When we asked to even identify
19 other shareholders, they objected and said it was irrelevant.
20 If there is anybody else who controlled this litigation, I
21 don't know who they are or where they were.

22 We certainly haven't heard anything but these two
23 people who founded this business. This was their brainchild.
24 They thought it was legal. They came in from the outset of the
25 case and submitted declarations explaining why a preliminary

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1 injunction shouldn't be issued. The company was found liable
2 on the basis of their testimony and only their testimony.

3 This, to me, is really a classic case of people who
4 participated actively. They are the only people who
5 participated on behalf of Redigi with the defense. There is
6 literally no other person I can think of who had any
7 involvement whatsoever.

8 THE COURT: That may be true. I don't know the answer
9 to that. But I'm talking about the specific issue under
10 Teltronics as to whether or not the individual defendants
11 should be estopped. You wouldn't take the position that a
12 30(b)(6) witness can then be added in a case and they are
13 estopped from asserting any defenses because having been
14 designated as a 30(b)(6) witness they are involved in the
15 litigation.

16 MR. MANDEL: Not entirely. I think if you look at the
17 couple of cases we cited, in both of them the courts talked
18 about the fact that they were the principal witness, that they
19 were there at the trial, that they had submitted declarations.
20 These are the kind of facts that the Court looked at in those
21 cases. If you look at our situation, these really were the
22 only two individuals who have been there from the outset.

23 THE COURT: It's not clear to me how the courts in the
24 cases you've cited were in the position to make those
25 pronouncements about the state of the record because the

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1 posture of the case wasn't such that I think it was in the
2 record. They kind of cherrypicked the circuit data and looked
3 at what some of the district court submissions and filings
4 were, but I don't know that that's dispositive on the issues.

5 MR. MANDEL: I think in this case I would like to hear
6 if there is somebody else who effectively controlled or
7 participated. They have never been identified.

8 THE COURT: I've got a lawyer for the individuals and
9 I've got a lawyer for the corporate defendant here, somebody
10 else who is running this company.

11 Who retained you, Mr. Adelman?

12 MR. ADELMAN: John Ossenmacher.

13 THE COURT: And who gives you direction now as to how
14 the corporate defendant should be pursuing this case? Don't
15 tell me the substance of communications, but the individual
16 who --

17 MR. ADELMAN: Primarily, we talked to John Ossenmacher
18 and Larry Rudolph.

19 THE COURT: Mr. Pizzirusso, what is the defense here
20 with respect to those individuals not joined at the hip with
21 the corporate defendant?

22 MR. PIZZIRUSSO: Certainly, your Honor. I understand
23 there is a history here and I have not been involved in that
24 history. I'm coming in as an outsider at the end of case when
25 Capital decided on the eve of trial that they wanted to name my

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1 clients.

2 THE COURT: I don't know if it was the eve of trial.

3 MR. PIZZIRUSSO: It was near the end of discovery and
4 the case was pretty much -- partial summary judgment obviously
5 had been granted. And then they decided that they didn't think
6 Redigi had enough money, so they wanted to name the individual
7 defendants, too. And they dropped in one conclusory paragraph,
8 paragraph 37 in the amended complaint, that says: And John
9 Ossenmacher and Larry Rudolph controlled the company and,
10 therefore, they are liable, too. And then this did a find all
11 defendant and changed it to defendants.

12 And so then they said, well, this was the complaint
13 against your clients. We have these partial summary judgment
14 order. Your clients are also liable. They basically tried to
15 hold my clients responsible based on one conclusory paragraph
16 because they say there is this entire record where they
17 submitted declarations and did all these other things, but I
18 have to go by the complaint that's in front of me. I have to
19 go by what's been pled against my clients. And that's why we
20 filed a motion to dismiss because we think it is wholly
21 conclusory under Twombly and under Iqbal and don't really
22 understand the allegations made against my client. A lot of
23 them don't make any sense.

24 When they say defendants, defendants users did this
25 and this and this. Obviously, my clients don't have users.

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1 Redigi does, but the individuals don't. If it were the case
2 that you could merely name individuals in a copyright case,
3 every copyright case the executives of the company would be
4 liable, but that's not the law. That's not what the law says.
5 So we are kind of floundering. We are left with this very
6 conclusory complaint that pleads very little against our
7 clients and have to assert at the same time discovery defenses
8 and potential summary judgment motions that we want to file.
9 But we still aren't even sure what they are alleging against
10 our client.

11 What's the direct financial interest that my clients
12 have? What are the acts that each one of them individually did
13 that contributed or that caused the copyright infringement of
14 this case? They can't just say, well, you're in charge of the
15 company and that's it. That's not what the law says. So we
16 have said we might have defenses. We don't know yet because we
17 have not seen a real complaint. We don't think that adequately
18 alleges information against our client. So we have had to sort
19 of alert, what are all of the possible defenses that we could
20 have based on what we think the allegations are probably trying
21 to say against us?

22 THE COURT: Including whether there is copyright in
23 the songs at issue?

24 MR. PIZZIRUSSO: Yes. Because, your Honor,
25 interestingly enough, we went through every single copyright

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1 registration they produced, and we made a chart and we said,
2 which songs have they asserted copyright claims against and
3 which songs have they provided actual copyright registrations.
4 And it was probably less than 20 percent that they actually
5 provided registrations for. We said, well, that's a summary
6 judgment issue. They have not proved their case.

7 So even though Mr. Mandel asserts discovery is over,
8 in the last week we have received over 3,000 pages of
9 additional discovery, approximately 3,000 pages of additional
10 discovery from his client after we said we are going to file
11 summary judgment on this and after he has said, no more
12 discovery.

13 So we have got thousands of pages of additional
14 documents that were just sprung on us over the Thanksgiving
15 holiday that we have not even had a chance to review yet while
16 he is asserting that we don't get any discovery against his
17 client. But here are the documents, you just have to accept
18 them for what they are.

19 THE COURT: Here is the question I have in connection
20 with the motion to amend. If amending to add them, your
21 clients, is not going to require any additional discovery, then
22 I think I will probably allow it. But if it's going to require
23 additional discovery then I am not so sure. I asked
24 Mr. Mandel, he didn't think there would be any additional
25 discovery, and Mr. Adelman agreed.

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1 So why would your clients not be bound by that?

2 MR. PIZZIRUSSO: Mr. Adelman didn't represent my
3 clients at the time. They weren't named as defendants in the
4 litigation. Now that the Court has allowed an amendment and
5 they have brought in new counsel, may have new ideas or may
6 want to do things differently, I don't know why Redigi did the
7 things that they did. I don't know their strategy.

8 But my clients are now being asked to be joint and
9 severally liable for potentially millions of dollars. And they
10 have a due process right to take discovery, to find out what
11 the claims are being asserted against them and don't think that
12 they are bound by representations on behalf of people who did
13 not represent them personally, that no discovery is needed
14 here.

15 THE COURT: There is case law, slightly different
16 procedural context, though, that basically bars the principals
17 of a corporate defendant from asserting claims and making
18 arguments that were or could have been made by the corporate
19 defendant. You're familiar with those cases. You've seen
20 them, right?

21 MR. PIZZIRUSSO: I have seen the cases that Mr. Mandel
22 cited, and I agreed with your Honor's initial assessment that
23 they took place in generally different contexts than what we
24 have here.

25 THE COURT: They are different contexts, but it's not

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1 clear to me why the rationale would be any different at this
2 stage of this proceeding.

3 You are not asserting that somebody else is who ran
4 the litigation and somebody else is who is responsible for the
5 corporate defendant defending himself, right? Is there
6 somebody else?

7 MR. PIZZIRUSSO: There are other shareholders of the
8 company, your Honor. There is inside counsel. There aren't
9 just these two individuals. If Mr. Mandel wants to have some
10 additional discovery after he is saying that no additional
11 discovery is needed, we can go into that. I think we have got
12 to take the complaint that we have against us and respond to
13 that. He hasn't asserted any of these facts that he claims he
14 has that talk about how my clients have run the show from day
15 one and are really responsible here, and he has got this great
16 discovery record. I think it should have been in the
17 complaint. It wasn't. So now here we are on the, quote
18 unquote, eve of trial, the 11th hour, the close of discovery
19 and he is saying, you don't get any more discovery, you're
20 essentially liable. And we think that's prejudicial and we
21 think the complaint should be dismissed with prejudice, but, at
22 the very least, if not, he should have to replead and allow us
23 to answer.

24 But I do agree that the cases should be severed. We
25 could proceed right now against Redigi and go to trial and let

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1 him proceed separately against my clients so they can assert
2 what they believe are their rights to take discovery on issues
3 that were never raised. Most of the issues that we are talking
4 about, your Honor, are not issues that were asserted by Redigi.

5 THE COURT: That's the whole point, though. I guess
6 the initial issue then is whether your client should be barred
7 from asserting defenses and arguments that could have been
8 asserted previously by the corporate defendant.

9 MR. PIZZIRUSSO: They have defenses that are solely
10 applicable to them, like laches. Like them only being named
11 here at the end of the case. That clearly wouldn't apply to
12 Redigi. That's a different as to Redigi.

13 Your Honor, in your opinion itself, said that fair use
14 is really a case-by-case equitable doctrine. You've got to
15 look at the specific instances of the case at hand and there
16 may be, again, particular fair use issues as to the individual
17 defendants that weren't applicable to Redigi.

18 THE COURT: Like what?

19 MR. PIZZIRUSSO: I have not seen a complaint that I
20 could fairly respond to yet, so I don't know, but there may be.

21 THE COURT: I am not sure why that the answer to that
22 question turns on the complaint. I mean, fair use is obviously
23 a defense. I addressed it in the summary judgment motion,
24 cross motions, I guess, by Redigi and by the plaintiffs.

25 And so in what way would your fair use and first sale

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1 defense be different from what was asserted previously by the
2 corporate defendant?

3 MR. PIZZIRUSSO: The first sale defense, your Honor, I
4 think your Honor pretty clearly covered. Obviously, my clients
5 would disagree, respectfully, with the opinion.

6 But with regard to fair use, to the extent that they
7 are being deemed individually liable, I think the equities
8 might weigh more in their favor on a fair use defense just
9 because these are individuals who had meetings with Capital,
10 who encouraged their use of this technology, who, you know, we
11 think, gave implied consent to it. There were people who were
12 supportive of them. So we think when you weigh the equities of
13 the fair use defense, it may weigh more in their favor because
14 of the individual liability trying to be imposed on them by
15 Capital.

16 THE COURT: I would love to see some authority for
17 that proposition. It doesn't sound right to me.

18 (Continued on next page)

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1 THE COURT: So, you're not looking then to dismiss the
2 complaint or sever the defendants.

3 MR. MANDEL: I'm sorry?

4 THE COURT: You're not looking to sever the defendants
5 or dismiss the amended complaint and go forward on the old one.

6 MR. MANDEL: No. And I don't think we should have to.
7 I really believe, with all due respect, that this is a bit of a
8 smoke screen. I mean the idea that these two individuals who
9 founded this company came in arguing vociferously that what
10 they were doing was legal, don't know what they are charged
11 with, it's ridiculous. I mean of course they know. They
12 founded a company, they founded a business model, they
13 developed the technology, they did all of the acts that were
14 found to be infringing. It's not like somebody else did it.
15 They did it. This was their brainchild, and they are the
16 people who put it into motion, who completed the business
17 modeled and who did all of the acts at issue.

18 Now, the idea that they would somehow have a different
19 fair use defense makes no sense under the four factors we are
20 looking at. We are looking at the same exact things. We are
21 looking at the exact same analysis. Of course their fair use
22 defense is no different.

23 There is also just no factual basis for any of these
24 defenses. They are so far afield from anything that I honestly
25 don't think they could be asserted consistent with Rule 11.

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1 For example, unclean hands, they are asking questions about the
2 mechanical royalties that Capitol pays to its artists with whom
3 it has contracts, and their theory is that maybe Capitol has
4 somehow underpaid these artists, then that would create an
5 unclean hands defense for them. They have nothing to do with
6 these artists. They have no contractual relationship. They
7 are not in a position to assert anything. And they want to
8 turn it into a trial about whether we paid the right royalties,
9 what audits have been done, whether these audits have been
10 properly paid? They are just outside infringers who have
11 nothing to do with this. This has nothing to do with them.
12 And our business relationship with our artists has nothing to
13 do with this case. It can't possibly set the grounds for an
14 unclean hands defense.

15 They also talk about laches. Mr. Ossenmacher's own
16 deposition testimony -- and I would ask Mr. Pizzirusso to read
17 it at pages 104 to 110 in his deposition -- he basically says
18 that he couldn't get a meeting with Capitol; capitol wouldn't
19 meet with him. "They took an uneducated view. Unlike the
20 other record labels, they refused to hear what I had to say.
21 They were too busy to meet with me, and then after the RA sent
22 a claim letter I got to meet with every other label but Capitol
23 refused." How is that possibly under any factual scenario
24 going to give rise to laches, where you have to have reasonable
25 prejudicial reliance on what the plaintiff did?

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1 The plaintiff made clear, they sued Redigi within
2 three months of its launch, and they want to say that they
3 somehow reasonably relied that it was OK for them to go forward
4 in the face of Capitol having filed a suit against their
5 company for infringement, that somehow they thought they had
6 assurances that what they were doing was legal or Capitol
7 approved of it? There is no possible basis to assert any of
8 these things.

9 THE COURT: That's a Rule 11 point, and we're not
10 there yet. Right?

11 MR. MANDEL: I guess the question is in terms of
12 discovery, it's not true -- we're willing to be reasonable
13 about discovery. The reason we thought, both Mr. Adelman and I
14 thought that no real discovery was necessary, was because all
15 of the issues relate to the defendant's own conduct. It was
16 solely within their knowledge. And we didn't understand what
17 discovery they could really want from Capitol on whether they
18 personally participated, what they did. I think that it's
19 clear what they did, and they know what they did.

20 THE COURT: So, you are not seeking additional
21 discovery to establish the point whether they controlled the
22 company.

23 MR. MANDEL: No. We think the record is clear, as it
24 is now, as to their participation in the acts. Whether they
25 are collaterally estopped, or whether you want to relook at it,

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1 the record is such that we have no doubt that we can establish
2 as a matter of law that they are personally liable.

3 Now, it's true if they want to take discovery into
4 ownership -- because that was something that Mr. Adelman didn't
5 want to pursue; we talked about it during the second discovery
6 period after the summary judgment opinion -- look, that's fair
7 game. I think that's a legitimate point, and if that's
8 something they want to pursue, you know, we just identified the
9 universe of songs at the end of discovery. It was somewhat
10 complicated because they had to run a program to figure out
11 which ones had been uploaded through Redigi 1.0.

12 THE COURT: You're talking about ownership of --

13 MR. MANDEL: -- our copyrights in the universe of
14 recordings that we were able to finally figure out through the
15 discovery process and isolate those recordings at the end of
16 discovery. So, it wasn't really until August, when we came
17 before your Honor, that we had fully through getting the charts
18 that Redigi compiled, through the program that Mr. Rudolph ran,
19 where we were able to say these are the recordings that went up
20 through Redigi 1.0. And we eliminated some recordings, and we
21 changed the universe. You know, there are 500 some odd
22 recordings, and so obviously if you want to start digging into
23 the record of contracts on every one of those, that's fine. I
24 mean we're not saying that they shouldn't be allowed to do
25 that. Mr. Adelman wasn't interested in doing that, but we

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1 understand that they are entitled to take discovery on that.
2 So, we are now producing that voluminous record because they
3 asked for it, and we're putting it together.

4 Frankly, there probably are a couple of recordings
5 that we would even drop, and we might even need to add some
6 subsidiaries, because as we are going through the chain of
7 title, if you really are going to dig into it and take that
8 discovery, some of these copyrights are owned by wholly owned
9 subsidiaries of Capitol. It doesn't change anything in terms
10 of the analysis. It would be the same witness --

11 THE COURT: Would it require an amended pleading?

12 MR. MANDEL: It might, actually. But we had always
13 said from the outset of the case management schedule that the
14 universe of recordings was dynamic, and it was going to take a
15 little bit of work to figure that out, and to hone in on what
16 they are, to isolate them, and also because of a lot of change
17 that is going on at our client with changes in corporations
18 because they have now been merged together with the Universal
19 Music Group, there are company names that are changing, there
20 are things that have changed even since July, you know, I think
21 it's a technical point. If it turns out that it's now Capitol
22 Christian Music Group that owns the copyright, that's a wholly
23 owned subsidiary of Capitol Records, we would like to clear
24 that up.

25 We would certainly be willing to work with defendants

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1 to make sure they get anything they need if they really do want
2 to mount a challenge to whether we own each of those
3 recordings.

4 THE COURT: That's with respect to the individual
5 defendants only, in your opinion.

6 MR. MANDEL: Or Redigi. If Redigi is now interested
7 in doing that, I think that's sort of related to damages, and
8 they are all jointly and severally liable. I am not standing
9 on trying to say that that's not fair game in terms of
10 determining the full scope of recordings that we can collect a
11 damage award for.

12 The problem that Capitol has is to be hit with massive
13 discovery requests, that ask about things that are completely
14 tangential to any issue in the case, that have nothing to do
15 with the underlying causes of action, that are being offered in
16 front of defenses that even counsel didn't think enough to
17 assert because there wasn't a basis for them, there really
18 wasn't.

19 THE COURT: I think he's complimenting you, Mr.
20 Adelman.

21 MR. ADELMAN: Excuse me?

22 THE COURT: I think he's complimenting you.

23 MR. ADELMAN: I think he is, but I still would like to
24 address it.

25 THE COURT: I will give you a chance.

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1 MR. ADELMAN: Thank you, your Honor.

2 MR. MANDEL: So, that's really where we are. The
3 problem is that if it's going to be turned into an accounting
4 about how we pay royalties to our artists on every one of these
5 500 recordings, how we digitally exploit them all, every piece
6 of correspondence we have had with anybody, I mean that is not
7 reasonably related to any issue that remains in the case at
8 this point, in our view.

9 THE COURT: And the discovery with respect to damages,
10 what we launched on before the amended complaint, or I guess
11 contemporaneous with the contemplation of the amended
12 complaint, where are you with that?

13 MR. MANDEL: Well, from our perspective we are done
14 with discovery. I mean Capitol doesn't need anymore discovery.
15 If the individuals defendant and/or Redigi wants to take a
16 deposition of our 30(b)(6) witness and go through the chain of
17 title and talk about ownership, we don't have a problem with
18 that; we are prepared to produce somebody. We are producing
19 the documents. We have been producing the documents. Since
20 they say they want that, that's fine.

21 Beyond that, I mean if they want us to answer some
22 interrogatories that explain to them why they are individually
23 liable, I mean we think it's pretty obvious from the opinion
24 and from their deposition testimony, but obviously we can
25 answer that. The real problem is if they want to turn it into

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1 a fishing expedition, to look for defenses that the record
2 absolutely clearly establishes have no possible basis -- I mean
3 in terms of the DMCA defense, they are not even registered as
4 an agent as required by the statute. As a matter of law they
5 could not assert a DMCA defense, you know, separate and apart
6 from anything else.

7 And the court's opinion found that they had a
8 financial interest, that Redigi had a financial interest, that
9 the elements of control and financial benefit were both
10 satisfied, so that would also defeat the defense under 512.

11 So, a lot of these defenses, honestly, you know, it's
12 going to end up being very expensive, wasting a lot of time and
13 effort, and, you know, if we have to pursue this, we are going
14 to hear about it at the end of the day when there is an
15 attorney fee motion, because there is no way these defenses can
16 stand, and they really shouldn't be asserted.

17 THE COURT: All right. But, so what you are seeking
18 then is this: Rule on the motion to dismiss, basically stay
19 discovery until I rule on that, and then allow for I guess what
20 would be styled as a motion for summary judgment with respect
21 to the Teltronics issue? Is that right?

22 MR. MANDEL: Well, I think what I would propose is not
23 staying discovery, because regardless of what the issue is on
24 the motion to dismiss -- I mean obviously if your Honor grants
25 the motion to dismiss and that's the end of it, then of course

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1 that's one thing. But we're pretty confident that that's not
2 something that's going to happen.

3 We think that if they want to pursue discovery, we
4 certainly think ownership discovery we should go forward with;
5 we should do everything that needs to be done. We would
6 probably ask permission to maybe amend at the end of that so
7 that we all are operating on a clear understandings of what the
8 recordings are, who the plaintiffs are, so there can be no
9 dispute about that.

10 But I think that this other discovery, in terms of the
11 issues that we complained about in our letter, we would be
12 fighting about that, and I don't even know how we could comply
13 with that. If we are going to have to start producing, you
14 know, every accounting and every deal that we've done for every
15 one of these recording artists, it's going to be a massive
16 undertaking and I think toward no end.

17 THE COURT: I understand that, but certain defenses
18 would be off the table, depending on how I resolve the issue of
19 what we will call the Teltronics issue, right?

20 MR. MANDEL: So, your Honor is proposing having a
21 separate briefing on the Teltronics issue.

22 THE COURT: Well, I think that depending on how that
23 gets resolved, then the defendants basically are stripped down
24 to the same defenses that are asserted by the corporate
25 defendant.

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1 MR. MANDEL: I suppose we could do that. I mean I
2 guess the issue I have is I'm still assuming that if the motion
3 to dismiss is denied, and they have to come in with an answer,
4 they have an extensive factual record, they have deposition
5 testimony that I have just cited them to, I assume they will
6 look at that before they sign a pleading that asserts some of
7 these defenses separate and apart from Teltronics.

8 THE COURT: Right. Well, that's the reason for my
9 suggestion, that I rule on the motion to dismiss first, and
10 then they have to answer, and depending on what they answer,
11 then there are certain defenses that would require additional
12 discovery and others that wouldn't.

13 MR. MANDEL: Right. And that's fine. I think the
14 point I was making is regardless of what happens, I think the
15 one thing is if they are intent on pursuing chain of title and
16 delving into ownership, then that's going to have to take
17 place, and there is no reason to hold off on that; we are
18 prepared to allow that and to cooperate with that.

19 THE COURT: Well, I don't know if it prevents
20 additional discovery, but I may otherwise not require the
21 parties to produce discovery where there is a dispute as to
22 whether such discovery should be had at all. That seems to be
23 what you are really arguing, right?

24 MR. MANDEL: Yes, I think so. If we stayed discovery
25 on the issues that we are fighting about, went forward on the

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1 ownership interests, that would be fine.

2 THE COURT: Mr. Adelman, you have been waiting
3 patiently.

4 MR. ADELMAN: Thank you, your Honor.

5 And notwithstanding Mr. Mr. Mandel's compliment to me,
6 there is one thing I take issue with, and that is that we were
7 not interested in the ownership issue. It's not that we were
8 not interested. In fact, in our initial demands in March of
9 2012 we asked all contracts, agreements, assignments, any
10 documents evidencing or concerning --

11 THE COURT: OK. But then we went to summary judgment
12 without that being disputed, right?

13 MR. ADELMAN: No, for the purposes of that motion.

14 THE COURT: Well, I mean, wait a minute. The purpose
15 of that motion was that you folks were teeing it up for me, but
16 it wasn't like if you lose you get to make repeated additional
17 motions, right?

18 MR. ADELMAN: No, but they certainly still have to
19 prove in damages that ownership of copyright.

20 THE COURT: We are in damages discovery now; I get
21 that.

22 MR. ADELMAN: That's all I'm talking about. But this
23 is a continuing demand, which means they have to provide the
24 ownership materials continuing. And, as far as I'm concerned,
25 discovery ended August 8, and they've had the lists. The last

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1 list was generated in early June of 2013. The first list was
2 generated in June of 2012.

3 THE COURT: I ruled on the summary judgment. I
4 granted it. Then we said we are going to have damages
5 discovery.

6 MR. ADELMAN: That's what I am talking about, your
7 Honor. Damages discovery for Redigi corporate closed on August
8 8, yet what we maintained in our letter is that they have not
9 proved ownership in many of their copyrights, and all of a
10 sudden in the last four or five days we get 3,000 pages of
11 ownership.

12 We maintain that they're precluded, and that certainly
13 goes to the issue of damages, because any copyright that they
14 cannot prove reduces any potential damage to us. So, I would
15 take issue that we don't care about it. Our position is that
16 any ownership documents that were not produced by the end of
17 disclosure for Redigi corporate are precluded at this point.

18 THE COURT: All right. So you want to take back all
19 the nice things you said about him?

20 MR. MANDEL: No. I mean I think his choice of what
21 defenses to assert was proper and reasonable, and is what I
22 would have done, so I stand by that.

23 THE COURT: No, the issue is he is saying that you're
24 out of time on discovery. He asked for these things before he
25 decided to concede them for purposes of a summary judgment

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1 motion.

2 MR. MANDEL: No, but here is the thing. We all
3 understood on summary judgment that the actual universe of what
4 recordings were going to end up being claimed on was something
5 that we were going to have to figure out. We didn't have that.

6 Now, what happened is Redigi on summary judgment did
7 not challenge ownership. When we talked about what discovery
8 they wanted during Redigi post-summary judgment discovery,
9 Mr. Adelman didn't want to take a deposition, didn't seem to be
10 pursuing wanting to challenge ownership, which he hadn't
11 challenged on summary judgment. So, my assumption was that
12 they recognized that it wasn't going to be a very fruitful area
13 to see that Capitol didn't own the recordings it says it owns.
14 And that was my assumption. Most of the effort during that
15 discovery was really focused on figuring out which of the
16 recordings that actually --

17 THE COURT: Look --

18 MR. ADELMAN: Your Honor, one thing. Remember they
19 amended the complaint and added copyrights. That was not part
20 of the complaint during the summary judgment motion. There
21 were only about 111 tracks at issue during the summary judgment
22 motion, and all of those were purchased by the investigator.
23 So, there is an amended complaint, we have actually answered,
24 and we have affirmative defenses as far as ownership is
25 concerned. I don't think we ever conceded ownership as to the

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1 tracks that they are alleging in the complaint. I think what
2 we are arguing was whether there was an infringement or not.
3 And for the basis of the summary judgment motion, they
4 certainly owned at least one of the tracks, and I think that we
5 have stated that; but, nevertheless, my position on discovery
6 is solely as to the copyright issue.

7 THE COURT: But you are suggesting that Mr. Mandel
8 basically did and should have understood that you wanted all of
9 this discovery with respect to ownership. And the date of that
10 is when in relation to my summary judgment ruling, in relation
11 to the conference we had on the motion to amend? What's the
12 date of your demand?

13 MR. ADELMAN: The date of the demand is March.

14 THE COURT: March of 2013.

15 MR. ADELMAN: 2012.

16 THE COURT: 2012, OK. So, I ruled.

17 MR. ADELMAN: So, the question you asked me at the
18 conference is as it related to the individuals, who as
19 Mr. Pizzirusso suggested -- I did not represent at the time --
20 but you asked me what I thought was an off-the-cuff request,
21 and at the time off the top of my head, as far as the
22 individuals are concerned, no, I could not think of any
23 discovery. But going forward discovery had already closed
24 after we had that conference. August 8 was the close of
25 discovery.

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1 THE COURT: Damages discovery. We all contemplated
2 that.

3 MR. ADELMAN: No, not before that conference, your
4 Honor. Damages discovery was closed prior to that conference.
5 We had that conference after the close of damages discovery.

6 MR. MANDEL: Your Honor, if I could. What happened is
7 it wasn't really until the end of that damage discovery
8 period -- we were racing to figure out which were the
9 recordings that actually had been uploaded through Redigi 1.0.
10 We then did a quick search of our computer systems to identify
11 which recordings we could claim on, and we came up with an
12 amended complaint.

13 It would not have been possible in that couple of
14 weeks between the time, less than two weeks really between when
15 we finalized the information to know what the recordings were,
16 to have produced contracts covering all 500 of those
17 recordings. And it wasn't my understanding that Mr. Adelman
18 was contesting that. But, you know, obviously --

19 THE COURT: Look, I have to say, to the extent that
20 Mr. Mandel was wrong in what he assumed, I assumed the same
21 thing. So, I did not anticipate that the document request made
22 a year before my summary judgment ruling was still alive and
23 that you were going to say they haven't produced.

24 MR. ADELMAN: Well, your Honor, the fact is that
25 damages discovery had closed before that conference.

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1 THE COURT: Before the conference on the motion to
2 amend, you mean, in August?

3 MR. ADELMAN: Yes.

4 MR. MANDEL: But it's not --

5 MR. ADELMAN: So, my assumption was that discovery was
6 closed and Mr. Mandel had provided me with all the discovery
7 that he wished to.

8 And to the extent that Mr. Mandel knows that it's his
9 burden of ownership in a copyright case on damages, he should
10 have provided all the documentation. To the extent he wanted
11 to provide more documentation after that, the close of damages,
12 at the conference, he should have brought up the fact that
13 damages discovery needs to continue because we haven't provided
14 all the ownership documents, which is our burden to prove at
15 trial.

16 THE COURT: All right.

17 MR. MANDEL: Well, your Honor, we did produce all the
18 registrations during the discovery period, which satisfies as
19 our burden of prima facie proof.

20 I didn't understand that Mr. Adelman -- because he had
21 didn't served new requests. And we asked are you going to want
22 a deposition of our witness, and the answer was, no, I don't
23 want to take another deposition. And he asked barely any
24 questions about ownership at the first deposition. And we had
25 produced some ownership documents relating to the original

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1 universe of recordings.

2 So, it was not my understanding that this was a topic
3 that they were actually pursuing. And I thought the
4 registrations were going to provide sufficient proof.

5 If they want to pursue it, if the individual
6 defendants want to pursue it, that's fine, we don't object to
7 that. That I think is fair game, although --

8 THE COURT: Well, he's saying it's too late for that.
9 So, the fact that you are not objecting, of course you are not
10 objecting. He's not asking for it now; he says you are
11 precluded from producing any.

12 MR. MANDEL: That I guess I have a problem with under
13 the circumstances of how this developed. And the individual
14 defendants asked for it.

15 We made very clear from the outset -- even though we
16 were objecting to a lot of the discovery that the individual
17 defendants were serving -- that we were absolutely going to
18 produce. If they wanted the chain of title documentation, we
19 would produce that, and we would certainly produce a witness to
20 testify to that. That's never been something that we have
21 sought to block. The whole reason we got derailed with
22 discovery disputes with the individual defendants is because of
23 all these other issues that they were seeking.

24 MR. ADELMAN: Your Honor, notwithstanding that, in
25 order to proceed with this case, he has to have ownership

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1 documents. He has to prove the copyright. He has to prove
2 that they own the copyright. We have never conceded that as to
3 the individual tracks.

4 And during discovery there was also conversations
5 between Ms. Matz and Mr. King, which I'd like her to express,
6 if you would, your Honor.

7 THE COURT: Look, I don't know that I'm going to need
8 to sort of peel this onion, because I don't think there is a
9 satisfactory way to do it.

10 So, what I'm prepared to do is stay all discovery now,
11 rule on the motion to dismiss -- which I will do very
12 shortly -- and then once I have done that, then we will have an
13 answer, we will have defenses that are asserted, and then you
14 can make your motion for summary judgment against the
15 individual defendants, arguing at least in part that they are
16 precluded from certain defenses, and we can I guess coordinate
17 whatever additional discovery is necessary to wrap this up.
18 And then I guess we would have additional summary judgment
19 motions on damages.

20 That's what you are contemplating, right, Mr. Mandel?

21 MR. MANDEL: We are only contemplating summary
22 judgment motion on the individual defendants' liability.

23 THE COURT: So, damages would be at trial?

24 MR. MANDEL: Well, we are going to move for summary
25 judgment on the innocent infringement defense that would open

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1 up a lower category of damages.

2 THE COURT: So, anyway, I think all of that happens
3 after I rule on the motion to dismiss.

4 So, to the extent you want to do informal discovery
5 between now and then, you can. If Mr. Adelman is of the view
6 that discover is closed, and he is not so accepting or asking
7 for anything more, then he can take that position. But I am
8 very likely to reopen discovery for a limited time for the
9 purpose of wrapping this up, so we can get to the finish line.

10 So, I think to the extent there has been confusion and
11 that there has been misunderstandings -- I'm not accusing
12 anybody of anything -- I'm just saying that certainly at the
13 time we had our conference in August, I anticipated a very
14 different way this would unfold.

15 So, I think it's not fair to Mr. Pizzirusso to be
16 asserting defenses until he knows what he's shooting at, so I
17 think I have to rule on that motion. But discovery I'm going
18 to hold off.

19 You see the way this wind is blowing, right, Mr.
20 Pizzirusso? You're a smart guy.

21 MR. PIZZIRUSSO: I do. That was going to be my next
22 question, which was: I hear the court is inclined perhaps
23 probably to deny the motion to seek an answer. And if that's
24 going to happen, we might be more inclined, my clients, to go
25 ahead with some informal discovery if that appears to be the

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1 way the wind is blowing.

2 THE COURT: Nobody is precluded from informal
3 discovery, but I'm certainly stopping the requirement of
4 reciprocal discovery at this point.

5 Discovery is stopped unless you folks can agree. But
6 once I rule, and assuming this thing is back on a litigation
7 track, then I will almost certainly reopen discovery for a
8 limited range of issues. What those are exactly, I'm not sure
9 yet, and I think that will turn on what the pleadings, what the
10 answer says.

11 So, I'm not sure that's satisfactory to everybody, but
12 I think it's the best we can do at this hour. So, anything else
13 I have overlooked, or anything else you think I should at least
14 keep in my brain?

15 MR. ADELMAN: Only that we also have a letter for
16 summary judgment as well.

17 THE COURT: Right. Well, there certainly was talk
18 about summary judgment, and I think we should hold off on
19 summary judgment until we have concluded all discovery.

20 MR. ADELMAN: I agree.

21 THE COURT: So, no prejudice to your motion, but I
22 think we should --

23 MR. ADELMAN: No. I was just making sure that it was
24 in the mix. But I think your plan is a good one.

25 THE COURT: And you don't always think that.

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1 MR. ADELMAN: No, you're right. And you know I'm very
2 vocal as far as whether I agree or disagree. But I think it's
3 a rational one, because I think there has been some confusion
4 as to where everyone is going, and I am going to say on the
5 record that I am open to discussing it with Mr. Mandel.

6 THE COURT: Good. Look, that's the goal, of course.
7 You obviously have very different positions on the law,
8 interesting case, clients who feel the importance of this.
9 It's not lost on me, but there is no reason why the lawyers
10 have to be acrimonious with each other. And I am not
11 suggesting they are necessarily. So, do sit down and see where
12 you can reach agreement, but right now the ball is in my court
13 to resolve a couple of things and get you on track.

14 MR. ADELMAN: We're actually quite unacrimonious. We
15 all get along, so it's been helpful. Even Mr. Pizzirusso.

16 But I appreciate your help on this one, your Honor.

17 THE COURT: I'm not sure how much I've helped, but
18 anyway.

19 So, let's adjourn. Let me thank the court reporter
20 for his time and his predecessor's time. If anybody needs a
21 copy of the transcript, you can take that up with the court
22 reporter, but I will be in touch with you very shortly. OK?

23 Mr. Pizzirusso, thanks for coming up.

24 - - -