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Capitol Records, LLC v. ReDigi Inc.

Doc. 164

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, CAPITOL  
CHRISTIAN MUSIC GROUP, INC., and VIRGIN  
RECORDS IR HOLDINGS, INC.

Case No.: 12CV00095  
(RJS)

Plaintiffs,

**ANSWER TO SECOND AMENDED  
COMPLAINT**

v.

REDIGI INC., JOHN OSSENMACHER and  
LARRY RUDOLPH a/k/a LAWRENCE S.  
ROGEL,

Defendants.

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Defendant ReDigi, Inc., (“ReDigi”), by its attorneys ADELMAN MATZ P.C., for its Answer to the Second Amended Complaint (“Complaint”) of Plaintiff Capitol Records, LLC, Capitol Christian Music Group, Inc., and Virgin Records IR Holdings, Inc., (“Plaintiffs”) upon knowledge as to itself and its own actions and upon information and belief as to all other matters alleged below answers as follows:

1. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.
2. Denies the truth of the allegations contained in paragraph 2 of the Complaint, except admits that ReDigi owns and operates the “ReDigi” music service which is the first online marketplace for used digital music files and that one of the functionalities of ReDigi 1.0 was that

users could upload sound recordings by migrating them to that user's ReDigi Cloud Locker and offer them for sale.

3. Denies the truth of the allegations contained in paragraph 3 of the Complaint, except admits that ReDigi has compared its service to among other things a used record store.

4. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint.

6. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. Admits the truth of the allegations contained in paragraph 7 of the Complaint.

8. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint, except admits that John Ossenmacher is the Chief Executive Officer of ReDigi.

9. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the Complaint, except admits that Larry Rudolph a/k/a Lawrence Rogel is the Chief Technology Officer of ReDigi.

#### **JURISDICTION AND VENUE**

10. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the Complaint and otherwise states that paragraph 10 contains legal conclusions to which no response is required.

11. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the Complaint and otherwise states that paragraph 11 contains legal conclusions to which no response is required.

12. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint, except denies the truth of the allegations that ReDigi transacts business in New York State, that ReDigi committed tortious acts within or outside New York state and that ReDigi caused injury in New York and otherwise states that paragraph 12 contains legal conclusions to which no response is required.

13. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the Complaint and otherwise states that paragraph 13 contains legal conclusions to which no response is required.

### **FACTS**

14. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 of the Complaint.

15. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of the Complaint.

16. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the Complaint.

17. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the Complaint.

18. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint.

19. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint, except denies the truth of the allegation that Plaintiffs' sound recordings have been illegally reproduced and distributed by or for users of the ReDigi 1.0 service.

20. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint, except denies the truth of the allegation that any of the pre-1972 recordings were illegally reproduced and distributed by or for users of the ReDigi's 1.0 service.

21. Denies the truth of the allegations contained in paragraph 21 of the Complaint except admits that ReDigi owns and operates the ReDigi website and service located at [www.redigi.com](http://www.redigi.com), that the website was launched in 2011 and that ReDigi's website contained statements concerning its services and refers the Court to its website as the best evidence of the statements made thereon and the legal import thereof.

22. Denies the truth of the allegations contained in paragraph 22 of the Complaint except admits that its website contained statements concerning ReDigi's ability to facilitate the transfer of a digital music file from one user to another without copying or file sharing and refers the Court to the website as the best evidence of the statements made thereon and the legal import thereof.

23. Denies the truth of the allegations contained in paragraph 23 of the Complaint except admits that ReDigi issued a press release prior to its launch and refers the Court to said press release as the best evidence of the statements made therein and the legal import thereof.

24. Denies the truth of the allegations contained in paragraph 24 of the Complaint.

25. Denies the truth of the allegations contained in paragraph 25 of the Complaint except admits that ReDigi issued a press release prior to its launch and refers the Court to said press release as the best evidence of the statements made therein and the legal import thereof.

26. Denies the truth of the allegations contained in paragraph 26 of the Complaint except admits that ReDigi's website had a tutorial video and refers the Court to said tutorial video as the best evidence of the statements made therein and the legal import thereof.

27. Denies the truth of the allegations contained in paragraph 27 of the Complaint except admits that ReDigi's website had a tutorial video and refers the Court to said tutorial video as the best evidence of the statements made therein and the legal import thereof.

28. Denies the truth of the allegations contained in paragraph 28 of the Complaint except admits that ReDigi users could earn "ReDigi coupons" and credits which could be applied to the purchase of music files and that ReDigi's website had a tutorial video and refers the Court to said tutorial video as the best evidence of the statements made therein and the legal import thereof.

29. Denies the truth of the allegations contained in paragraph 29 of the Complaint except admits that the ReDigi website offered contests and refers the Court to the website as the best evidence of the statements made thereon and the legal import thereof.

30. Denies the truth of the allegations contained in paragraph 30 of the Complaint except admits that ReDigi was mentioned in a New York Times article dated November 14, 2011 and that ReDigi earns a transaction fee from the sale of music by one user to another through the ReDigi website.

31. Denies the truth of the allegations contained in paragraph 31 of the Complaint.

32. Denies the truth of the allegations contained in paragraph 32 of the Complaint.

33. Denies the truth of the allegations contained in paragraph 33 of the Complaint except admits that ReDigi's proprietary "Music Manager" software including its "Verification Engine" analyzed each file that users wished to upload through ReDigi 1.0 to ensure that the track was legally downloaded by the user in the first instance and as such would have been eligible for sale if a user chose to offer such track for sale.

34. Denies the truth of the allegations contained in paragraph 34 of the Complaint.

35. Denies the truth of the allegations in paragraph 35 of the Complaint, except admits that ReDigi's website made statements concerning the verification process, rules concerning upload of music files to the user's ReDigi Cloud Locker, and the requirement that a user may not possess copies of a file offered for sale on any device and refers the Court to the website as the best evidence of the statements made thereon and the legal import thereof.

36. Denies the truth of the allegations contained in paragraph 36 of the Complaint except admits that the First Sale Doctrine codified as 17 U.S.C. § 109 is a defense to this action and refers the Court to the ReDigi website as the best evidence of the statements made thereon and the legal import thereof.

37. Denies the truth of the allegations contained in paragraph 37 of the Complaint and otherwise refers the Court to the Copyright Act for the definitions of "copy" and "phonorecord" as the best evidence of those definitions and the legal import thereof.

38. Denies the truth of the allegations contained in paragraph 38 of the Complaint.

39. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the Complaint.

40. Denies the truth of the allegations contained in paragraph 40 of the Complaint.

41. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the Complaint, except admits that the RIAA sent ReDigi a letter in November 2011 and respectfully refers the Court to said letter as the best evidence of the contents therein and the legal import thereof.

42. Denies the truth of the allegations contained in paragraph 42 of the Complaint, except admits that the Court issued a summary judgment ruling in this case on March 30, 2013 and that shortly thereafter ReDigi disabled certain parts of its 1.0 technology and refers the Court to such ruling as the best evidence of the contents of the ruling and the legal import thereof.

43. Denies the truth of the allegations contained in paragraph 43 of the Complaint.

**FIRST CAUSE OF ACTION**  
**(Copyright Infringement – 17 U.S.C. § 101 *et seq.*)**

44. ReDigi repeats and re-alleges each and every answer in the foregoing paragraphs 1 through 43 as if fully set forth herein.

45. Denies the truth of the allegations contained in paragraph 45 of the Complaint.

46. Denies the truth of the allegations contained in paragraph 46 of the Complaint, and otherwise states that paragraph 46 contains legal conclusions to which no response is required.

47. Denies the truth of the allegations contained in paragraph 47 of the Complaint.

48. Denies the truth of the allegations contained in paragraph 48 of the Complaint.

49. Denies the truth of the allegations contained in paragraph 49 of the Complaint.

50. Denies the truth of the allegations contained in paragraph 50 of the Complaint.

**SECOND CAUSE OF ACTION**  
**(Inducement of Copyright Infringement)**

51. ReDigi repeats and re-alleges each and every answer in the foregoing paragraphs 1 through 50 as if fully set forth herein.
52. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 52 of the Complaint.
53. Denies the truth of the allegations contained in paragraph 53 of the Complaint.
54. Denies the truth of the allegations contained in paragraph 54 of the Complaint.
55. Denies the truth of the allegations contained in paragraph 55 of the Complaint.
56. Denies the truth of the allegations contained in paragraph 56 of the Complaint, and otherwise states that paragraph 56 contains legal conclusions to which no response is required.

57. Denies the truth of the allegations contained in paragraph 57 of the Complaint.
58. Denies the truth of the allegations contained in paragraph 58 of the Complaint.
59. Denies the truth of the allegations contained in paragraph 59 of the Complaint.
60. Denies the truth of the allegations contained in paragraph 60 of the Complaint.

**THIRD CAUSE OF ACTION**  
**(Contributory Copyright Infringement)**

61. ReDigi repeats and re-alleges each and every answer in the foregoing paragraphs 1 through 60 as if fully set forth herein.
62. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the Complaint.
63. Denies the truth of the allegations contained in paragraph 63 of the Complaint.
64. Denies the truth of the allegations contained in paragraph 64 of the Complaint.

65. Denies the truth of the allegations contained in paragraph 65 of the Complaint.
66. Denies the truth of the allegations contained in paragraph 66 of the Complaint, and otherwise states that paragraph 66 contains legal conclusions to which no response is required.
67. Denies the truth of the allegations contained in paragraph 67 of the Complaint.
68. Denies the truth of the allegations contained in paragraph 68 of the Complaint.
69. Denies the truth of the allegations contained in paragraph 69 of the Complaint.
70. Denies the truth of the allegations contained in paragraph 70 of the Complaint.

**FOURTH CAUSE OF ACTION**  
**(Vicarious Copyright Infringement)**

71. ReDigi repeats and re-alleges each and every answer in the foregoing paragraphs 1 through 70 as if fully set forth herein.
72. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 72 of the Complaint.
73. Denies the truth of the allegations contained in paragraph 73 of the Complaint, except admits that the ReDigi website has a termination policy for users who violate its Terms of Service and refers the Court to such policy as the best evidence of the contents therein and the legal import thereof.
74. Denies the truth of the allegations contained in paragraph 74 of the Complaint.
75. Denies the truth of the allegations contained in paragraph 75 of the Complaint, except admits that ReDigi earns a transaction fee from the sale of music by one user to another through the ReDigi website.
76. Denies the truth of the allegations contained in paragraph 76 of the Complaint.

77. Denies the truth of the allegations contained in paragraph 77 of the Complaint, and otherwise states that paragraph 77 contains legal conclusions to which no response is required.

78. Denies the truth of the allegations contained in paragraph 78 of the Complaint.
79. Denies the truth of the allegations contained in paragraph 79 of the Complaint.
80. Denies the truth of the allegations contained in paragraph 80 of the Complaint.
81. Denies the truth of the allegations contained in paragraph 81 of the Complaint.

**FIFTH CAUSE OF ACTION**  
**(Vicarious Copyright Infringement)**

82. ReDigi repeats and re-alleges each and every answer in the foregoing paragraphs 1 through 81 as if fully set forth herein.

83. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 of the Complaint and otherwise states that paragraph 83 contains legal conclusions to which no response is required.

84. Denies the truth of the allegations contained in paragraph 84 of the Complaint, except denies knowledge and information sufficient to form a belief as to the truth of the allegations regarding Capitol's actions.

85. Denies the truth of the allegations contained in paragraph 85 of the Complaint, and otherwise states that paragraph 85 contains legal conclusions to which no response is required.

86. Denies the truth of the allegations contained in paragraph 86 of the Complaint.
87. Denies the truth of the allegations contained in paragraph 87 of the Complaint.
88. Denies the truth of the allegations contained in paragraph 88 of the Complaint.

## **JURY DEMAND**

ReDigi hereby demands a trial by jury on all issues triable of right by a jury.

## **AFFIRMATIVE DEFENSES**

ReDigi hereby sets forth its separate and distinct affirmative defenses to the claims set forth in Plaintiffs' Complaint. By listing any matter as an affirmative defense, ReDigi does not assume the burden of proving any matter upon which Plaintiff bears the burden of proof under applicable law.

### **FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

### **SECOND AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the doctrine of fair use.

### **THIRD AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part because Plaintiff has failed to mitigate damages.

### **FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' damages, if any, are limited by ReDigi's innocent intent.

### **FIFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the doctrine of estoppel.

### **SIXTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the doctrine of waiver.

### **SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the doctrine of unclean hands.

## **EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the fact that ReDigi did not engage in volitional conduct which is a required element of direct infringement.

## **NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the fact Plaintiffs do not own a valid copyright in one or more of the works it seeks to recover damages for.

## **TENTH AFFIRMATIVE DEFENSE**

Plaintiffs' damages if any are limited on the grounds that a statutory damage award would be wholly disproportionate to any alleged amount of actual harm to Plaintiffs and as such would be punitive and unconstitutional.

## **ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the first sale doctrine codified as 17 U.S.C. § 109.

## **TWELFTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the common law doctrine of exhaustion and/or principles of exhaustion.

## **THIRTEENTH AFFIRMATIVE DEFENSE**

To the extent Plaintiffs seek attorneys fees or statutory damages in this action, such remedies are not available pursuant to *inter alia*, 17 U.S.C. § 412.

## **FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part by the Court's lack of personal jurisdiction over ReDigi.

### **FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part based upon the doctrine of substantial-non infringing use.

### **SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part as ReDigi's music storage service and used music marketplace do not infringe on copyright based on the essential step defense of 17 U.S.C. § 117.

### **SEVENTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part as tracks merely offered for sale through the ReDigi marketplace are not "distributions" within the meaning of 17 U.S.C. 106(3).

### **EIGHTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part on the grounds that ReDigi did not intentionally induce or encourage direct infringement, which is a required element of contributory infringement.

### **NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims, including but not limited to its claims of vicarious, contributory and inducement of copyright infringement are barred in whole or in part by ReDigi's innocent intent.

### **TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part because ReDigi is protected by one or more of the DMCA Safe Harbors in 17 U.S.C. § 512.

## **TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred in whole or in part because uploads to ReDigi's cloud locker and/or downloads to a user's personal computer are barred by the doctrine of fair use and/or are uses permitted by license and/or iTunes Terms of Service.

## **TWENTY-SECOND AFFIRMATIVE DEFENSE**

As a separate and distinct affirmative defense, Plaintiff's claims are barred in whole or in part because some or all of the allegedly infringed works have not been registered in accordance with the Copyright Act.

**WHEREFORE**, ReDigi demands judgment as follows:

- a) that Plaintiffs' Complaint be dismissed in its entirety with prejudice;
- b) that ReDigi be awarded costs, including reasonable attorneys fees from Plaintiffs pursuant to 17 U.S.C. §505; and
- c) that this Court award ReDigi such other and further relief as the Court deems just and proper.

Dated: New York, New York  
November 12, 2014

ADELMAN MATZ P.C.

By:  : \_\_\_\_\_

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