UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS LLC,

Plaintiff,

-v-

REDIGI INC., *et al.*,

Defendants.

No. 12-cv-95 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

The Clerk of the Court is respectfully directed to docket on ECF the four attached letters, which were submitted to the Court before electronic docketing of letters was required in the Southern District of New York.

SO ORDERED.

DATED: February 17, 2016
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

DSL

Davis Shapiro & Lewit, LLP

New York | Beverly Hills

August 2, 2013

VIA ELECTRONIC MAIL

Hon. Richard J. Sullivan, U.S.D.J.
sullivannysdchambers@nysd.uscourts.gov

Re: *Capitol Records, LLC v. ReDigi Inc.* (12CV0095) (RJS)

Hon. Judge Sullivan:

We represent defendant ReDigi Inc., ("ReDigi") in the above referenced action. We write in accordance with Rule 2.A of Your Honor's Individual Practices to respectfully request a pre-motion conference in anticipation of making a motion to exclude certain categories of tracks from being considered in any calculation of damages at trial.

Plaintiff Capitol Records, LLC ("Capitol") has stated its intent to pursue statutory damages at trial for each work allegedly "infringed" pursuant to 17 U.S.C. § 504(c). Capitol further intends to include in the calculation of "works infringed" (i) all tracks that were offered for sale by customers through the ReDigi marketplace, but never sold; and (ii) the approximately 134 works that Capitol purchased through its investigator Ms. Coleen Hall prior to commencing the instant action. It is ReDigi's position that neither of the aforementioned instances constitute "infringements"[1] and as such should not be included in any calculation of statutory damages at trial.

Capitol's position that the tracks offered for sale (i.e. "made available"), but never sold, are "infringements" is based on the theory that tracks offered for sale constitute a "distribution" in violation of 17 U.S.C. 106(3). This contention was already addressed by this Court in the March 30, 2013 Memorandum and Order, when the Court noted that "a number of courts, including one in this district, have cast significant doubt on this 'make available' theory" . . . but "because the Court concludes that actual sales on ReDigi's website infringed Capitol's distribution right, it does not reach this additional theory of liability". *See* 3/30/13 Order at 8, n.6. Cases from this and other circuits have consistently held that there can be no distribution where no sale occurred. *See London-Sire Records, Inc.*, 542 F. Supp. 2d at 169 (defendants cannot be liable for violating the plaintiffs' distribution right unless a "distribution" actually occurred); *Natl Car Rental Sys., Inc., v. Computer Assocs Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords); *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (the support in the case law for the "make available" theory of liability is quite limited). Under relevant law, it is not a violation of the distribution right to merely make a work available, where no sale or transfer of ownership is consummated and this Court has already declined to decide that making a work available is an infringement. As such, tracks that were merely offered for sale through the ReDigi marketplace,

[1] While the anticipated motion will focus on the aforementioned two issues, ReDigi does not concede that any other instance is an infringement.

but never sold, cannot be considered as "infringements" for the purposes of calculating statutory damages at trial in this action.

Similarly, the works downloaded by Capitol's investigator paralegal Ms. Coleen Hall should not be considered in any potential calculation of statutory damages. Prior to filing the instant action, Capitol, through one of its employees downloaded approximately 134 musical tracks as part of its "investigation" of the ReDigi system. Now, Capitol intends to seek an award of statutory damages on the 134 musical tracks it had its own paralegal download. It is ReDigi's position that the tracks Capitol itself purchased and downloaded should not be part of any potential damages calculation for statutory damages. To count these works as "infringements" for the purpose of determining a statutory damage award, would reward Capitol for downloading far more works than necessary to determine the functionality of the ReDigi website. Furthermore, allowing Capitol to recover a statutory damage award for works where its own employee was actually the infringer, would encourage future copyright plaintiffs' to engage in the infringing activity more than necessary during "investigations", so that they could artificially inflate the potential statutory damage award. Such a precedent would encourage companies, like Capitol here, to have interns and paralegals download hundreds or even thousands of their own works so that the potential recovery is larger, when such activity is completely unnecessary to accomplish the goal of "investigating," what they consider to be a potentially infringing service.

We appreciate the Court's time and consideration in this matter, and should the Court need any further information, we are available at the Court's convenience.

Respectfully submitted,

DAVIS SHAPIRO & LEWIT LLP

Gary Adelman, Esq.

Cc: Jonathan Z. King, Esq.
Richard Mandel, Esq.

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August 2, 2013

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

Hon. Richard J. Sullivan, U.S.D.J.
United States Courthouse
Southern District of New York
500 Pearl Street
New York, NY 10007

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

Dear Judge Sullivan:

We represent plaintiff Capitol Records, LLC ("Capitol") and write in accordance with ¶¶ 4 and 6 of the Joint Amended Case Management Plan (the "CMP," Docket No. 111) and Rule 2.A of the Court's Individual Practices regarding Capitol's proposed motion to amend its complaint. Capitol wishes to amend its complaint to: (1) supplement the list of its copyrighted recordings that have been infringed; (2) join the principals of defendant ReDigi, Inc. ("ReDigi") as additional defendants; and (3) eliminate portions of its complaint no longer necessary to resolution of this dispute. Capitol's proposed First Amended Complaint is attached. Pursuant to Paragraph 6 of the CMP, we understand that the August 9, 2013 post-discovery conference will also serve as a pre-motion conference to address this proposed motion.

Paragraph 4 of the CMP provides that Capitol may move to join parties or amend pleadings "with leave of the Court, in accordance with Fed. R. Civ. P. 15(a)(2)." Rule 15(a)(2), in turn, provides that the Court "should freely give leave when justice so requires." As this Court has held, leave will be "liberally granted," except in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." See, e.g., Bush v. Horn, 2009 WL362513 (S.D.N.Y. Feb. 13, 2009) (citations omitted). None of the listed exceptions apply to Capitol's meritorious and narrow amendments, which are the first it has sought in this case. These amendments are necessary to conform Capitol's claims to evidence adduced during damages discovery, require no further discovery, and will not delay the case schedule.

Capitol first proposes to supplement the list of its sound recordings infringed via ReDigi's 1.0 service. The list attached to the original complaint identifies recordings known to have been infringed at the time of Capitol's initial pleading. Discovery has revealed that since that time, ReDigi users have offered for sale or sold many additional Capitol recordings. Capitol

thus proposes to amend its complaint to account for the full universe of recordings at issue from ReDigi's inception until it discontinued ReDigi 1.0 following the Court's summary judgment ruling. The parties expressly anticipated such an amendment in their joint submission to the Court: "Because of the dynamic nature of the ReDigi website at issue in this case, the parties contemplate that the list of plaintiff's recordings allegedly infringed will have to be supplemented prior to a final adjudication in the case based on information obtained through discovery." CMP ¶4.

While supplementing the list of works at issue should thus be non-controversial in principle, Capitol anticipates one area of dispute based on discussions with opposing counsel. Capitol contends that each track that a user either offered for sale or actually sold is actionable, while ReDigi insists that only those actually sold constitute infringement. ReDigi's narrowing interpretation does not comport with the Court's conclusion on summary judgment that ReDigi violates the reproduction right when users upload recordings from their home computers to ReDigi's cloud server, absent some affirmative defense. Under the Court's logic, ReDigi can enjoy no fair use defense for such reproductions where the very purpose of such uploads was to offer those tracks for sale to other ReDigi users. Capitol should be permitted to assert all such tracks in its amended complaint, and will be prepared to discuss this issue further to the extent necessary at the pre-motion conference.

Capitol's second proposed amendment seeks to join ReDigi's two founders, John Ossenmacher and Larry Rudolph, as defendants. Discovery has confirmed that both are personally liable as a legal matter and that, contrary to its earlier protestations, ReDigi itself has insufficient funds to satisfy even a modest damage award in this case. Thus, as the parties move to the remedy phase of this case, Capitol seeks to join these individuals as jointly and severally responsible for Capitol's damages. The relevant facts and legal authorities are as follows.

In defending against Capitol's motion for a preliminary injunction, ReDigi argued vociferously that money damages would be available to remedy any infringement. See Declaration of John Ossenmacher (Docket No. 15) ¶10 ("Even if plaintiff were right that ReDigi's used music marketplace business somehow infringes its copyrights, this infringement would be fully compensable in damages. ReDigi keeps detailed records of all of the purchase and sale transactions ..."); Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 14) at 2 ("It is evident that this is about nothing but money for the Plaintiff, and that if they were to win on the merits an award of statutory damages would more than make them whole"). However, during recent depositions addressed to damages and remedies, ReDigi acknowledged that it is operating at a huge loss, has extremely limited funds in its accounts, and has no concrete promise of any future capital infusion. That financial status makes it highly unlikely that ReDigi will be able to pay statutory damages for each of the many hundreds of recordings at issue.

As a substantive legal matter, Ossenmacher and Rudolph clearly satisfy the standards for personal liability insofar as they "participate in, exercise control over or benefit from an infringement." Arista Records LLC v. Lime Group LLC, 784 F.Supp.2d 398, 439 (S.D.N.Y.

2011) (citations omitted); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009). ReDigi's founders conceived of the ReDigi "used marketplace" and its methodology. Mr. Rudolph was the architect of the infringing software. Mr. Ossenmacher operates the business day-to-day, with final say over all strategic, marketing, financial, personnel, and operational decisions. They jointly own a majority interest in the company, which is essentially comprised of the two of them and a handful of programmers under their direction. As this Court held, "ReDigi's founders built a service where only copyrighted work could be sold" and "programmed their software to choose copyrighted content." See Summary Judgment Memorandum and Order (Docket No. 109) at 14. This control over every aspect of the business renders them personally liable. See, e.g., Lime Group, 784 F. Supp. 2d at 438-39 (CEO who "conceived of" infringing technology and was "ultimate decisionmaker" on strategic and business planning personally liable for infringement); Microsoft Corp. v. Tech. Enters., LLC, 805 F. Supp. 2d 1330, 1333 (S.D. Fla. 2011) (corporate officer personally liable where he "was the moving force behind his company's infringement" and "[was] the only person involved in the business decisions"); Usenet.com, 633 F. Supp. 2d at 158-59 (director and sole shareholder responsible for strategic, marketing and technical decisions personally liable).

Moreover, adding ReDigi's founders as parties imposes no delay or prejudice. Capitol seeks no additional discovery or other extensions, and has established strong grounds for their personal liability. If Capitol were unable to include them now, it would need to file a separate action against them personally to preserve its ability to obtain meaningful financial redress. While the parties were focused on obtaining a quick resolution of the underlying liability issues last year, now that the case has moved on to remedies, ReDigi's founders should be added as parties so that Capitol has the remedial resources ReDigi promised last year.

Finally, in the interests of efficiency, Capitol also seeks to eliminate aspects of its complaint no longer germane to this dispute. Since Capitol has now elected to seek statutory damages for infringement of its federally copyrighted works, it eliminates claims for other species of damages (such as profits or actual damages) for federal copyright infringement. Capitol's claims for violation of the performance and display rights are also effectively mooted by the Court's summary judgment ruling. Since those claims relate to the same recordings as to which Capitol has already established violations of the reproduction and distribution right, proof of infringement of these additional rights is no longer necessary for Capitol to seek statutory damages for each of those recordings. Capitol, accordingly, elects not to pursue those claims. We assume ReDigi will gladly accept such narrowing amendments.

Respectfully,

Richard S. Mandel

cc: Gary Adelman, Esq.

DSL

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New York | Beverly Hills

August 7, 2013

VIA ELECTRONIC MAIL
Hon. Richard J. Sullivan, U.S.D.J.
sullivannysdchambers@nysd.uscourts.gov

Re: *Capitol Records, LLC v. ReDigi Inc.* (12CV0095) (RJS)

Hon. Judge Sullivan:

We represent defendant ReDigi Inc., ("ReDigi") in the above referenced action. We write in accordance with Rule 2.A of Your Honor's Individual Practices in response to Plaintiff Capitol Records, LLC's ("Capitol") letter dated August 2, 2013 regarding Capitol's request to: (i) amend its Complaint to supplement the list of copyrighted recordings that have been allegedly infringed; and (ii) join the principals of ReDigi as defendants in the within action.[1]

It is ReDigi's position that Capitol should not be given leave to amend its Complaint to include tracks that were merely offered for sale through the ReDigi marketplace. Capitol's contention that tracks merely "made available" are infringements was already addressed by this Court in the March 30, 2013 Memorandum and Order, when the Court noted that "a number of courts, including one in this district, have cast significant doubt on this 'make available' theory" . . . but "because the Court concludes that actual sales on ReDigi's website infringed Capitol's distribution right, it does not reach this additional theory of liability". *See* 3/30/13 Order at 8, n.6. *See also London-Sire Records, Inc.*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (defendants cannot be liable for violating the plaintiffs' distribution right unless a "distribution" actually occurred); *Natl Car Rental Sys., Inc., v. Computer Assocs Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords); *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (the support in the case law for the "make available" theory of liability is quite limited). This Court has already declined to decide that making a work available is an infringement. As such, tracks that were merely offered for sale through the ReDigi marketplace, but never sold, cannot be considered as "infringements"[2] for the purposes of calculating statutory damages at trial in this action.

Capitol is now claiming that these tracks that were merely "made available" should be added to the damages calculation by arguing that the Court "conclu[ded] on summary judgment that ReDigi violates the reproduction right when users upload recordings from their home computers to ReDigi's cloud server absent some affirmative defense." *See* 8/2/13 Cap. Let. at 2. Although the Court found that a reproduction occurred during the upload process, the decision is clear that an **infringement only occurs through sale**. Contrary to Capitol's mis-paraphrasing of the Courts

[1] Capitol has also stated its intent to eliminate the portions of its complaint that relate to the alleged infringement of its display and performance rights. ReDigi has no objection to this.

[2] ReDigi does not concede that any other instance is an infringement that warrants damages.

decision the Court found that "absent the existence of an affirmative defense the **sale** of digital music files on ReDigi's website infringes Capitol's exclusive right of reproduction." *See* 3/30/13 Order at 7 (emphasis added). Buttressing this conclusion, when discussing the applicability of fair use the Court noted it was only uploading to and downloading form the Cloud locker "*incident to sale*" that fell outside of the ambit of fair use. *Id* at 10. The Court's Order did not find that uploads to the cloud that were never actually sold were infringements. In fact the Order specifically declined to make this finding, and instead found that it was the **sale** on ReDigi's website that infringed the exclusive right of reproduction. As the Court has already decided that mere uploads that were offered for sale and never sold are not infringements, it would be futile and a waste of resources for Capitol to be allowed to supplement their Complaint to add these tracks now.

Next, Capitol's request to add John Ossenmacher and Larry Rudolph as defendants in the instant action should be denied, as neither the spirit nor the letter of the law support allowing Capitol to implead Mr. Ossenmacher and Mr. Rudolph at this stage. *First*, contrary to Capitol's statement, Mr. Rudolph and Mr. Ossenmacher do not satisfy the legal standard for personal liability. Individually, neither Mr. Ossenmacher nor Mr. Rudolph own a controlling share of ReDigi. Moreover, although Mr. Ossenmacher and Mr. Rudolph exercise some decision making power, they are not solely in charge of the company—they sit on a board that is comprised of 4 active members. Lastly, neither individual has been paid a salary or received any other form of remuneration from ReDigi, and as such haven not benefitted from the allegedly infringing activity.

The facts here are wholly unlike the cases cited by Capitol and other cases where imposition of liability on individuals may have been appropriate. *C.f. Arista Records LLC v. Lime Grp. LLC,* 784 F. Supp. 2d 398, 438 (S.D.N.Y. 2011) (imposing individual liability on CEO who knew about infringement being committed through LimeWire, actively marketed LimeWire to Napster users, operated multiple companies as one, and owned majority share of LimeWire); *Arista Records LLC v. Usenet.com, Inc.,* 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009) (individual defendant Reynolds was moving force behind entire business of both corporate defendants, was the sole employee of company who carried out business of defendant companies, director and sole shareholder of both companies and encouraged employees to take steps that were found to intend to foster infringement); *Microsoft Corp. v. Tech. Enterprises, LLC*, 805 F. Supp. 2d 1330, 1333 (S.D. Fla. 2011) (individual defendant was moving force behind his company's infringement, owned 99 percent of company and was the its only employee); *Stumm v. Drive Entm't, Inc.*, 00 CIV. 4676, 2002 WL 5589 (S.D.N.Y. Jan. 2, 2002) (individual liability was appropriate for CEO who was the only employee receiving a salary). The contrast between the above cases and the facts here is stark. Unlike these cases, neither Mr. Ossenmacher nor Mr. Rudolph have received financial benefit, are not the only persons in control of the company, and do not own a controlling interest of ReDigi. Additionally, unlike the file sharing cases cited to by Capitol, here ReDigi's entire purpose was to provide a lawful service. Although the Court has found that parts of the original ReDigi 1.0 technology were infringing, this was a case of first impression and cannot, under any stretch of the imagination be compared to situations where the individuals in the cases cited by Capitol intentionally provided a known infringing service for their own personal financial gain. As such there is no reason to implead Mr. Ossenmacher and Mr. Rudolph.

Second, and also contrary to Capitol's representations, ReDigi could satisfy a modest damage award in this matter. Although Capitol would like to pretend there are "many hundreds" of tracks at issue—there are not.[3] In reality the number of tracks at issue in this litigation is very

[3] Capitol's statement that there are "many hundreds" of works at issue is an exaggeration based upon Capitol's attempt to include the 134 tracks downloaded by their own investigator and the tracks that were offered for sale through the

limited--well under one hundred. In light of the limited number of works at issue, ReDigi could absolutely satisfy a modest[4] damage award. Capitol is not in a position of not being able to obtain meaningful financial redress. Capitol's request to add Mr. Ossenmacher and Mr. Rudolph as defendants in this action is legally without merit and seems motivated by an intention to harass and exert pressure and stress on ReDigi's officers. As such Capitol's request should be denied.

We appreciate the Court's time and consideration in this matter, and should the Court need any further information, we are available at the Court's convenience.

Respectfully submitted,

DAVIS SHAPIRO & LEWIT LLP

Gary Adelman, Esq.

Cc: Jonathan Z. King, Esq.
Richard Mandel, Esq.

ReDigi marketplace but never sold. As set forth above, the Court has already declined to find that the latter of the two constitutes infringement. As to the tracks downloaded by Capitol itself, for the reasons set forth in ReDigi's August 2, 2013 letter to the Court, Capitol should not be allowed to include these tracks in any calculation of statutory damages. To do so would reward Capitol for downloading over a hundred tracks, which was far more than was even arguably necessary for investigation purposes. Given the high number of tracks, it appears as if Capitol intentionally downloaded an extremely high number of tracks for the purpose of driving up a damage award and allowing Capitol to include these tracks would only encourage copyright plaintiffs to attempt to artificially inflate potential statutory damages to the point where they become punitive. Such a ruling would serve no legitimate purpose.

[4] "In awarding statutory damages, the courts may consider, among other factors, the expenses saved and the profits earned by the defendant, the revenues lost by the plaintiff, the deterrent effect on the defendant and third parties, the defendant's cooperation in providing evidence concerning the value of the infringing material, and the conduct and attitude of the parties." *See Smith v. NBC Universal*, 06 CIV. 5350, 2008 WL 483604 (S.D.N.Y. Feb. 22, 2008). Here all of these factors point in favor of a minimal statutory damage award. ReDigi has not "profited" from the infringement or saved expenses, it designed a system that it believed to comply with the law and any monies earned from actual customers are so limited at this point it has not been able to recoup any expenses. Plaintiffs have not "lost revenues" either. Immediately after receiving the Court's 3/30/13 Order, ReDigi disabled its 1.0 migration technology, cancelled any offers for sale for any tracks that were uploaded using the 1.0 technology, and replaced all tracks that users had purchased using the 1.0 migration technology, by purchasing those tracks from iTunes and having the replacement tracks delivered directly from iTunes to the ReDigi cloud locker. ReDigi did all of this at its own cost, and as ReDigi purchased these replacement tracks from iTunes, Capitol has already recovered any revenues it could claim to have "lost". There is no lack of evidence concerning the value of tracks sold through ReDigi, and Capitol surely could have pursued actual damages. The conduct of ReDigi and the need for a deterrent, similarly point to a minimal damage award. ReDigi has at all times tried to comply with copyright law in designing its system, has promptly complied with all Court Orders and a large award here would have a chilling effect on the development of new technologies, like ReDigi that are trying to develop lawful services where the law is at best uncertain. Given the facts here, ReDigi believes that the bare minimum of statutory damages would be appropriate and it could certainly satisfy such an award.

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August 7, 2013

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

Hon. Richard J. Sullivan, U.S.D.J.
United States Courthouse
Southern District of New York
500 Pearl Street
New York, NY 10007

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

Dear Judge Sullivan:

We represent plaintiff Capitol Records, LLC ("Capitol"), and write in accordance with Rule 2A of the Court's Individual Practices in response to ReDigi's pre-motion letter dated August 2, 2013, which requested a pre-motion conference concerning ReDigi's contemplated motion to exclude certain categories of tracks from being considered in any calculation of damages at trial. For the reasons set forth below, ReDigi's proposed motion is without any merit.

ReDigi first contends that recordings which were offered for sale via the ReDigi website, but which were never actually sold, should not be considered for statutory damages purposes because no distribution occurred. While Capitol continues to maintain that making the recordings available for sale is sufficient to constitute a violation of the distribution right,[1] and the Court's March 30, 2013 summary judgment order expressly refused to resolve that issue (see 3/30/13 Order at 8 n.6), ReDigi's attempt to exclude these recordings from any damage award is unfounded whether or not a distribution is found to exist.

ReDigi's letter simply ignores the fact that for a recording to be offered for sale, it first had to be reproduced by ReDigi and its users in order to be transferred to the ReDigi cloud. Under the clear reasoning of the Court's summary judgment opinion, such reproduction constitutes an independent violation of Capitol's copyright rights under 17 U.S.C. § 106(1), without regard to whether Capitol's distribution right has also been violated. As the Court's opinion explained, in uploading Capitol's recordings to the ReDigi cloud, ReDigi and its users

[1] See, e.g., Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 201 (4th Cir. 1997); Motown Records Co., LP v. DePietro, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007); Arista Records, LLC v. Greubel, 453 F. Supp.2d 961, 969-971 (N.D. Tex. 2006); Universal City Studios Prods. LLLP v. Bigwood, 441 F. Supp.2d 185, 190-91 (D. Me. 2006).

have necessarily fixed the recording in a new phonorecord, acts that violate Capitol's exclusive right of reproduction under the Copyright Act absent some affirmative defense permitting the reproduction. See 3/30/13 Order at 5-7.

With respect to the only affirmative defense proffered by ReDigi concerning violation of the reproduction right, the fair use defense, the Court explained that it "has little difficulty concluding" that ReDigi's copying of Capitol's sound recordings "falls well outside the fair use defense." Id. at10. The Court's fair use analysis – that ReDigi's purposes are commercial, that its service "transforms" nothing about the digital file, and that the entire creative work is appropriated in a fashion that devalues the market for legitimate digital distribution – applies regardless of whether a track offered for sale is ultimately sold. Accordingly, Capitol is entitled to an award of statutory damages for violation of the section 106(1) right of reproduction with respect to every one of its recordings that was reproduced and then offered for sale, regardless of whether or not a sale was ever consummated. See 17 U.S.C. §§ 501(a) (anyone who violates "any of the exclusive rights of the copyright owner" is an infringer) (emphasis added); 504(c) (any "infringer" liable for statutory damages in specified amount per work).

ReDigi also argues that the works downloaded by Capitol's investigator paralegal, Colleen Hall, should be excluded from any statutory damage award. Such a contention fails for the same reason addressed above with respect to the works offered for sale, but not sold. Any recordings downloaded by Ms. Hall that are part of Capitol's complaint were first uploaded to the ReDigi cloud, in violation of Capitol's reproduction right. In any event, as this Court held in Arista Records LLC v. Lime Group LLC, 2011 WL 1226277 (S.D.N.Y. March 29, 2011), "[c]ourts have consistently relied upon evidence of downloads by a plaintiff's investigator to establish both unauthorized copying and distribution of a plaintiff's work." See also Olan Mills Inc. v. Linn Photo Co., 23 F.3d 1345, 1348 (8th Cir. 1994) (defendant infringed by copying works for plaintiff's agent); Warner Bros. Records Inc. v. Walker, 704 F. Supp.2d 460, 467 (W.D. Pa. 2010) (holding that downloads by investigator "establish[ed] unauthorized distribution as to those nine recordings"); Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp.2d 124, 149-150 n. 16 (S.D.N.Y. 2009) ("Courts routinely base findings of infringement on the actions of plaintiff's investigators") (collecting cases); Capitol Records, Inc. v. Thomas, 579 F. Supp.2d 1210, 1216 (D. Minn. 2008) (distribution to an investigator can form the basis for an infringement claim); Atlantic Recording Corp. v. Howell, 554 F. Supp.2d 976, 985 (D. Ariz. 2008) (investigator downloads could form basis for infringement because "the recording companies obviously did not intend to license [investigator] to authorize distribution or to reproduce copies of their works;" "investigator's assignment was part of ... attempt to stop [Defendant's] infringement, and therefore the 12 copies obtained by [investigator] are unauthorized"); U2 Home Entm't, Inc. v. Wang, 482 F. Supp.2d 314, 317-18 (E.D.N.Y. 2007) (infringement liability based on rentals of copyrighted works to plaintiff's investigator). Thus, any downloads by Ms. Hall are also sufficient to establish violations of Capitol's exclusive right of distribution under 17 U.S.C. § 106(3).

As ReDigi's contemplated motion is completely lacking in merit, the Court should deny any such motion. We would be happy to address this issue in further detail at the August 9, 2013 conference to the extent the Court deems it necessary.

Respectfully,

Richard S. Mandel

cc: Gary Adelman, Esq.