



Cowan, Liebowitz & Latman, P.C.  
1133 Avenue of the Americas  
New York, NY 10036

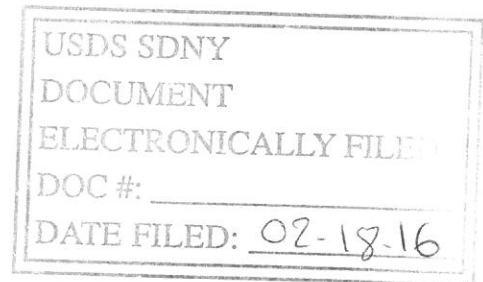
(212) 790-9200 Tel  
(212) 575-0671 Fax  
www.cll.com

**Richard S. Mandel**  
(212) 790-9291  
rsm@cll.com

August 7, 2013

**By E-mail (sullivanysdchambers@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,<sup>1</sup> 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

---

<sup>1</sup> 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.

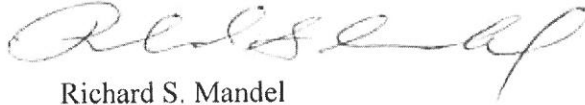
With respect to the only affirmative defense proffered by ReDigi concerning violation of the reproduction right, the fair use defense, the Court explained that it "has little difficulty concluding" that ReDigi's copying of Capitol's sound recordings "falls well outside the fair use defense." Id. at 10. 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).

**Cowan, Liebowitz & Latman, P.C.**  
Hon. Richard J. Sullivan, U.S.D.J.  
August 7, 2013  
Page 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,

A handwritten signature in cursive script, appearing to read "R. S. Mandel", written in dark ink.

Richard S. Mandel

cc: Gary Adelman, Esq.