



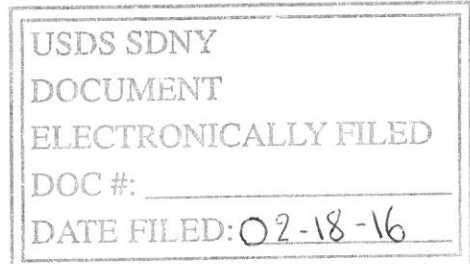
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**By E-mail ([sullivannysdchambers@nysd.uscourts.gov](mailto:sullivannysdchambers@nysd.uscourts.gov))**

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.

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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.