

MCMULLAN DECLARATION

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CAPITOL RECORDS, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,	:	12 Civ. 0095 (RJS)
	:	
Plaintiff,	:	
	:	
-against-	:	<u>DECLARATION OF</u>
	:	<u>ALASDAIR J. McMULLAN</u>
	:	
REDIGI INC.,	:	
	:	
Defendant.	:	
----- X	:	

ALASDAIR J. McMULLAN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am Executive Vice-President of Legal Affairs for EMI Music North America (“EMI”), where I have been employed since 1995. I supervise litigation for EMI and its record label affiliates, including Plaintiff Capitol Records, LLC (formerly Capitol Records, Inc.) (“Capitol”). I make this declaration in support of Capitol’s motion for a preliminary injunction. I have knowledge of the facts set forth herein based on my personal knowledge as well as review of EMI’s and Capitol’s books and records and other documents referenced herein. If called upon to do so, I could and would testify competently to the matters stated herein.

Capitol’s Business and Ownership of Copyrights

2. Capitol is a well known record company engaged in producing, manufacturing, distributing, selling, licensing and facilitating the distribution and sale of sound recordings.

3. Capitol is the copyright owner or owner of exclusive rights (by way of agreement)

with respect to an extensive and diverse catalog of sound recordings first fixed after February 15, 1972 (the “Copyrighted Recordings”), including those of such famous recording artists as Coldplay, Norah Jones, Katy Perry and Lily Allen, to name just some. Under the Copyright Act, Capitol enjoys the exclusive rights to reproduce, distribute to the public and publicly perform (by digital means) the Copyrighted Sound Recordings, and to authorize or license others to do so.

4. Among Capitol’s Copyrighted Recordings which are registered with the U.S. Copyright Office and which have been infringed by Defendant ReDigi, Inc. (“ReDigi”) are those identified in the non-exhaustive, illustrative list attached hereto as Exhibit 1. The certificates of registrations for the recordings listed in Exhibit 1 are also attached as part of the same exhibit. They identify as copyright claimant either (i) Capitol or a “division” of Capitol; (ii) Capitol Records, Inc. or a division of Capitol Records, Inc. (the name under which Capitol was known until it was converted into an LLC and changed to its present name on April 1, 2008); (iii) a fictitious name or d/b/a under which Capitol conducts business, such as Blue Note Records or EMI Records Nashville; (iv) a foreign affiliate of Capitol, such as EMI Records Ltd. or Jaydone Ltd., which has granted Capitol an exclusive license to its sound recordings in the United States; or (v) Virgin Records America, Inc., an entity which merged into Capitol on August 15, 2011.

5. Capitol also owns copyrights in original cover artwork and images with which the Copyrighted Recordings have been sold and marketed (the “Copyrighted Artwork”). For ease of reference, examples where the certificates of copyright registration for the Copyrighted Recordings listed in Exhibit 1 specifically include registration of the Copyrighted Artwork have been designated as such in the column entitled “Artwork/Photographs.”

6. Additionally, Capitol has entered into various agreements by which it obtained the common law copyrights in sound recordings embodying performances initially “fixed” prior to

February 15, 1972 (the “Pre-1972 Recordings”). These performances are protected under state law rather than federal copyright law. Pursuant to agreements and New York common law, Capitol possesses the exclusive rights to manufacture, reproduce, distribute, sell and perform the Pre-1972 Recordings. Among the Pre-1972 Recordings owned by Capitol are “What A Little Moonlight Can Do” by Peggy Lee and “The Christmas Song (Merry Christmas To You)” by Nat King Cole, both of which have been infringed by ReDigi.

7. In addition to manufacturing, distributing, and licensing sound recordings in CDs, cassettes and other tangible media, Capitol also distributes the Copyrighted Recordings and the Pre-1972 Recordings as digital audio files, which are marketed and distributed online. Legitimate avenues for the digital distribution of music exist through authorized services, such as Apple’s iTunes and Amazon’s MP3 Music Service, which provide these sound recordings for consumers pursuant to agreements that the services negotiated with Capitol.

8. Capitol has invested significant money, time, effort and creative talent to discover and develop recording artists, and to create, manufacture, advertise, promote, sell and license the Copyrighted Recordings and the Pre-1972 Recordings. Capitol, its recording artists and others in the music industry are compensated for their efforts largely from the sale and distribution of their sound recordings to the public, and from other exploitation of such sound recordings.

Defendant and its Illegal Business

9. ReDigi owns and operates the ReDigi website and service located at www.reddigi.com. Recently launched, ReDigi describes itself as “the world’s first and only online marketplace for used digital music” and claims that its service allows users to “buy used digital music from others at a fraction of the price currently available on iTunes.” Relevant excerpts from the ReDigi website are attached hereto as Exhibit 2.

10. As ReDigi's marketing materials make clear, the foundation upon which ReDigi's "marketplace" is built is the unauthorized reproduction, distribution and performance of third party sound recordings, including the Copyrighted Recordings and the Pre-1972 Recordings. For example, ReDigi's pre-launch press release reveals how the entire service operates by making and distributing multiple unauthorized copies of such recordings. According to the press release, a copy of which is attached hereto as Exhibit 3, after downloading ReDigi's proprietary "Music Manager" software, users designate the songs they wish to sell from their desktop computers. "Eligible" tracks are then allegedly removed from the user's computer and "synced" devices, "stored in the ReDigi cloud and offered for sale on ReDigi's website."

11. The track "stored" in and offered to consumers from ReDigi's "cloud" is of course an unauthorized copy of the user's original file, as no material object could be transferred to the ReDigi "cloud." Rather, the user's original file is duplicated and then stored by ReDigi. ReDigi's claim that it instantaneously deletes the original file from the user's computer is not only impossible to verify, but also irrelevant; whatever the destiny of the original file, a *copy* of that file is what is transferred to and resides in ReDigi's storage medium.

12. A second infringing copy is made when a ReDigi transaction is consummated. The press release continues, "When the song is purchased, the track and license will be instantly transferred to its new owner." The so-called sale, in other words, is accomplished by creation and transfer of another copy of what was once the original user's file. Again, no material object – like a CD or painting – passes from one user to another. Rather, copies are made and distributed, all without Capitol's permission or control.

13. The tutorial video on ReDigi's website homepage (a copy of which is submitted as Exhibit 4) describes essentially the same unlawful process. The video encourages users to

download the “ReDigi Desktop Client,” open a ReDigi account and begin selling “used” digital files. After the user then confirms tracks to be sold, “ReDigi will *upload your songs for sale* and clean all of those unwanted files off your computer” (emphasis added). Uploading, by its very nature, can only be accomplished by making an unauthorized copy of the original user’s track. The user does not “sell” that original track but merely agrees to its deletion after it has been copied and the copy transferred, by “upload,” to the ReDigi service.

14. The video continues that interested purchasers can designate songs they wish to buy from any computer, after which those songs are “safely stored in the ReDigi Cloud.” Users are urged, “you’ll be able to buy a song from any computer, and *download* it later to your computer” (emphasis added). Both storage and downloading again presuppose the making of *copies* of the file that resided on the original user’s computer.

15. According to the tutorial video, ReDigi also engages in other infringing acts. In promoting the ease of shopping on ReDigi, the tutorial tells users, “To listen to a 30 second clip of a song, drag it to your playbox or click the song. We’ll store it in your memory bank, so you know which songs you listened to.” ReDigi thus makes an unauthorized public performance (via digital audio transmission) of Capitol’s recordings and then even apparently makes yet another copy to “store” in users’ “memory banks.”

16. Additionally, throughout its website, ReDigi displays numerous unauthorized copies of the Copyrighted Artwork Capitol owns and markets in connection with its sound recordings. In seeking to boost the infringing activity and encourage the unlawful copying and distribution of Capitol’s sound recordings by displaying the Copyrighted Artwork, ReDigi further violates Capitol’s rights of reproduction and display.

17. ReDigi offers its users various incentives to encourage them to participate in the

unauthorized reproduction and distribution of Capitol's sound recordings. For example, the video tutorial explains that for each song uploaded, a user earns "ReDigi coupons" which can be used to buy additional songs for a "discounted price." Likewise, when those uploaded songs sell, the original user earns ReDigi "credits" that can be applied to the purchase of new songs. Further encouraging infringement, ReDigi offers contests and incentives urging users to avail themselves of the service. The homepage promises, "Store or Sell at Least 10 MP3s on the ReDigi Cloud and be Entered to Win" prizes ranging from a Fiat sports car to headphones. Moreover, by simply storing those 10 songs for purposes of later resale, the user is encouraged, "Get 5 FREE songs just for storing 10 songs on ReDigi."

18. ReDigi apparently hopes to build a large user-base and corresponding profits by encouraging users to store and sell their digital files. According to a ReDigi spokeswoman quoted in a November 14, 2011 New York Times article, a copy of which is attached as Exhibit 5, ReDigi sells tracks for 79 cents, and earns a fee of "5 to 15 percent." ReDigi's business model is thus to build a customer base and earn profits by infringing copyrighted sound recordings.

19. No doubt anticipating that companies like ours would challenge its conduct, ReDigi has made various public comments protesting that its service is lawful, but none justify its conduct. For example, ReDigi promises that its "Verification Engine" analyzes each file to ensure that it was "legally downloaded" by the user in the first instance and thus "eligible for sale." Given the widespread piracy of sound recordings on the Internet – an issue with which we have been struggling for more than a decade – it is questionable whether ReDigi can effectively determine whether files were lawfully obtained in the first instance.

20. Moreover, many such files, even if lawfully obtained, are restricted from resale, duplication or redistribution by our distributors and vendors. For example, Amazon.com – a

common source and likely the origin of many ReDigi uploads – expressly prohibits users from redistribution, transfer, or sale of recordings downloaded via its MP3 Music Service. A copy of “Amazon MP3 Music Service: Terms of Use” is attached hereto as Exhibit 6. Thus, whenever ReDigi urges users of this popular vendor to upload their content for resale, ReDigi is encouraging those users to breach their agreements and infringe copyrights.

21. ReDigi’s website also boasts that after a file is “verified” for eligibility, ReDigi ensures that the original user will not “willfully use/possess any copies of the sold item,” presumably by deleting the original source file from the user’s computer and synchronized devices. But even ReDigi’s founder has acknowledged publicly in the above-referenced New York Times article (Exhibit 5) that there is no way to ensure that all users are not violating copyright law, perhaps by retaining copies of the files they upload to ReDigi’s service on other devices or media that ReDigi’s software cannot reach. Our experience in the record industry certainly raises grave concerns that infringers are resourceful when it comes to using our recordings without payment or authorization. And regardless, even if the source file is deleted, multiple infringing copies of that file must be made for the ReDigi service to function.

22. Finally, ReDigi protests that its service is protected by the “First Sale Doctrine” of U.S. Copyright law. As set forth in the accompanying brief, ReDigi has simply done violence to this doctrine by misapplying it to copied digital files. Indeed, much of our concern stems from ReDigi’s attempts to misinform the consuming public about what copyright law allows and to foster the mistaken belief that digital files can be copied without permission, as set forth below.

23. ReDigi’s aggressive promotion of its service has resulted in infringement of many of Capitol’s best-selling, most valuable sound recordings. For instance, many of Billboard’s “top 100” songs listed as available from ReDigi are owned by Capitol. More generally,

inspection of ReDigi's website reveals that it is currently offering for "sale" countless recordings owned or controlled by Capitol, including the representative list of Copyrighted Recordings shown in Exhibit 1.

24. The Recording Industry Association of America ("RIAA"), a trade association whose members, including Capitol, create, manufacture and distribute sound recordings in the United States, notified ReDigi in November 2011 that its service violated Plaintiff's and other RIAA members' copyrights and demanded that ReDigi cease and desist from any further infringement. A copy of the RIAA's demand letter is attached hereto as Exhibit 7. ReDigi has to date refused to halt its infringing conduct.

The Irreparable Harm Being Suffered by Capitol

25. ReDigi's service and the way it is promoted impose a significant threat of irreparable harm to Capitol, its business and legal interests, its reputation and goodwill, and its ability to control its intellectual property in the future. These harms, while potentially economically devastating, are also impossible to measure in money damages.

26. ReDigi's service is a moving target of infringement. According to ReDigi's website, each track is sold on a "first listed, first sold basis." Accordingly, there is constant turnover of copied files. And if, as claimed, ReDigi erases source files from user computers once uploaded to the ReDigi "cloud," and also presumably erases the "cloud" copy once a second user "buys" that track, the chain of infringing copies itself is in constant flux. It thus becomes tremendously difficult to constantly monitor ReDigi's inventory of files to keep tabs on which files are being uploaded and/or downloaded, which include infringing copies and displays of artwork, which also include unauthorized sound clips that are publicly performed, and what the total scope of infringement is. This sequence of infringing events needs to be stopped now

for Capitol even to have a fair chance at understanding the scope of the problem.

27. More importantly, ReDigi is deliberately deceiving the public into believing that its conduct is legal and approved by record companies like Capitol, and is creating marketplace confusion among consumers about what is and is not lawful behavior. At the bottom of every page on the site, ReDigi boasts:

ReDigi is the world's first and only online marketplace for used digital music. Its genius lies in its ability to facilitate the transfer of a digital music file from one user to another without copying or file sharing. This gives digital music a resale value for the first time ever, and consumers the freedom to buy and sell the music they rightfully own. ReDigi also gives back to artists and labels through generous payments with every track sold (and resold).

This message is false and harmful to Capitol in a number of ways.

28. It suggests that ReDigi has technologically created an exception to the Copyright law that permits wholesale copying of digital music files, in violation of Capitol's copyright rights and user agreements with distributors like Amazon, who provided those files to users with carefully stated restrictions. The statement that no "copying" is involved is belied by ReDigi's own description of the uploading, downloading and storage it provides. The suggestion that files are "transferred" without being "copied" is a distinction of ReDigi's own imagination. ReDigi is simply trying to redefine what the act of "copying" is to serve its own business goals and confuse consumers about what they can and cannot do with a digital music file.

29. Moreover, ReDigi's promise that it "gives back" to artists and "labels" is false. Capitol has not received a single dime from the many "used" copies of its copyrighted recordings that have been peddled via the ReDigi service. But ReDigi falsely reassures consumers that it is somehow looking out for the best interests of labels like Capitol.

30. Elsewhere, ReDigi's website is also at pains to redefine the Copyright law and

mislead average consumers into believing that ReDigi has somehow created a new kind of legitimate secondary market for digital files. The ReDigi homepage defensively proclaims the service to be “THE LEGAL ALTERNATIVE.” Clicking on that link leads to a highly confusing mini-treatise on the “First Sale Doctrine,” wherein ReDigi boasts that it “makes a significant contribution to copyright compliance well beyond any method previously available in any secondary music market.” Clearly, rights holders, such as Capitol and the many record companies represented by the RIAA, do not agree.

31. Without authorization, ReDigi has made available hundreds of Capitol’s recordings at reduced prices. As digital reproductions, those recordings suffer no degradation in sound quality – as might a used CD – and thus supplant Capitol’s market for legitimate digital distributions through authorized distributors, like Amazon or iTunes. The process is uncontrolled, in a constant state of turnover, and falsely presented to the public as a new legitimate frontier that benefits parties like Capitol.

32. This combination of constant turnover and confusion of the public about legitimate conduct imposes irreparable harm on Capitol, and completely undermines our ability to manage and control our intellectual property in a sensible way in accordance with both the benefits and limitations of existing law. If ReDigi wants to redefine what Copyright law allows in the digital environment, it may petition Congress, but it cannot act unilaterally in a way that jeopardizes our ability to manage our greatest asset.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON JANUARY 19, 2012 IN NEW YORK, NEW YORK.



ALASDAIR J. McMULLAN