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Davis Shapiro & Lewit, LLP

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.