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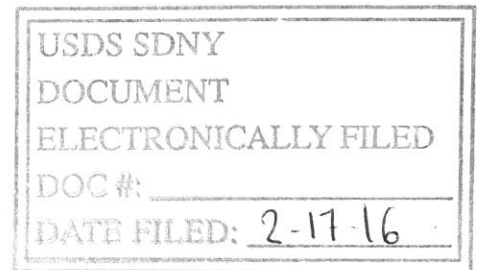
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MEMO ENDORSED

February 16, 2016

By E-mail (sullivannysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007



Re: Capitol Records, LLC v. ReDigi Inc., 12 cv. 0095 (RJS)

Dear Judge Sullivan:

We represent plaintiffs ("Plaintiffs") in the above captioned action and write jointly with all Defendants ("Defendants"). The Court's October 13, 2015 Order (Docket No. 177), reinstated pursuant to the Court's subsequent Order of November 13, 2015 (Docket No. 185), requires the parties to update the Court regarding their settlement and discovery efforts by today's date. The case is currently scheduled for a damages trial commencing April 11, 2016, with pretrial submissions and motions *in limine* due on March 11, 2016. Plaintiffs and Defendant ReDigi, Inc. are represented by counsel; individual Defendants John Ossenmacher and Larry Rudolph are currently without legal representation and, therefore are appearing *pro se*.

The parties have continued their settlement efforts, both through outside counsel and direct discussions between representatives for the parties themselves. The parties have exchanged numerous counterproposals and term sheets, and are in the process of negotiating a comprehensive draft settlement agreement. The terms of proposed settlement are somewhat complex, and while the parties have made significant progress, there are still a number of items to be resolved.

With regard to discovery, Plaintiffs have supplemented their production to ReDigi with additional information relating to chain of title/ownership of the allegedly infringed works, and are sending that production to the individual defendants this week, with the exception that Plaintiffs will be considering the issues concerning access to documents marked as CONFIDENTIAL COUNSEL ONLY, will be discussing those issues with the Individual Defendants and will advise the Court if there are any disputes.. Plaintiffs are also in the process of compiling a summary chart detailing chain of title for each claimed track, and they hope that such chart will be the basis for productive discussions regarding potential pre-trial stipulations on ownership. Upon Defendants' receipt of the summary chart, the parties will continue their efforts to see if agreements can be made concerning a stipulated universe of recordings.

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There remain however, other disagreements concerning whether certain recordings are ‘infringements’ for liability purposes and whether certain recordings should be considered for damages purposes in this action. Plaintiffs maintain that Defendants are liable for each recording that ReDigi users uploaded to the ReDigi server and either (a) offered for sale, or (b) actually sold. Plaintiffs’ position is that uploads offered for sale constitute an unauthorized reproduction for which Defendants have no available fair use or other defense. Plaintiffs further contend that this issue has already been resolved by the Court’s summary judgment opinion and subsequent grant of their motion to amend the complaint to include a full list of recordings either offered for sale or actually sold. Plaintiffs note that this issue was previously the subject of discussion in letters submitted by the parties in August 2013 and was addressed at the August 2013 conference regarding Plaintiffs’ proposed amendment.

Defendants maintain that they are not liable for tracks that were offered for sale but never sold i.e. “made available” using ReDigi 1.0 and that the 134 works that Capitol purchased through its investigator should be excluded for damages purposes. In connection with the prior motion for summary judgment, Capitol conceded that migration to the cloud was protected fair use. Capitol’s prior motion only asserted that uploading to and downloading from the cloud locker incident to sale fell outside the ambit of fair use. Moreover, the Court’s 3/30/13 Opinion expressly noted that the Court had not reached a decision on the additional “make available” theory of liability. Defendants maintain that this issue was not resolved in Plaintiff’s favor on the merits by the Court’s summary judgment opinion and that while these issues were the subject of prior letters, that the allowance of the amendment was not an adjudication on the merits of this issue.

The parties jointly seek a conference to resolve this issue in an efficient manner. The dispute has a material bearing on both pretrial submissions and preparation, as well as the scope and length of trial, as there is a substantial difference in the number of recordings at issue under the parties’ differing views of the case. The parties believe that a resolution of this issue will help streamline preparation for trial by providing clear definition on the number of recordings that are actually at issue and for which ownership must be established. The parties believe that a conference would provide the best mechanism to discuss the most efficient manner to resolve this issue, as well as its impact on the completion of the required pre-trial submissions. The Individual Defendants, who are now representing themselves *pro se*, would also like to use this conference as an opportunity to discuss pre-trial procedures and next steps with the Court.

The parties respectfully request that the Court schedule the conference as soon as is practical after February 28, 2016. As previously noted, counsel for ReDigi is unavailable next week. The parties are mutually available in the afternoons on February 29, March 1 or March 2 if any of those dates are convenient for the Court.

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We thank the Court for its attention to the foregoing.

Respectfully,



Richard S. Mandel

cc: Gary Adelman, Esq.
Sarah Matz, Esq.
John Ossenmacher
Larry Rudolph

IT IS HEREBY ORDERED THAT the parties' request for a conference is DENIED. The Court agrees with Plaintiffs that Plaintiffs may introduce evidence about recordings that were uploaded to the ReDigi server and offered for sale. The jury may then decide what, if any, damages are appropriate for such recordings. To the extent the individual Defendants would like a conference to "discuss pre-trial procedures and next steps with the Court," they are invited to consult the Court's scheduling order, dated October 13, 2015. (Doc. No. 177.) As previously ordered, the parties shall appear for a final pretrial conference on March 25, 2016 at 10 a.m.

SO ORDERED

Dated:

2/17/16


RICHARD J. SULLIVAN
U.S.D.J.