

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, CAPITOL	:	12 Civ. 0095 (RJS)
CHRISTIAN MUSIC GROUP, INC. and	:	
VIRGIN RECORDS IR HOLDINGS, INC.,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
REDIGI INC., JOHN OSSENMACHER and	:	
LARRY RUDOLPH a/k/a LAWRENCE S.	:	
ROGEL,	:	
	:	
Defendants.	:	
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**JOINT PROPOSED JURY INSTRUCTIONS**

Pursuant to Rule 4.C of this Court’s Individual Rules and Practices and this Court’s Order dated October 13, 2015 (Docket No. 177), the parties submit the following Proposed Jury Instructions. Where the parties have not agreed on a particular instruction or particular language, those disagreements are indicated by parentheses and, if necessary, an explanation of what portion is disputed.

**I. INSTRUCTIONS AT THE START OF TRIAL**

**A. INTRODUCTION AND PRIOR LEGAL DETERMINATIONS**

**Parties**

To help you follow the evidence, I will briefly summarize who the parties to this case are and what their legal positions are.

First, the party who brings a lawsuit is called the plaintiff. In this action, the plaintiffs are Capitol Records, LLC, Christian Music Group, Inc. and Virgin Records IR Holdings, Inc.

The parties against whom the suit is brought are called the defendants. There are three defendants in this action: ReDigi Inc., John Ossenmacher and Larry Rudolph.

**Authority:** Adapted from 6-39 *Nimmer on Copyright* § 39.04 (2015).

## Nature of the Action

This case involves copyright infringement. A copyright is a set of legal rights that the law grants to those who own an original work of authorship. This case involves one kind of copyrighted work that the United States Copyright Act refers to as “sound recordings.” You may also hear the parties refer to these sound recordings as “tracks”. Sound recordings are works that result from recording musical performances in some permanent format, whether records, tapes, compact discs or digital files.

Plaintiffs Capitol Records, LLC, Christian Music Group, Inc. and Virgin Records IR Holdings, Inc., whom I will collectively refer to as the “Plaintiffs,” are record companies who allege that they own or are the exclusive licensees of certain sound recordings that are at issue in this case.

### [PLAINTIFFS’ PROPOSED REMAINDER OF THIS INSTRUCTION:

Defendant ReDigi Inc. is a company founded by Defendants John Ossenmacher and Larry Rudolph. I will collectively refer to ReDigi, Mr. Ossenmacher and Mr. Rudolph as “Defendants.” Defendants operated a website and online service called “ReDigi,” which invited users to upload their music files to ReDigi’s remote server and then to offer those same music files for sale to other ReDigi users.<sup>1</sup> Plaintiffs commenced this action alleging that the Defendants’ operation of the ReDigi website infringed Plaintiffs’ copyrights in their sound recordings.

As I will now explain, prior to the commencement of this trial, I determined that Defendants are liable for copyright infringement. Accordingly, you are not being asked in this trial to decide the question of whether a copyright infringement has taken place. Rather, your sole task at this trial will be to determine the amount of damages that Plaintiffs are entitled to recover for the copyright infringement that I have found occurred. You will be asked to determine “statutory damages” under federal copyright law and nominal damages and punitive damages under state copyright law. I will explain these three categories of damages in more detail after you have heard and seen all of the evidence.]

### [DEFENDANTS’ PROPOSED REMAINDER OF THIS INSTRUCTION:

Defendant ReDigi Inc. is a company founded by Defendants John Ossenmacher and Larry Rudolph. I will collectively refer to ReDigi, Mr. Ossenmacher and Mr. Rudolph as “Defendants.” ReDigi operated a website and online service called “ReDigi,” which was founded to provide a service for people to lawfully gift and/or a marketplace for individuals to re-sell their legally purchased digital goods including music. The ReDigi service allowed users to upload certain legally purchased digital music files through a process called migration to the ReDigi Cloud Locker. Following a file’s migration to the Cloud Locker, a user could store the file in its Cloud Locker, or the user could offer the

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<sup>1</sup> *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 645-46 (S.D.N.Y. 2013) (Sullivan, J.).

track for sale.<sup>2</sup> Plaintiffs commenced this action alleging that the Defendants' operation of the ReDigi website infringed Plaintiffs' copyrights in their sound recordings. Defendants have raised defenses to Plaintiffs' infringement claims, including that the users' uploading to and downloading from the Cloud Locker was fair use and/or permissible under the terms of service of iTunes or an implied license and that the sales of the tracks that happened in the ReDigi system were protected by the first sale doctrine.

Prior to the commencement of this trial, I made certain determinations regarding Plaintiffs' claims and certain of the Defendants' defenses, which I will explain in a moment. Given that I have already decided certain issues, you will not be deciding those issues. Instead you will be deciding the issues that remain in this case.]

**Authority:** Adapted from *Arista Records, LLC v. Lime Wire, LLC*, Case No. 06 Civ. 5936 (KMW) (S.D.N.Y. 2011), Dkt. No. 729 (jury instructions available on PACER); 17 U.S.C. §101.

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<sup>2</sup> *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 645-46 (S.D.N.Y. 2013) (Sullivan, J.).

## Facts Relating to Court's Prior Determinations

Before I explain to you my specific prior rulings in this case, I will give you a brief synopsis of the facts upon which I relied in making those rulings.

ReDigi's website was launched on October 13, 2011 as an online marketplace for selling digital music files. ReDigi permitted users to sell their [DEFENDANTS: legally purchased] digital music files in exchange for credits which could then be used to purchase [DEFENDANTS: other used] music files from other ReDigi users. All activity took place online.

The process worked as follows. To sell music on ReDigi's website, a user would first download ReDigi's "Media Manager" software, which would analyze the user's computer for the presence of [DEFENDANTS: legally purchased] digital music files considered eligible for sale. Eligible files included music files either [DEFENDANTS: legally] purchased from iTunes or from another ReDigi user.

[PLAINTIFFS' PROPOSED PARAGRAPH: Once a list of eligible files was created, a ReDigi user could then upload one or more of those files to ReDigi's computer server, which ReDigi called its "Cloud Locker." The user could select which files to upload by clicking on them in the list of eligible files. Once the music files were uploaded to and stored in ReDigi's Cloud Locker, the user could then click a button to offer them for sale in ReDigi's marketplace. When a user chose to sell digital music files located in the Cloud Locker, he or she would lose access to the file while it was being offered for sale. If another ReDigi user purchased that file, the selling user would permanently lose access to the file, which would then be transferred to the buyer, who would then assume control of the file, and could stream it, download it to his or her computer, or offer it for sale to other ReDigi users.]

[DEFENDANTS' PROPOSED PARAGRAPHS: Once a list of eligible files was created, a ReDigi user could then upload one or more of those eligible files to ReDigi's server, which ReDigi called its "Cloud Locker." The upload process ReDigi used is called migration. Electronic files, including the files we are discussing in this case, are a series of 1's and 0's that are magnetically encoded in a hard drive. The ReDigi migration file transfer process sent electronic files from the user's computer hard drive to the ReDigi Cloud Locker in packets so that as soon as the file starts to move, the packets that are in transfer are no longer on the User's hard drive. When all of the packets have reached the ReDigi Cloud Locker they were re-assembled. Unlike standard copy and delete file transfer protocols where a file is copied and then deleted, ReDigi's migration process was designed so that the files that were migrated were never in existence in two places at one time. ReDigi made the analogy of this process to a train, where each packet is a car. As one car leaves the user's hard drive, it is no longer on the User's computer. When all the cars reached the Cloud Locker, each car was re-assembled into the complete train. The whole process happened in a matter of milliseconds.

The user could select which files to upload (or migrate) by clicking on them in the list of eligible files. Once the music files were uploaded (or migrated) to and stored in

ReDigi's Cloud Locker, the user would access the files in his or her Cloud Locker for personal use only. An additional service allowed Users to click a button to offer one or more of the tracks in its Cloud Locker for sale in ReDigi's marketplace. This was not a requirement to use the ReDigi cloud service. If a user decided to sell digital music files located in his or her Cloud Locker, he or she would lose access to the files. When a track was sold, ReDigi would transfer the key associating the track that was sold with the space on the Cloud Locker of the selling user, so that ownership of the key to that space was now assigned to the purchasing user. When the sale was made only ownership of the Key was transferred to the buyer, who would then assume control of the track, and could stream it, download it to his or her computer, or offer it for sale to other ReDigi users. This would be like placing your phone in a locker and then selling the key to that locker to another person.]

No actual money changed hands between buyer and seller in these transactions. Rather, users would buy music with credits they either purchased or obtained from ReDigi or acquired from other sales, and sellers would receive payment in the form of credits they themselves could use to buy other music. Defendants would earn a fee for every transaction of [PLAINTIFFS: 60%] [DEFENDANTS: 5%-20%] of the proceeds of the sale. [DEFENDANTS: The price of a used track was between 59 and 79 cents.]

[DEFENDANTS: ReDigi encouraged its users to store their music on the ReDigi Cloud Locker]. ReDigi offered users various incentives for participating in the marketplace. Defendants gave twenty-cent credits to users who offered files for sale and entered active sellers into contests for prizes. Defendants also emailed new users that they could "[c]ash in" their music on the website, tracking and posting the titles of popular songs on the website and in the ReDigi newsletter, notifying users when they were low on credits and advising them to either purchase more credits or sell songs, and connecting users who were seeking unavailable songs with potential sellers who owned copies of those songs.<sup>3</sup>

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<sup>3</sup> *Id.* at 645-646.

### **The Court's Prior Determinations – Copyright Infringement Generally**

Having told you how Defendants' service operated, I will now explain the legal rulings I made based on those facts. These rulings are final and established, and you are duty bound to follow these legal determinations.

I will first explain what copyright infringement means. A copyright owner has the exclusive right to reproduce or distribute a copyrighted work.<sup>4</sup> Because these rights are exclusive, if another person or company reproduces or distributes a copyrighted work without the copyright owner's permission, he or she is said to have "infringed" the copyright [DEFENDANTS:, unless that person is protected by an affirmative defense].

There are two types of infringement in this case: direct copyright infringement and secondary copyright infringement. For present purposes, direct infringement occurs when a defendant itself violates one of the exclusive rights of a copyright owner. Secondary copyright infringement occurs when a defendant is held liable for the direct infringement committed by others. I have previously found [DEFENDANTS: that the ReDigi service violated both the reproduction and distribution right in the ways that I will explain and as such, absent an affirmative defense] the Defendants are liable both for direct and secondary infringement. I will now describe those prior rulings to you.

**Authority:** Adapted from *Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation*: 1.1 "Introduction," ABA Section of Litigation (2008).

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<sup>4</sup> *Id.* at 648.

[PLAINTIFFS' PROPOSED INSTRUCTIONS REGARDING DIRECT INFRINGEMENT:

(DEFENDANTS generally object to this instruction as it is unnecessarily prejudicial and does not explain any of Defendants' defenses which are relevant to their innocence defense and intent. Defendants have a proposed instruction that combines the explanation of the Court's ruling for direct, contributory and vicarious infringement on page 13, that Defendants believe is more fair and balanced to the issues raised by both parties. To the extent the Court adopts this instruction Defendants have proposed alternative language that more accurately quotes the Court's 3/30/13 Decision. Defendants further request that the court include some discussion of the defenses raised by Defendants as they relate to the issue of intent. Defendants' proposed language is contained on page 13.

PLAINTIFFS believe that Plaintiffs proposed instructions below accurately and succinctly summarize the Court's prior liability rulings and supply the appropriate context for the jury's consideration of damages. The purpose of the instruction is not to provide a lengthy recitation of positions, defenses and arguments previously raised, but merely to inform the jury of the Court's basic rulings leading to this damages trial.)

**The Court's Prior Determinations – Direct Infringement**

I previously determined that Defendants are liable for direct copyright infringement of Plaintiffs' sound recordings. I ruled that Defendants violated Plaintiffs' exclusive right of reproduction, which gives copyright owners the exclusive right to make copies of their copyrighted works. I ruled that [PLAINTIFF: an unauthorized reproduction of Plaintiffs' sound recordings occurred whenever a user uploaded one of Plaintiffs' sound recordings to ReDigi and offered it for sale, regardless of whether any sale ever took place] [DEFENDANTS "the sale of digital music files on ReDigi's website infringes Capitol's exclusive right of reproduction"]. In other words, the act of uploading [PLAINTIFF: the file for purposes of selling the file] [DEFENDANTS: and selling files] violated Plaintiffs' exclusive right of reproduction.<sup>5</sup>

I also ruled that the unauthorized sale of digital music files through ReDigi's website violated Plaintiffs' exclusive right to distribute their sound recordings. In addition to the right of reproduction, a copyright owner also has the separate exclusive right to distribute copies of a copyrighted work by sale or other transfer. I ruled that Defendants violated Plaintiffs' distribution right whenever ReDigi users actually sold music files embodying Plaintiffs' sound recordings on the ReDigi service.<sup>6</sup>

I held that Defendants were directly liable for these infringing acts of reproduction and distribution on the ReDigi website, because Defendants built a service where only copyrighted work could be sold, provided the infrastructure for infringing sales, and affirmatively brokered sales by connecting users seeking unavailable songs with potential sellers.<sup>7</sup> Thus, you must

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<sup>5</sup> *Id.* at 650-51, 657-58.

<sup>6</sup> *Id.* at 651, 657-58.

<sup>7</sup> *Id.* at 657.



accept as an established fact that Defendants directly infringed Plaintiffs' rights of reproduction and distribution.]

[PLAINTIFFS' PROPOSED INSTRUCTION REGARDING CONTRIBUTORY INFRINGEMENT:

(DEFENDANTS object to this instruction as it is extremely prejudicial and has the potential to confuse and/or mislead the jury regarding the factors that they should consider in awarding statutory, nominal and/or punitive damages. In the Court's determination on contributory infringement the court noted that Defendants had raised the issue that they sincerely believed in the legality of the service and that the Court will not create "a subjective good faith defense to contributory liability's objective knowledge requirement." See 3/30/13 Order. However, the exercise of a Jury weighing the statutory damage "factors are necessarily a subjective and fact-intensive exercise." *Beastie Boys v Monster Energy Co.*, 66 F Supp 3d 424, 464 (S.D.N.Y. 2014). As such the Defendants' believe that a detailed recitation of the Court's analysis of the factors using an objective standard will mislead the jury into believing that they should reach a similar conclusion using a subjective standard, which is not the case. Additionally, Defendants object as the Plaintiffs' proposals do not accurately reflect the Court's language in the 3/30/13 Order. Defendants' proposed language is contained on page 13.

To the extent the Court overrules Defendants' objection concerning the entire instruction, Defendants have inserted portions below to more accurately reflect the Court's 3/30/13 Order.

PLAINTIFFS again believe the instructions below accurately and succinctly summarize the Court's prior findings on contributory infringement and supply the appropriate context for the jury's consideration of damages. Defendants quote the Court's ruling out of context, as the Court actually found that it had "little difficulty concluding that ReDigi knew or should have known that its service would encourage infringement.")

**The Court's Prior Determinations – Contributory Infringement**

[PLAINTIFF: In addition to direct infringement,] I also determined that Defendants are liable for secondary infringement of Plaintiffs' sound recordings. As I mentioned earlier, secondary copyright infringement occurs when a defendant is held liable and responsible for acts of direct copyright infringement committed by others. [PLAINTIFF: I held Defendants liable for secondary infringement in two different ways.

First, I held that Defendants were liable for what is known as "contributory copyright infringement," which occurs when a Defendant "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."<sup>8</sup>

I first found that Defendants knew or should have known that their service would encourage copyright infringement because of the following facts:

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<sup>8</sup> *Id.* at 658.

- Defendants warned investors that [PLAINTIFF: the ReDigi service might be deemed to commit copyright infringement] [DEFENDANT: the law cannot be said to be well-settled” in this area and that it could not guarantee ReDigi would prevail on its copyright defenses];
- [PLAINTIFF: Defendants received a cease-and-desist letter in November 2011 advising ReDigi that its website violated Plaintiffs’ and other record companies’ copyrights] [DEFENDANTS: The Recording Industry Association of America (“RIAA”) sent ReDigi a cease-and-desist letter in November 2011, advising ReDigi that its website violated Capitol’s and other RIAA members’ copyrights];
- Defendants knew that copyright protected content was being sold on the ReDigi website; and
- [PLAINTIFF Defendants had educated themselves on copyright law and understood the likelihood that use of ReDigi's service would result in infringement] [DEFENDANTS: claim to have “researched copyright law [and] consulted with attorneys” concerning their service, and also to have met with record companies “to get input, get marketing support[,] and enter into deals with the labels.”].<sup>9</sup>

I further ruled that Defendants materially contributed to ReDigi’s users' infringement because of the following facts:

- Defendants were [PLAINTIFFS: intimately involved in examining the music files uploaded to the ReDigi website and supervising the steps involved in making those files available for sale] [DEFENDANTS: directly involved with developing ReDigi’s service];
- Defendants provided the site and facilities for users’ infringement; and
- Without ReDigi's Cloud Locker, no infringement could have occurred.<sup>10</sup>

Based on these facts, I held Defendants liable for contributory copyright infringement. Thus, you must accept as an established fact that Defendants are liable for contributory copyright infringement.]

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<sup>9</sup> *Id.* at 658-59.

<sup>10</sup> *Id.* at 659.

[PLAINTIFFS' PROPOSED INSTRUCTIONS REGARDING VICARIOUS INFRINGEMENT:

(DEFENDANTS object to this instruction as it is extremely prejudicial. Defendants have a proposed instruction that combines the explanation of the Court's ruling for direct, contributory and vicarious infringement on page 13, that Defendants believe is more fair and balanced to the issues raised by both parties. To the extent the Court adopts this instruction Defendants have proposed alternative language that includes relevant information regarding alleged financial benefit. Without this language the Jury may be pre-disposed to believe that the alleged financial benefit was very large.

PLAINTIFFS again believe the instructions below accurately and succinctly summarize the Court's prior findings on vicarious infringement and supply the appropriate context for the jury's consideration of damages. Moreover, nothing in the instruction suggests a "very large" financial benefit.)

**The Court's Prior Determinations – Vicarious Infringement**

I also ruled that Defendants were liable for another kind of secondary liability known as vicarious infringement, which occurs when a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."<sup>11</sup>

I held that Defendants had the right and ability to supervise the infringing activity occurring on the ReDigi website, because they exercised complete control over ReDigi's website's content, user access, and sales. I also found that Defendants were intimately involved in supervising the steps involved in making the music available for sale and selling it.

I further held that Defendants had a direct financial interest in the infringing activity because they collected a [PLAINTIFFS: 60%] [DEFENDANTS: 5%-20%] transaction fee for each sale of a music file on the ReDigi service [DEFENDANTS, which ranged from fifty-nine to seventy-nine cents each].<sup>12</sup>

Based on these facts, I found Defendants vicariously liable for acts of infringement committed by ReDigi users. Thus, you must accept as an established fact that Defendants committed vicarious copyright infringement.]

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<sup>11</sup> *Id.* at 660.

<sup>12</sup> *Id.*

[DEFENDANTS' PROPOSED INSTRUCTION REGARDING COPYRIGHT INFRINGEMENT (DIRECT, CONTRIBUTORY, AND VICARIOUS COMBINED):

(PLAINTIFFS object to this instruction in its entirety as it unnecessarily seeks to summarize every rejected argument and legal position in the case. It further provides confusing and entirely superfluous detail about ReDigi's failed defenses and the complexities of the first sale doctrine and fair use, without ever specifying the Court's actual holdings on direct, contributory and vicarious copyright infringement.)

DEFENDANTS propose the below combined instruction to explain the Court's prior rulings on direct, contributory and vicarious infringement. Defendants believe that it presents a more balanced presentation of the Court's rulings as it includes some discussion of what Defendants' defenses were and explained the Court's rulings on those issues. Defendants position is that it would be unfairly prejudicial for the Court to explain its prior rulings without discussion of Defendants' defenses. Additionally, Defendants defenses and their good faith belief in those defenses is further relevant to the issue of intent in connection with the damages portion of the trial.)

**The Court's Prior Determinations**

I previously determined 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.

It is important for me to explain some definitions before I explain the reasons for my ruling. Under the copyright act a "phonorecord [is a] material object[] in which sounds . . . are fixed". The reproduction right is the exclusive right to embody, and prevent others from embodying the sound recording in a new material object. ReDigi made several arguments that the migration process was not a reproduction, because the digital music file was never in two places as once and because multiple copies of the file were not made. However, my decision was that, the act of uploading (or migrating) a digital music file to the Cloud Locker constituted a reproduction, because when the file was fixed in the Cloud Locker it was a new material object or new phonorecord within the meaning of the Copyright Act. I further decided that, absent an affirmative defense, these reproductions would be infringements. With respect to the reproductions Defendants asserted that the upload and download to the Cloud Locker for personal use was protected by fair use, and the Plaintiffs did not challenge that argument. Plaintiffs asserted that uploading (or migrating to) and downloading from the Cloud Locker incident to sale fell outside of the ambit of fair use, and I agreed. Therefore the sale of digital music files was an infringement of Plaintiffs' reproduction right.<sup>13</sup>

I also previously determined that, absent the existence of an affirmative defense, the sale of digital music files on ReDigi's website infringes Plaintiffs' exclusive right of distribution. It is important to understand the scope of my prior ruling when it comes to the term distribution. Distribution means a sale. Defendants argued that the sales on the ReDigi system were protected

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<sup>13</sup> *Id.* at 650-51, 657-58.

by what is called the first sale doctrine. The first sale doctrine says that the “owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>14</sup> In your everyday life this is what allows you to buy a book, CD or record and then re-sell it to a used book store, a music store or give it away to a friend.

I decided that the first sale doctrine did not apply because of the ruling on reproduction that I just explained. Essentially, because the upload (or migration) process created a reproduction as I explained above, ReDigi was not selling the particular file, it was selling a reproduction of that file.

Plaintiff argued that ReDigi also violated Plaintiffs’ distribution rights simply by making Plaintiffs’ recordings available for sale to the public, regardless of whether a sale occurred. However, I did not reach a decision on this issue. You are not being asked to reach a decision on this issue either, because since I determined that actual sales on ReDigi’s website infringed Plaintiffs’ distribution right, it was unnecessary to reach that issue.

I ruled that Defendants violated Plaintiffs’ distribution right whenever ReDigi users actually sold music files embodying Plaintiffs’ sound recordings on the ReDigi service.<sup>15</sup>

Based on the above, I held that Defendants were directly and secondarily liable for these infringing acts of reproduction and distribution on the ReDigi website. Thus, you must accept as an established fact that Defendants directly and secondarily infringed Plaintiffs’ rights of reproduction and distribution.]

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<sup>14</sup> 17 USC § 109.

<sup>15</sup> Id. at 651, 657-58

## **The Court's Prior Determinations – Federal and State Copyright Infringement**

Plaintiffs' claims for copyright infringement were brought under both federal and state copyright law. This is because Plaintiffs' [DEFENDANTS: alleged] sound recordings created after February 15, 1972 are protected by federal copyright law, while Plaintiffs' [DEFENDANTS: alleged] sound recordings created prior to February 15, 1972 are protected by state law.

My prior rulings apply to both Plaintiffs' federal copyright claims and their state copyright claims.<sup>16</sup> As you will learn later, however, different standards are applied in determining damages for federal copyright infringement and state law copyright infringement. I will describe those different standards after you have heard the evidence in this case.

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<sup>16</sup> *Id.* at 658 n.8.

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

(PLAINTIFFS object to this instruction as containing misstatements of law. As set forth in Plaintiffs accompanying *in limine* motions, Defendants no longer have any “fair use” or “license” defense at trial, which will adjudicate only the question of damages. Furthermore, since Plaintiffs are seeking statutory damages, the jury must make an award within the prescribed statutory damage award ranges for all infringed works, regardless of whether they were purchased by Plaintiffs’ investigator.

DEFENDANTS are proposing the below instruction to clarify for the Jury the issues that they should be considering at trial. It is further Defendants’ position that tracks uploaded to the cloud and offered for sale, but not sold, was not decided by the Court’s 3/30/15, as the Court noted that it did not reach a decision on the make available theory and the Court only held that uploading to and downloading from the cloud locker incident to sale fell outside the ambit of fair use. Additionally, it is Defendants’ position that the Jury should consider whether or not to award statutory damages for the 134 songs purchased by Plaintiffs’ investigator and if so, whether Defendants are entitled to a reduction of those damages as a result of Plaintiffs’ failure to mitigate its damages, and instead that Plaintiff intentionally tried to increase its damage award.)

#### **Issues For The Jury**

Before the trial begins, I want to identify the issues you are being asked to decide. As I said earlier you must accept my prior rulings. I did not explain these rulings because I have an opinion on the issues you are being asked to decide, nor should you infer that I think you should decide for one party or the other. You also should not infer any bias from my prior rulings. They are only explained to you so you understand the issues you are not being asked to decide.

In this case you are going to be asked to decide what sound recordings Plaintiff owns that were infringed by the ReDigi service in accordance with my prior ruling. For the tracks that were uploaded and offered for sale but not sold you will also be asked to decide if Defendants’ have a fair use defense or if Defendants have a defense based on express or implied license. You will also be asked to decide if the songs bought by the Plaintiffs’ investigator are infringements, whether you want to award damages for them, and if so whether you think the damages for those songs should be reduced.

Additionally, for the tracks that you decide that Plaintiff owns, you will be asked to determine damages. You will be asked to determine “statutory damages” under federal copyright law for tracks created after February 15, 1972 and nominal damages and whether you want to award punitive damages under state copyright law for tracks created before February 15, 1972. I will explain these three categories of damages in more detail after you have heard and seen all of the evidence.



## **B. GENERAL INSTRUCTIONS**

### **Opening Instructions**

[PLAINTIFFS' FIRST PROPOSED PARAGRAPH; As I mentioned earlier, you will not be asked in this trial to determine the question of Defendants' liability, as those issues have already been determined as I just described to you. Rather, your responsibility in this trial will only be to determine the damages to which Plaintiffs are entitled for Defendants' copyright infringement.]

[DEFENDANTS' PROPOSED FIRST PARAGRAPH: As I mentioned earlier, you will not be asked in this trial to determine all of the facts in this case, as some issues have already been determined as I previously described to you. Rather, your responsibility in this trial will be to determine 1) which, if any, copyrights to the alleged sound recordings are owned by Plaintiff; 2) whether Defendants' have a fair use defense or an express or implied license for the upload of sound recordings uploaded that were offered for sale but not sold; 3) whether the songs bought by the Plaintiffs' investigator are infringements and whether you want to award damages for them, if so whether you think the damages for those songs should be reduced; and 4) the damages to which Plaintiffs are entitled to, if any.]

You will determine the facts from all the testimony and other evidence that is presented. You are the sole and exclusive judge of the facts. Because you will be asked to decide the relevant facts, you should give careful attention to the testimony and evidence presented. During the trial, you should keep an open mind and should not form or express any opinion about the case until you have heard all of the testimony and evidence, the lawyers' closing arguments, and my instructions to you on the law.

From time-to-time during the trial, I may make rulings on objections or motions made by the lawyers. It is a lawyer's duty to object when the other side offers testimony or other evidence the lawyer believes is not admissible. You should not be biased or partial against a lawyer or the lawyer's client because the lawyer has made objections. If I sustain or uphold an objection to a question that goes unanswered by the witness, you should not draw any inference or conclusions from the question. You should not infer or conclude from any ruling or other comment I may make that I have any opinions on the case favoring one side or the other. I do not favor one side or the other.

The lawyers are not allowed to speak with you during this case. When you see the lawyers at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly; they are simply following the law.

During the trial, it may be necessary for me to talk with the lawyers out of your hearing about questions of law or procedure. Sometimes, you may be excused from the courtroom during these discussions. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine and should be patient even though the case may seem to go slowly.

Before you begin your deliberations at the close of the case, I will instruct you in more detail on the law that you must follow and apply in reaching your verdict. I must stress that you must accept the rules of law that I give you, whether or not you agree with them.

**Authority:** Adapted from O'Malley, et al., *Federal Jury Practice and Instructions* § 101.01 (6<sup>th</sup> ed. 2011).

## Jury Conduct

To insure fairness, you must obey the following rules:

1. Please do not discuss the case even among yourselves until all the evidence has been presented and the case has been given to you for your deliberations. The reason for this is that the evidence will be presented one witness and one exhibit at a time, and it is important that you keep an open mind until you have heard all the evidence.
2. Do not talk with anyone else about this case or about anyone involved with this case until the trial has ended and you have been discharged as jurors. "Anyone else" includes members of your family and your friends. This also includes discussing the case in person, in writing, by phone or electronic means, via text messaging, e-mail, Facebook, Twitter, blogging or any Internet chat room, web site or other feature. If you have to tell someone such as your spouse or your employer that you are serving on a jury and that the trial may last as late as [date], that's okay. But when they inevitably ask you what the case is about, please tell them that you are under strict instructions from the judge not to discuss the case. The reason for this, obviously, is that we want you to decide this case solely on the evidence presented in this courtroom, and not on the basis of anything anyone who hasn't heard the evidence may think about the case. If you are asked or approached in any way about your jury service or anything about this case, you should respond that you have been ordered by the judge not to discuss the matter, and you should report the contact to the court as soon as possible.
3. Outside the courtroom, do not let anyone tell you anything about the case, or about anyone involved with it, until the trial has ended. If someone should try to talk to you about the case during the trial, please report it to me immediately.
4. During the trial you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case – you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice.
5. Do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case or about anyone involved with it. And in the unlikely event you see anything in the media about this case, please turn away and pay it no heed. Your sworn duty is to decide this case solely and wholly on the evidence presented in this courtroom.
6. Do not do any research, such as independently checking allegations or facts or conducting computer searches, or make any investigation about the case on your own.
7. Keep an open mind until after you have gone to the jury room to decide the case and you and the other jurors have discussed all the evidence.
8. If you need to tell me something, simply give a signed note to the clerk to give to me.

**Authority:** Adapted from O'Malley, et al., *Federal Jury Practice and Instructions* §§ 101.11, 101.13 (6<sup>th</sup> ed. 2011).

**Instructions Apply to Each Party**

Unless I state otherwise, you should consider each instruction given to apply separately and individually to each party in this case, whether Plaintiffs or Defendants.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 103.10 (6<sup>th</sup> ed. 2011).

### **All Organizations Equal Before the Law**

You should consider and decide this case as a dispute between entities of equal standing in the community and of equal worth. A corporation or other legal entity, such as a limited liability company, is entitled to the same fair trial as a private individual. All persons, including corporations and other organizations, stand equal before the law and are to be treated as equals.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 103.12 (6<sup>th</sup> ed. 2011).

### Consideration of Evidence in the Case

Unless you are otherwise instructed, the evidence in the case consists of: (1) the sworn testimony of the witnesses – regardless of who called the witness; (2) all exhibits received in evidence – regardless of who may have produced them; (3) all facts and events that may have been admitted or stipulated to; and (4) all facts and events that may have been judicially noticed.

Statements and arguments by the lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times, is intended to help you interpret the evidence, but it is not evidence. However, when the lawyers on both sides stipulate or agree on the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proven.

There are rules of evidence that control what can be received into evidence. To constitute evidence which may be considered by you, exhibits must be received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials brought forth only to refresh a witness' recollection. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

I may have taken what we call “judicial notice” of certain facts or events. That phrase means that I have determined certain facts to be true. When I have declared that I will take judicial notice of some fact or event, you must, unless otherwise instructed, accept my declaration as evidence and regard as proven the fact or event which has been judicially noticed.

Also, some evidence may have been admitted for a limited purpose only. If I instruct you that the evidence is admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

Finally, statements which I may have made concerning the quality of the evidence do not constitute evidence.

It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 103.30 (6<sup>th</sup> ed. 2011); *Ninth Circuit Manual of Model Jury Instructions*, Civil § 1.10 (2007); 4-74 *Modern Federal Jury Instructions-Civil* P 74.01.

### **Questions Not Evidence**

[PLAINTIFFS: If a lawyer has asked a witness a question that contains an assertion of fact, you may not consider the assertion as evidence of that fact. The lawyer's questions and statements are not evidence.]

**Authority:** *O'Malley, et al., Federal Jury Practice and Instructions § 103.34 (6<sup>th</sup> ed. 2011).*]

[DEFENDANTS: The questions of the lawyers are not to be considered by you as evidence. It is the witnesses' answers that are evidence, not the questions. At times, a lawyer may have incorporated into a question a statement which assumed certain facts to be true, and asked the witness if the statement was true. If the witness denied the truth of a statement, and if there is no direct evidence in the record proving that assumed fact to be true, then you may not consider it to be true simply because it was contained in the lawyer's question.

An example of this is a lawyer's question: "When did you stop cheating on your taxes?" You would not be permitted to consider as true the assumed fact that the witness ever cheated on his or her taxes, unless the witness him or herself indicated he or she had, or unless there was some other evidence in the record that the witness had cheated on his or her taxes.

**Authority:** Modified from 4-74 *Modern Federal Jury Instructions-Civil* P 74.01.]



### **Use of Notes**

You may use the notes you take during the trial. However, the notes should not be substituted for your memory. Remember, notes are not evidence. If your memory should differ from your notes, then you should rely on your memory and not on your notes.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 103.02 (6<sup>th</sup> ed. 2011).

## “Direct” and “Circumstantial” Evidence

Generally speaking, there are two types of evidence that are typically presented during a trial: direct evidence and circumstantial evidence. “Direct evidence” is the testimony of a witness about something he or she knows from his or her own senses – something he or she has felt, touched, or heard. “Indirect” or “circumstantial” evidence is proof of one fact, or set of facts, that point to the existence or non-existence of another fact that you are trying to determine. Here is a simple example of circumstantial evidence:

Suppose you came to court on a day when the weather was clear and dry. After spending several hours in the courtroom, you see a person come in wearing a wet raincoat. If we didn’t have any windows in this courtroom, you couldn’t look outside to see if it’s raining – in other words, you wouldn’t have any direct evidence. But from the circumstances you observe – the wet raincoat – you might infer that it is raining.

That is all there is to circumstantial evidence. On the basis of reason and experience and common sense, you infer the existence or non-existence of a fact from one or more established facts. You are permitted to do that – to draw inferences from facts that you find to be proven – to the extent you think those inferences are reasonable and justified in light of your common sense and experience. But keep in mind that you are not permitted to simply guess or speculate.

As a general rule, the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence. You are simply required to find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial. I will explain to you shortly what preponderance of the evidence means.

**Authority:** O’Malley, et al., *Federal Jury Practice and Instructions* § 104.05 (6<sup>th</sup> ed. 2011); Adapted from *Patsy’s Italian Rest., Inc. v. Banas*, Case No. 06-CV-0729 (RER) (E.D.N.Y. 2008), Dkt. No. 140 (jury instructions available on PACER).

### Charts and Summaries

Certain charts and summaries may be shown to you in order to help explain facts disclosed by books, records, and other documents that are in evidence in the case. It is acceptable for the lawyers to use charts and summaries. However, these charts or summaries are not themselves evidence or proof of any facts, unless those charts or summaries have been admitted as evidence in the case. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, the charts or summaries are used only as a matter of convenience. To the extent that you find they are not truthful summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely. [DEFENDANTS: It is for you to decide whether the charts, schedules or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts, schedules and summaries if you find that they are of assistance to you in analyzing and understanding the evidence. Authority: 4-74 Modern Federal Jury Instructions-Civil P 74.06]

Authority: O'Malley, et al., *Federal Jury Practice and Instructions* § 104.50 (6<sup>th</sup> ed. 2011); *Ninth Circuit Manual of Model Jury Instructions*, Civil § 2.13 (2007).

### **Use of Depositions as Evidence**

During the trial, certain testimony may be presented by way of deposition. The depositions consist of sworn, recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys in the case. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by you, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

**Authority:** Adapted from O'Malley, et al., *Federal Jury Practice and Instructions* § 105.02 (6<sup>th</sup> ed. 2011).

### **Deciding What Testimony to Believe**

You are the sole judges of the credibility of the witnesses and the weight their testimony deserves. In deciding what the facts are, you must consider all of the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe, and also how much weight to give to testimony. There is no magical formula by which you evaluate testimony. You each bring with you to this courtroom all of the experience and background of your lives. In everyday affairs you decide for yourselves the reliability or unreliability of things people tell you. The same tests that you use in your everyday dealings are the tests which you should apply to your deliberations. Thus, in making the decision on which testimony to believe, there are a number of factors you make take into account, including the following:

- The witness's opportunity to observe the events he or she described;
- The witness's memory;
- The witness's manner while testifying;
- Does the witness have any interest in the outcome of the case? Does the witness have any bias or prejudice concerning any part of the matter involved in this case?
- Is the witness's testimony reasonable in light of all of the evidence in the case?

If you find that a witness's testimony is contradicted by what that witness has said or done at another time, or by testimony of other witnesses, you may disbelieve all or any part of the witness's testimony, if you find it appropriate.

If you find that any witness, including a party, has willfully testified falsely to any material fact, in whole or in part, you may disregard not only that particular statement, but you may also, if you find it appropriate, disregard all of his or her testimony as not worthy of belief.

**Authority:** Adapted from *Patsy's Italian Rest., Inc. v. Banas*, Case No. 06-CV-0729 (RER) (E.D.N.Y. 2008), Dkt. No. 140 (jury instructions available on PACER).

### **Effect of Prior Inconsistent Statements or Conduct**

Evidence that, at some other time while not under oath, a witness has said or done something inconsistent with the witness's testimony at trial may be considered for the sole purpose of judging the credibility of the witness. However, such evidence may never be considered as evidence of proof of the truth of any such statement.

Where the witness is a party to the case, and by such statement or other conduct admits some fact or facts against the witness's interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the fact or facts so admitted by such party, as well as for the purpose of judging the credibility of the party as a witness.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 105.09 (6<sup>th</sup> ed. 2011).

### **All Available Witnesses or Evidence Need Not Be Produced**

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters at issue in this trial. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

**Authority:** O'Malley, et al., *Federal Jury Practice and Instructions* § 105.11 (6th ed. 2011).

## II. INSTRUCTIONS FOLLOWING THE CLOSE OF EVIDENCE

### A. GENERAL INSTRUCTIONS

#### Introduction

Ladies and gentlemen of the jury, as I told you at the beginning of the trial

[PLAINTIFFS' PROPOSED FIRST PARAGRAPH: I already determined that Defendants are liable for direct and secondary copyright infringement prior to this trial. Your sole task is to determine Plaintiffs' damages.]

[DEFENDANTS' PROPOSED FIRST PARAGRAPH, I already made certain determinations prior to this trial. Your task is to determine 1) which, if any, copyrights to the alleged sound recordings are owned by Plaintiff; 2) whether Defendants' have a fair use defense or an express or implied license for the upload of sound recordings uploaded that were offered for sale but not sold; 3) whether the songs bought by the Plaintiffs' investigator are infringements and whether you want to award damages for them, and if so whether you think the damages for those songs should be reduced; and 4) the damages to which Plaintiffs are entitled to, if any.

For purposes of this trial, my prior findings that I read to you before the trial are settled and conclusive and you are not to second-guess those findings.

Now that you have heard the evidence and the arguments of counsel regarding the issues you will be deciding, it is my duty to instruct you about the applicable law. You must not infer from these instructions or from anything I may say or do [DEFENDANTS: , or my prior ruling,] that I have an opinion regarding the evidence or what your verdict should be. These instructions will be in three parts: First, the instructions on general rules that define and control the jury's duties; second, the instructions on the legal principles governing the issues [DEFENDANTS: of proof of ownership, affirmative defenses and] of damages; and, third, some rules for your deliberations.

You are the sole judges of the facts—not counsel and not the court. That fact-finding role is very important. It is for you and you alone to pass upon the weight of the evidence: you will resolve any conflicts you may see in the evidence and you will draw whatever inferences you deem to be reasonable and warranted from the evidence or lack of evidence. With respect to any questions concerning the facts, it is your recollection of the evidence and yours alone that controls.

On other hand, and with equal emphasis, I charge you that you are required to accept the law as I instruct you in this charge and in any instructions that I have given you during the course of the trial. Whether or not you agree with my instructions on the law, you are bound by them. You are not to ask anyone else about the law, and you are to pay no attention to anything you may have learned about the law in your private lives. My instructions on the law govern. The process by which you arrive at a verdict is first, to decide what the facts are from all of the evidence and the exhibits, and second, to apply the law as I give it to you, to the facts as you have decided them to be. The conclusion thus reached will be your verdict.



**Authority:** Adapted from *Patsy's Italian Rest., Inc. v. Banas*, Case No. 06-CV-0729 (RER) (E.D.N.Y. 2008), Dkt. No. 140 (jury instructions available on PACER).

## Court and Jury – Unanimous Verdict

You will now return to decide the

[PLAINTIFFS: damages in this case.]

[DEFENDANTS: the issues in this case. In order to prevail, the plaintiffs must sustain their burden of proof as I have explained to you with respect to each element of Plaintiffs' claims that you are being asked to decide. In order for Defendants' to prevail on their affirmative defenses, defendants must sustain the burden of proof as I have explained to you with respect to those affirmative defenses. If you find that the plaintiffs have succeeded, you should return a verdict in their favor on that issue. If you find that the plaintiffs failed to sustain the burden on any element, you should return a verdict against the plaintiffs in favor of Defendants. Similarly, if you find that the defendants have failed to sustain their burden with respect to any element of the defendant's affirmative defense, you must return a verdict against the defendant on that defense.<sup>17</sup>]

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, each of you must make your own decision about the proper outcome of this case, based upon your consideration of the evidence and your discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

**Authority:** Adapted from 4 *Modern Federal Jury Instructions*, Instruction 78-3.

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<sup>17</sup> 4-78 *Modern Federal Jury Instructions*-Civil P 78.01

### **Selection of Foreperson**

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in open court.

**Authority:** *4 Modern Federal Jury Instructions*, Instruction 78-5.

### **Preponderance of the Evidence**

[DEFENDANTS: This is a civil case and as such the Plaintiffs have the burden of proving the material allegations of their claims.<sup>18</sup>]

The applicable burden of proof in this trial is “preponderance of the evidence.” What does a “preponderance of the evidence” mean? A “preponderance of the evidence” means simply to prove that something is more likely than not. A preponderance of the evidence means the greater weight of the evidence. Preponderance of the evidence does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase “preponderance of the evidence” refers to the quality and persuasiveness of the evidence—the weight and effect it has on your minds.

[DEFENDANTS: In determining whether a claim has been proved by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them. If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party bearing this burden must prove more than simple equality of evidence—that party must prove the element at issue by a preponderance of the evidence.]

If the credible evidence supporting a matter at issue, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what it seeks to prove is more likely true than not true, you must find for the party raising the matter at issue. If the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, then you must find in favor of the opposing party on that issue.

You may have heard of the phrase “proof beyond a reasonable doubt.” That is a stricter standard that applies only in criminal cases. It does not apply in this case. You should, therefore, put it out of your minds.

**Authority:** Adapted from *Patsy’s Italian Rest., Inc. v. Banas*, Case No. 06-CV-0729 (RER) (E.D.N.Y. 2008), Dkt. No. 140 (jury instructions available on PACER); O’Malley, et al., *Federal Jury Practice and Instructions* § 104.01 (6<sup>th</sup> ed. 2011).

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<sup>18</sup> Adapted from 4-73 Modern Federal Jury Instructions-Civil P 73.01

### **Return of Verdict**

After you have reached a verdict, your foreperson will fill in the form that has been given to you, sign and date it and advise the marshal outside your door that you are ready to return to the courtroom.

I will stress that each of you should be in agreement with the verdict which is announced in court. Once your verdict is announced by your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

**Authority:** *4 Modern Federal Jury Instructions*, Instruction 78-6.

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

**General Verdict Accompanied by Answers to Interrogatories**

You have heard evidence in the form of certain “requests for admission” submitted by the Defendants. Requests for admission are written statements of fact submitted by one party prior to trial to the opposing party.

Since the Plaintiffs admitted certain facts, you must assume the facts admitted contained therein to be true. Therefore, in making your determinations, you are not permitted to disregard or disbelieve the contents of these admitted facts, even in light of any other evidence presented. The requests admitted in evidence are binding and conclusive on the defendant for the purposes of this trial.

**Authority:** Adapted from 4-74 Modern Federal Jury Instructions-Civil P 74.08]

## **B. INTRODUCTORY COPYRIGHT INSTRUCTIONS**

### **Types of Sound Recordings and Applicable Damages**

Before I discuss in detail the three categories of damages you will be determining, there are a couple threshold issues I need to address. First, you will need to determine, what, if any sound recordings Plaintiffs have proven that they own a copyright for. As I previously noted, there are two categories of sound recordings at issue in this case. The first category includes sound recordings created after February 15, 1972, which are protected by federal copyright law. For any post-1972 sound recordings that you have found that Plaintiffs own a copyright for, you will need to determine the amount of “statutory damages” to award for each recording infringed. I will instruct you on the standards and allowable ranges for statutory damages under federal copyright law, and you must assess statutory damages within those ranges for each of Plaintiffs’ sound recordings that has been infringed.

The second category of sound recordings are those recorded prior to February 15, 1972, which are protected by state law. For these sound recordings that you have found that Plaintiff owns a copyright for, you will need to determine whether or not to award two kinds of damages, and if so, in what amount. First, you will determine whether or not to award “nominal damages,” and if you do so, whether or not additionally to award “punitive damages” and the amount of such punitive damages. I will instruct you on the standards for awarding nominal and punitive damages for infringement of pre-1972 sound recordings.

You do not need to award damages separately against one or more of the Defendants; rather, you will only assess damages for each sound recording that Plaintiffs have proved that they own.

[PLAINTIFFS AND DEFENDANTS EACH SUBMIT SEPARATE INSTRUCTIONS ON OWNERSHIP]

### **Ownership of Sound Recordings**

[PLAINTIFFS: You may award damages only for those sound recordings for which one of the Plaintiffs has proven by a preponderance of the evidence that it either: (1) owned the copyright in the sound recording at the time of Defendants' infringement, or (2) was the exclusive licensee of the copyright in the sound recording at the time of Defendants' infringement. This rule applies to all three categories of damages that you will be determining.

Plaintiffs can prove ownership of a sound recording by showing that they were the author or creator of the sound recording or that they became an owner by virtue of a transfer or assignment of the copyright. A copyright registration certificate constitutes prima facie evidence of the valid ownership of a copyright. Therefore, if Plaintiffs admit into evidence a registration certificate that lists one of the Plaintiffs as the owner, you may consider this prima facie evidence that the Plaintiff owns that sound recording. Prima facie evidence refers to evidence that is sufficient to establish a given fact, and remains sufficient for that purpose unless it is rebutted and overcome by countervailing evidence.

Additionally, Plaintiffs can prove that they own a sound recording by showing that the former owner transferred or assigned the copyright to one of the Plaintiffs. To be valid, this transfer of rights must be in writing such as through a written assignment. Plaintiffs can also prove ownership by establishing that the prior owner has merged into one of the named Plaintiffs or undergone a name change such that it is now the same entity as one of the named Plaintiffs.

Alternatively, Plaintiffs can prove that they are an exclusive licensee of the copyright in the sound recording by showing that the owner of the recording has granted to one of the Plaintiffs an exclusive license to reproduce, distribute or otherwise commercially use the recording. To be valid, the grant of exclusive licensing rights must be in writing such as through a license agreement.

If the Plaintiffs prove that they were either the owner or exclusive licensee of a sound recording at the time of Defendants' infringement, then you may consider the damages to be awarded for the Defendants' infringement of that particular sound recording.

**Authority:** 17 U.S.C. §§ 204(a), 410(c), 501(b); *Davis v. Blige*, 505 F.3d 90, 100 n.10 (2d Cir. 2007); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003); *U2 Home Entm't v. Rolling Rock Music Corp.*, 2005 U.S. Dist. LEXIS 22117, at \*8 (S.D.N.Y. Sept. 30, 2005); *Kelly v. Jackson*, 31 U.S. 622, 632 (1832).]



[DEFENDANTS: On the Plaintiffs' copyright infringement claim, the plaintiff has the burden of proving that they are the owner of a valid copyright in each sound recording it claims. If you find that the Plaintiffs have proved this by a preponderance of the evidence for a particular sound recording or sound recording(s) you should consider the affirmative defenses and if you do not find that an affirmative defense applies, you may award damages for those sound recordings. If, on the other hand, the plaintiffs have failed to prove ownership of a sound recording or sound recordings(s) then you may not consider damages and you should not consider those sound recordings any further.

For works distributed on or after March 1, 1989, the plaintiffs are the owner of a valid copyright in a sound recording if the plaintiffs prove by a preponderance of the evidence that: 1. the plaintiffs' work is original; and 2 the plaintiffs received a transfer of the copyright, which I will explain shortly. For works distributed prior to March 1, 1989, the plaintiffs are the owner of a valid copyright in a sound recording if the plaintiffs prove by a preponderance of the evidence that 1. the plaintiff's work is original; 2. the plaintiff received a transfer of the copyright, which I will explain shortly; and 3. the plaintiff complied with copyright notice requirements by placing a copyright notice on publicly distributed copies of the allegedly infringed sound recordings.

In this case, the Plaintiffs do not claim to be the creators of the sound recordings at issue. Instead, the Plaintiffs claim that they received the copyright by virtue of assignment or exclusive licenses from the creator of the sound recordings. Plaintiff cannot prove ownership solely through a "work for hire" contract as sound recordings are not "works made for hire" under the Copyright Act.<sup>19</sup>

A copyright owner may sell to another person all or part of the owner's property interest in the copyright; that is, the right to exclude others from copying the work. The person to whom the copyright is sold becomes the owner of the copyright in the work. To be valid, the sale must be in writing. The person to whom this right is transferred is called an assignee.

A copyright owner may also sell exclusively to another person any of the rights comprised in the copyright. To be valid, the sale must be in writing. The person to whom this right is transferred is called a licensee. An exclusive licensee has the rights to exclude others from copying the work to the extent of the rights granted in the license. An exclusive licensee is entitled to bring an action for damages for copyright infringement of the right licensed.

You may award damages only for those sound recordings for which one of the Plaintiffs has proven by a preponderance of the evidence that it either: (1) owned the copyright in the sound recording at the time of Defendants' infringement by assignment, or (2) was the exclusive licensee of the copyright in the sound recording at the time of Defendants' infringement.

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<sup>19</sup> 17 U.S.C. § 101.

In the event that you find that Plaintiffs owned the copyright in or was the exclusive licensee for any particular sound recording at the time of the infringement, and later sold or assigned such a sound recording, or that the license terminated, in order to find that Plaintiffs' own the sound recording at issue for the purposes of awarding damages, you must also find that Plaintiffs' did not sell, assign or lose the right to sue for past infringements. This rule applies to all three categories of damages that you will be determining.

A copyright registration certificate constitutes *prima facie* evidence of the validity of the copyright and facts stated in the certificate. Therefore, if Plaintiffs admit into evidence a registration certificate that lists one of the Plaintiffs as the owner, you may consider this *prima facie* evidence that the Plaintiff owns that sound recording. *Prima facie* evidence refers to evidence that is sufficient to establish a given fact, and remains sufficient for that purpose unless it is rebutted and overcome by countervailing evidence.

If the Plaintiffs prove that they were either the owner or exclusive licensee of a sound recording as I have set forth above, then you should consider the affirmative defenses, if you do not find an affirmative defense applies, you may consider the damages to be awarded for the Defendants' infringement of that particular sound recording. If, on the other hand, the plaintiffs have failed to prove ownership of a sound recording or sound recordings(s) then you may not consider damages and you should not consider those sound recordings any further

**Authority:** Adapted from *Ninth Circuit Manual of Model Jury Instructions*, Civil § 17.4, 17.10, 17.11 (2014); 17 U.S.C. §§ 204(a), 410(c), 501(b); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003); *U2 Home Entm't v. Rolling Rock Music Corp.*, 2005 U.S. Dist. LEXIS 22117, at \*8 (S.D.N.Y. Sept. 30, 2005); *Kelly v. Jackson*, 31 U.S. 622, 632 (1832).]

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

(PLAINTIFFS object to any instruction regarding fair use for the reasons explained in their accompanying *in limine* motion. The Court has already rejected any fair use defense.

DEFENDANTS: It is Defendants' position that tracks uploaded to the cloud and offered for sale but not sold was not decided by the Court's 3/30/15, as the Court noted that it did not reach a decision on the make available theory and the Court only held that uploading to and downloading from the cloud locker incident to sale fell outside the ambit of fair use. As such, it is Defendants' position that this instruction should be submitted to the Jury.)

#### **Fair Use Defense**

Although I have found that an upload of a sound recording to the Cloud Locker constitutes a "reproduction", with reference to sound recordings that were uploaded to the Cloud Locker and offered for sale but not sold, the defendant contends that this copying is nevertheless not copyright infringement because it falls within the "fair use" doctrine.

One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the circumstances without the consent of the copyright owner if it would advance the public interest. Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner's copyrighted work.

Defendants contend that fair use applies to sound recordings uploaded to the Cloud Locker and offered for sale but not sold.

Defendants contend that these uses qualify as "fair use" because the ReDigi users only stored their sound recordings in the cloud for personal use.

If the defendants' activities fall within this fair use exception, there is no copyright infringement, and you are instructed to find for the defendants for these sound recordings, and you may not consider damages. In determining whether the use made of the work by the defendants falls within this fair use defense, you must consider the following factors:

- 1.the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;
- 2.the nature of the copyrighted work;
- 3.the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- 4.the effect of the use on the potential market for or value of the copyrighted work; and
- 5.any other factors that bear on the issue of fair use.

You are also free to consider other factors supporting this defense that the defendants have presented in support of their argument that the use of the sound recordings that were uploaded to the Cloud Locker and offered for sale but not sold is fair use.

It is important to note that this defense only relates to the uploading process. I declined to decide that sound recordings that were merely offered for sale were an infringement of Plaintiffs' distribution rights. My prior decision only found that actual sales violated Plaintiffs' distribution right.

The defendant has the burden of proving this defense by a preponderance of the evidence. If you find that fair use applies to sound recordings uploaded to the Cloud Locker and offered for sale but not sold, you should find for Defendants, and you may not consider damages for any tracks uploaded to the Cloud Locker and offered for sale but not sold.

**Authority:** Adapted 4-86B *Modern Federal Jury Instructions-Civil* P 86B.03; *Ninth Circuit Manual of Model Jury Instructions*, Civil § 17.18 (2014).]

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

(PLAINTIFFS object to any instruction regarding a license defense for the reasons explained in their accompanying *in limine* motion. ReDigi did not include any such defense in its answer and did not raise it at any time prior to the Court's summary judgment ruling adjudicating its liability. Such defense has therefore been waived and has no relevance at this damages trial.

DEFENDANTS: It is Defendants' position that tracks uploaded to the cloud and offered for sale but not sold was not decided by the Court's 3/30/15, as the Court noted that it did not reach a decision on the make available theory and the Court only held that uploading to and downloading from the cloud locker incident to sale fell outside the ambit of fair use. As such, it is Defendants' position that this instruction should be submitted to the Jury.)

#### **License Defense**

Although I have found that an upload of a sound recording to the Cloud Locker constitutes a "reproduction", with reference to sound recordings that were uploaded to the Cloud Locker and offered for sale but not sold, the defendant contends that this reproduction is nevertheless not copyright infringement because was permissible under the terms of an express or implied license.

One who owns a copyright may agree to let another reproduce, prepare a derivative work of, distribute, perform, or display the copyrighted work, this is a license. A license is a defense to a claim of copyright infringement. While exclusive licenses must be in writing, a nonexclusive license may be granted orally, or may even be implied from conduct. In fact consent given in the form of mere permission or lack of objection is also equivalent to a nonexclusive license and is not required to be in writing.

The permission or license can be express meaning clearly stated, or implied either by conduct or by Plaintiffs or iTunes knowledge of, and acquiescence to, this type of use. If you find that ReDigi's users had permission to upload their music files to a cloud server, Cloud Locker or other location, from either Plaintiffs or iTunes, you should find for Defendants, and you may not consider damages for any tracks uploaded to the Cloud Locker and offered for sale but not sold.

**Authority:** Adapted from *Keane Dealer Services, Inc. v Harts*, 968 F Supp 944, 947 (S.D.N.Y. 1997).]

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

(PLAINTIFFS object to this instruction in its entirety. The Court has already held that uploading a music file to the ReDigi cloud for purposes of resale constitutes an unauthorized reproduction, regardless of whether the file is subsequently purchased by anyone. Accordingly, Plaintiffs are entitled to a statutory damage award for every such file. Additionally, as the 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.

DEFENDANTS: It is Defendants’ position that tracks purchased by Plaintiffs’ themselves should not be considered for damages purposes. Copyright “[i]nfringement is the violation of an owner's copyright interest by a non-owner.... It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him.” *U.S. Nav. Inst. v Charter Communications, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991) (citing *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir.1984)). While Courts will allow investigators to gather evidence of infringement, it should not be considered for damages. As an initial matter, here the investigator was an employee of Plaintiffs, not a third party. Additionally, Courts usually allow for costs of investigations, however Plaintiffs here should not be allowed to use the 134 songs purchased by them to drive up a damages award.]

**Authorized Distribution and Reproduction**

Although I have found that the download of a sound recording from the Cloud Locker constitutes a “reproduction,” Defendants contend that any of Plaintiffs’ sound recordings purchased and downloaded from the Cloud Locker by plaintiff and/or its agent was an authorized distribution and reproduction, and thus not an infringement, because those acts were made, at least in-part, by the copyright owner, rights holder and/or under the direction of Plaintiffs.

If you find that a copyrighted work was purchased by Plaintiffs or an agent of Plaintiffs, then any consequential reproduction and/or distribution of that work would not be an act of infringement and should not be included in your damages calculation.

**Authority:** *U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 936 F.2d 692, 695 (2d Cir. 1991); *Cortner v. Israel*, 732 F.2d 267, 271 (2d Cir. 1984).]

## C. STATUTORY DAMAGES

### Statutory Damages: Introduction

First, I will discuss Plaintiffs' claim for a category of damages known as "statutory damages." For works protected under the Copyright Act, which is the federal copyright law, a copyright owner may elect to recover statutory damages instead of having to prove actual monetary damages. Thus, statutory damages are available without proof of the Plaintiffs' actual damages, or of the Defendants' profits, or other direct economic effects of the infringement.

The general purposes of statutory damages include the following:

- (1) Relieving copyright owners of the often difficult burden of proving their actual damages and the infringer's profits;
  - (2) Providing adequate compensation to the copyright owner and disgorgement of the infringer's benefits from infringement;
  - (3) Deterring the infringer and others similarly situated from future infringement;
- and
- (4) Punishing the infringer.

By electing statutory damages, Plaintiffs are agreeing that their damages for each sound recording infringed will fall somewhere within a monetary range fixed by federal copyright law. Within certain limits that I will describe below, the law gives you broad discretion to determine the exact amount of statutory damages that you find to be just in light of the evidence presented. In deciding what amount is just, you should take into consideration the factors that I will describe to you. However, in a case such as this, where Plaintiffs have elected to pursue statutory damages in lieu of recovering Defendants' profits or their actual damages, you must determine a statutory damage award for each sound recording infringed.

**Authority:** Adapted from *MODEL JURY INSTRUCTIONS: COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION*: 1.7.4 "Statutory Damages" ABA Section of Litigation (2008) (citing as authority 17 U.S.C. §§ 101, 102, 106 (2005)); *Robert Stigwood Grp. Ltd. v. O'Reilly*, 530 F.2d 1096, 1101 n.11 (2d Cir. 1976); *Lucerne Textiles, Inc. v. H.C.T. Textiles Co.*, 2013 U.S. Dist. LEXIS 7820, at \*5 (S.D.N.Y. Jan. 17, 2013), *approved and adopted*, 2013 U.S. Dist. LEXIS 42555 (S.D.N.Y. Mar. 25, 2013); *UMG Recordings, Inc. v. Griffin*, 2008 U.S. Dist. LEXIS 95905, at \*5 (N.D.N.Y. Nov. 24, 2008); 6 William F. Patry, *Patry on Copyright* § 22:185 (2012 ed.).



### **One Award of Statutory Damages Per Work**

Under copyright law, a copyright owner is entitled to one statutory damage award for each registered “work” that has been infringed. In this case, the “works” are the sound recordings owned by Plaintiffs. This remains true no matter how many infringing copies of that work have been made or how many different ways that work was infringed.

In the case of sound recordings, which are the types of works at issue in this case, where a sound recording was available for sale as a single unit on the date it was infringed – for instance, it was separately available for download on a service like iTunes – it is a separate “work” eligible for its own award of statutory damages. However, if on the date of the infringement, a sound recording was available for purchase only on an album with other sound recordings, and not available separately, the album itself is the “work” eligible for only one award of statutory damages. In other words, where two sound recordings from the same album are individually for sale on a service like iTunes, each sound recording is a “work,” but where they are only available by purchasing an entire album, they are part of the same “work.”

The Plaintiffs have the burden of proving by a preponderance of the evidence whether, on the date of the infringement, each individual sound recording at issue in this case was available for purchase as a single, or only as part of an album. If you determine that Plaintiffs have not proven by a preponderance of the evidence that any particular sound recording was available for purchase or license separately as a single on the date of the infringement, you may only grant one statutory damages award for the album on which that particular sound recording appears.

**Authority:** Adapted from *MODEL JURY INSTRUCTIONS: COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION*: 1.7.5 “One Statutory Damages Award Per Work” ABA Section of Litigation (2008) (citing as authority 17 U.S.C. §§ 101, 102, 106 (2005)); *Arista Records LLC v. Lime Group LLC*, 2011 U.S. Dist. LEXIS 36536, at \*13-15 (S.D.N.Y. Apr. 4, 2011).

### **Statutory Damages – Range and Factors**

The plaintiff seeks a statutory damage award, established by Congress for each sound recording that it owns or was exclusively licensed and that was infringed. [PLAINTIFFS: Its purpose is to penalize the infringer and deter future violations of the copyright laws.] The amount you may award as statutory damages is not less than \$750, nor more than \$30,000 for each work infringed, except as I otherwise instruct you below.

It is up to you and you alone to determine the amount of statutory damages you will award for each infringed sound recording that Plaintiffs prove that they own or were exclusively licensed, so long as the amount is within the allowable range.

In determining the amount of an award of statutory damages, you may consider any of the following factors:

- the infringer’s state of mind;
- the expenses saved, and profits earned, by the infringer;
- the revenue lost by the copyright holder;
  - [DEFENDANTS: whether Plaintiffs caused the infringement for the tracks Plaintiffs purchased and downloaded, its motives for doing so, and accordingly that Plaintiffs are not entitled to the same damage award for those tracks or a reduced award because Plaintiffs caused those tracks to be downloaded;]
- the deterrent effect on the infringer and third parties;
- the infringer’s cooperation in providing evidence concerning the value of infringing materials;
- the conduct and attitude of the parties.
  - [DEFENDANTS: and the sophistication and level of understanding of the parties.]

[DEFENDANTS: You may also consider other factors that you consider to be relevant. You have discretion to determine the exact amount of statutory damages that you find to be just in light of the evidence presented. Additionally, Statutory damages must bear some relation to the actual damages suffered by the Plaintiffs.]

**Authority:** 17 U.S.C. § 504(c); *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010); Ninth Circuit Manual of Model Jury Instructions, Civil § 17.25 (2007). [DEFENDANTS: *RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 862 (S.D.N.Y.1984)] .

[PLAINTIFFS AND DEFENDANTS EACH SUBMIT SEPARATE INSTRUCTIONS ON ADJUSTMENT OF STATUTORY DAMAGE RANGE]

[PLAINTIFFS' INSTRUCTION ON ADJUSTMENT OF STATUTORY DAMAGE RANGE:

**Statutory Damages – Infringer's State of Mind and Willful Infringement**

One of the purposes of statutory damages is to deter and punish wrongful conduct. Therefore, the appropriate statutory damages award may escalate in proportion to blameworthiness of the infringing conduct. In assessing blameworthiness, you may consider “the infringer’s state of mind” and “the conduct and attitude of the parties.”

The infringer’s state of mind is the key factor in determining the appropriate statutory damages award. When the infringer acts with a willful state of mind, a statutory damage award should incorporate not only a compensatory, but also a punitive component to discourage further wrongdoing by the defendants.

Thus, where a Defendants’ infringement is found to be “willful,” the amount of statutory damages may be increased up to \$150,000 per work infringed. It is the Plaintiffs’ burden to prove by a preponderance of the evidence that a particular infringement was willful. An infringement is “willful” if the Defendants: (1) had actual knowledge that they were infringing Plaintiffs’ copyrights; (2) acted in reckless disregard of the possibility of infringement; or (3) were willfully blind to the Plaintiffs’ rights in the sound recordings. Reckless disregard means that the Defendants behaved recklessly in ignoring the possibility that their acts could constitute infringement or in disregarding the rights of copyright owners. Willful blindness means that the Defendants were aware of a high probability of the fact of infringement and consciously avoided confirming that fact. You may infer the Defendants’ state of mind, including reckless disregard or willful blindness, from their conduct.

In evaluating willfulness, you may consider several factors, including: (1) whether the infringer was on notice that the copyrighted work was protected; (2) whether the infringer had received warnings of the infringements; and (3) whether the infringer had experience with previous copyright ownership, prior lawsuits regarding similar practices, or works in an industry where copyright is prevalent.

If you find that the Defendants’ infringement of a sound recording was willful, you may increase your award of statutory damages for that infringement in an amount you consider just up to \$150,000 per work.

**Authority:** Adapted from *MODEL JURY INSTRUCTIONS: COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION*: 1.7.7 “State of Mind and Corresponding Ranges of Statutory Damages” ABA Section of Litigation (2008); see also 17 U.S.C. § 504(c); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005); *Agence Fr. Presse v. Morel*, 111 U.S.P.Q.2d 2017, 2021 (S.D.N.Y. 2014); *Capitol Records v. Mp3tunes, LLC*, 2014 U.S. Dist. LEXIS 11218, at \*28-29 (S.D.N.Y. Jan. 29, 2014); *Nat’l*

*Football League v. Prime Time 24 Joint Venture*, 131 F. Supp. 2d 458, 474 (S.D.N.Y. 2001); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984); *Hounddog Prods., LLC v. Empire Film Grp.*, 826 F. Supp. 2d 619, 631 (S.D.N.Y. 2011).]

[DEFENDANTS' INSTRUCTION ON ADJUSTMENT OF STATUTORY DAMAGE RANGE:

**Statutory Damages – Infringer's State of Mind and Willful Infringement/Innocent Infringement**

Under the Copyright Law, a Defendants' intent can affect the amount of statutory damages awarded. Essentially, the statutory range can also be adjusted upwards or downwards, depending on whether the infringements were "willful," or "innocent": only a minimal award may be warranted where the infringement is innocent; a higher award may be warranted where the defendant acted willfully.<sup>20</sup>

The Plaintiffs contend that the defendants willfully infringed the Plaintiffs' copyrights. Defendants contend that any infringement was innocent. If you find that the defendants have proven any of their affirmative defenses to copyright infringement, then you will have no reason to consider whether the defendants engaged in willful infringement.<sup>21</sup>

To prove willful copyright infringement, the Plaintiffs must prove by a preponderance of the evidence that the Defendants knew that they were infringing the Plaintiffs' copyrights or that they acted as a result of reckless disregard or willful blindness as to whether they were doing so. If you conclude that the defendants reasonably and in good faith believed that they were not infringing the plaintiffs' copyrights, then you may not find that they willfully infringed those copyrights.<sup>22</sup>

In evaluating willfulness, you may consider many factors, including: (1) whether the infringer was on notice that the copyrighted work was protected; (2) whether the infringer had received warnings of the infringements; (3) whether the infringer had experience with previous copyright ownership, prior lawsuits regarding similar practices, or works in an industry where copyright is prevalent; (4) the deterrent effect on others besides the Defendants; (5) whether Defendants have cooperated in providing records in this lawsuit; (6) the potential for discouraging the defendant; (7) whether the state of the law was clearly applicable to the Defendants' alleged acts and any evidence of legal advice to the Defendants that they were or were not infringing; (8) whether the state of

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<sup>20</sup> *Bryant v Media Right Productions, Inc.*, 603 F3d 135, 143 (2d Cir 2010)

<sup>21</sup> Adapted from 6-39 Nimmer on Copyright § 39.04 (2015).

<sup>22</sup> *Id.*

the law was unsettled; and (9) Defendants' course of conduct after determinations of liability.<sup>23</sup>

If you find that Defendants were not aware and had no reason to believe that their acts constituted an infringement, you can decrease the statutory damage award below the minimums we discussed earlier.<sup>24</sup>

The infringer's state of mind is the key factor in determining the appropriate statutory damages award. You may infer the Defendants' state of mind from their conduct.

If you find the infringement was innocent, you may award as little as \$200 for each sound recording innocently infringed. If you do not find that the infringement was innocent, you may award as statutory damages not less than \$750, and not more than \$30,000 for each work you conclude was owned by Plaintiffs. If you find the infringement was willful, you may award as much as \$150,000 for each work willfully infringed.<sup>25</sup>

**Authority:** Adapted from *MODEL JURY INSTRUCTIONS: COPYRIGHT, TRADEMARK AND TRADE DRESS LITIGATION*: 1.7.7 "State of Mind and Corresponding Ranges of Statutory Damages" ABA Section of Litigation (2008); see also 17 U.S.C. § 504(c); *L.A. Printex Indus., Inc. v. Doe*, 543 F. App'x 110, 111 (2d Cir. 2013); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005); *Agence Fr. Presse v. Morel*, 111 U.S.P.Q.2d 2017, 2021 (S.D.N.Y. 2014); *Capitol Records v. Mp3tunes, LLC*, 2014 U.S. Dist. LEXIS 11218, at \*16 (S.D.N.Y. Jan. 29, 2014); *Nat'l Football League v. Prime Time 24 Joint Venture*, 131 F. Supp. 2d 458, 474 (S.D.N.Y. 2001); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984); *Hounddog Prods., LLC v. Empire Film Grp.*, 826 F. Supp. 2d 619, 631 (S.D.N.Y. 2011).]

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<sup>23</sup> *Tiffany (NJ) Inc. v. Luban*, 282 F Supp 2d 123, 125 [SDNY 2003]

<sup>24</sup> 17 U.S.C. § 504(c)(2); *D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29, 35-36 (2d Cir. 1990).

<sup>25</sup> Adopted from *Ninth Circuit Manual of Model Jury Instructions*, Civil § 17.25 (2007).

[PLAINTIFFS ADD THE FOLLOWING INSTRUCTION:

(DEFENDANTS object to this instruction. As deterrence of third parties has already been listed as one of the factors to be considered by the jury, having a separate instruction for this factor will unfairly prejudice Defendants as the jury will be led to believe that this factor has more considerable weight than the other factors. However in the event that the Court overrules Defendants' objections, defendant has added language to the instruction in an attempt to make it more balanced.

PLAINTIFFS maintain that it is appropriate to elucidate this core purpose of statutory damages. To the extent the Court believes it preferable to consolidate discussion of all statutory damage factors into a single instruction, Plaintiffs respectfully request that the Court include the language and principles below in the main statutory damage instruction above.)

### **Statutory Damages – Deterrence Of Third Parties**

In considering the need for deterrence discussed above, you may consider the need both to deter the Defendants but also to deter the infringements of third parties. Absent such deterrence, the Defendants and other potential infringers will be encouraged to violate the law, as infringement would be more cost effective than obtaining permission from copyright owners. More specifically, you may consider whether a heightened award is necessary to send a signal to the market that it is not permissible to jump start a business by relying on infringing conduct.

In considering the need to deter other would-be infringers, your analysis need not be limited to the culpability of these particular Defendants. If you find that it is appropriate to send a message to others who have or might engage in the infringement of Plaintiffs' copyrighted works on the Internet or use the unauthorized exploitation of Plaintiffs' works to jump start their businesses, you may enhance the award to deter these future infringers.

[DEFENDANTS: In considering the need to deter third parties you may also consider whether there is such a need in areas of the law that are unclear, whether Defendants' new business was operating in an area of the law that was unclear, and given that I have made a ruling on this case, whether sending a message is needed to deter future third parties, or whether in light of my ruling it is unnecessary.]

**Authority:** *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010); *Psihoyos v. John Wiley & Sons, Inc.*, 2012 U.S. Dist. LEXIS 162822, at \*9 (S.D.N.Y. Nov. 7, 2012); *Entral Grp. Int'l, LLC v. New York One Café Inc.*, 2007 U.S. Dist. LEXIS 99020, at \*18-19 (E.D.N.Y. Mar. 5, 2007); *Arista Records LLC v. Usenet.com, Inc.*, 2010 U.S. Dist. LEXIS 103022, at \*18-19 (S.D.N.Y. Feb. 2, 2010).

[PLAINTIFFS ADD THE FOLLOWING INSTRUCTION:

(DEFENDANTS object to this instruction. As actual damages has already been listed as one of the factors to be considered by the jury, having a separate instruction for this factor will unfairly prejudice Defendants as the jury will be led to believe that this factor has more considerable weight than the other factors. Additionally, there is no evidence that profits were difficult to calculate or that Plaintiffs could not have sought actual damages. Plaintiffs chose not to and should be precluded from arguing that the damages were difficult or impossible to calculate. However in the event that the Court overrules Defendants' objections, Defendants have added language to the instruction in an attempt to make it more balanced. Additionally, it will mislead the jury, as statutory damages must bear some relation to actual damages suffered by Plaintiffs. *See RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 862 (S.D.N.Y.1984)

PLAINTIFFS believe that the factors described below require further elucidation. To the extent the Court believes it preferable to consolidate discussion of all statutory damage factors into a single instruction, Plaintiffs respectfully request that the Court include the language and principles below in the main statutory damage instruction above.)

#### **Statutory Damages – Actual Damages**

Two of the six factors you may consider in awarding statutory damages are “the expenses saved, and profits earned, by the infringer” and “the revenue lost by the copyright holder.”

[PLAINTIFF: However, one reason for the existence of statutory damages is to provide a remedy for instances where the specific harm to Plaintiffs or the Defendants' profits from the infringement are difficult or impossible to calculate. Thus,] Plaintiffs are entitled to statutory damages regardless of whether they submitted any evidence of Defendants' profits or Plaintiffs' lost revenues as a result of the Defendants' conduct.

[PLAINTIFF: In addition, statutory damages are designed in part to discourage wrongful conduct. Thus, regardless of the extent of the Plaintiffs' harm or the extent to which Defendants profited from the infringement, an award within the statutory limits is justified by the purposes of copyright law. Moreover, the amount of statutory damages does not have to bear any relationship to the loss of revenue suffered by Plaintiffs or the extent of Defendants' profits from the infringement.] [DEFENDANTS: However, as I said earlier statutory damages must bear some relation to the actual damages suffered by Plaintiffs.<sup>26</sup>]

***Authority:*** *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010); *Psihoyos v. John Wiley & Sons, Inc.*, 2012 U.S. Dist. LEXIS 162822, at \*7-9 (S.D.N.Y. Nov. 7, 2012); *All-Star Mktg. Grp., LLC v. Media Brands Co. Ltd.*, 775 F. Supp. 2d 613, 626-27 (S.D.N.Y. 2011).

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<sup>26</sup> *RSO Records, Inc. v. Peri*, 596 F.Supp. 849, 862 (S.D.N.Y.1984) .

[DEFENDANTS ADD THE FOLLOWING INSTRUCTION:

(PLAINTIFFS object to this instruction as unsupported by law or fact. Mitigation of damages has no application to copyright statutory damages, which are fixed by statute. *See, e.g., Purzel Video GmbH v. Smoak*, 11 F. Supp. 3d 1020, 1031 (D. Colo. 2013) (“A copyright plaintiff’s exclusive pursuit of statutory damages invalidates a failure-to-mitigate defense”); *Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 422 (D. N.J. 2005) (mitigation of damages defense not appropriate in copyright infringement case where plaintiffs sought only statutory damages). Further, each of the referenced recordings was uploaded to the ReDigi cloud and offered for sale without authorization, resulting in an infringing reproduction regardless of any subsequent distribution or sale to Plaintiffs or anyone else.

DEFENDANTS position is that this instruction should be allowed. The cases cited by Plaintiffs are inapplicable and not consistent with holdings in this District. Particularly the decision in *Arista Records, Inc. v. Flea World, Inc.*, where the Court’s finding was in large part premised upon the fact that in that case the mitigation defense was expressly “waived by Defendants upon Plaintiffs’ representation that they would be seeking damages”. *See Arista Records, Inc. v Flea World, Inc.*, 356 F Supp 2d 411, 422 [DNJ 2005]. Here no such waiver has occurred. Moreover, recently Courts in this District have overruled objections similar to that of Plaintiffs’ to allow a failure to mitigate defense even where statutory damages are sought instead of actual damages, holding that “because the jury has ‘broad discretion in determining how to award statutory damages and may consider actual damages as a factor in making that determination, a failure to mitigate damages may remain relevant’”. *See e.g. UMG Recordings, Inc. v Escape Media Group, Inc.*, 11 CIV. 8407 TPG, 2015 WL 1873098, at \*8 [SDNY Apr. 23, 2015] (internal citations omitted). Given that Plaintiffs are the cause of the alleged infringement for at least 26% of the sound recordings Plaintiffs are claiming were infringed, it is Defendants’ position that this instruction is particularly relevant and should be considered by the Jury.)

**Mitigation of Damages for Investigator Purchases**

You are instructed that any person who claims damages as a result of an alleged wrongful act of another has a duty under the law to use reasonable diligence under the circumstances to “mitigate,” or minimize, those damages. The law imposes on an injured person the duty to take advantage of reasonable opportunities he may have to prevent the aggravation of his injuries, so as to reduce or minimize the loss or damage.

Defendants contend that Plaintiffs’ investigator’s purchase of 134 tracks from its system was a failure to minimize its alleged damages, that it unnecessarily increased Plaintiffs’ damages and that damages for these tracks should be reduced.

If you find that Plaintiffs investigators purchase of 134 tracks, was a failure of the Plaintiffs to reasonably reduce their possible damages or unnecessarily increases Plaintiffs’ damages, the Plaintiffs may not recover for any item of damage they could have avoided through such reasonable effort. If the plaintiffs unreasonably failed to take advantage of an opportunity to



lessen their damages, you can reduce the recovery for those damages which Plaintiffs' would have avoided had they taken advantage of the opportunity to reduce damages.

Bear in mind that the question whether the plaintiffs acted "reasonably" with respect to the mitigation of damages is one for you to decide, as sole judges of the facts. Although the law will not allow injured plaintiffs to sit idly by when presented with an opportunity to mitigate, this does not imply that the law requires an injured plaintiff to exert himself unreasonably or incur unreasonable expense in an effort to mitigate, and it is defendant's burden of proving that the damages reasonably could have been avoided. In deciding whether to reduce plaintiffs' damages due to some failure to mitigate, therefore, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the Defendants have satisfied his burden of proving that the plaintiff's conduct was not reasonable.

**Authority:** Adapted from 4-77 Modern Federal Jury Instructions-Civil P 77.01]

[PLAINTIFFS ADD THE FOLLOWING INSTRUCTION:

(DEFENDANTS object to this instruction. As this was not a factor listed for consideration it does not need a separate instruction.

PLAINTIFFS include this instruction to guard against any attempt by Defendants to assert their limited financial resources for purposes of reducing statutory damages.)

**Statutory Damages – Ability to Pay Not a Factor**

In determining the proper amount of the award within the statutory range, you need not consider the Defendants' ability to pay those damages.

**Authority:** *Wilén v. Alt. Media Net, Inc.*, 74 U.S.P.Q.2d 1053, 1057 (S.D.N.Y. 2005).]

#### D. NOMINAL DAMAGES

I will now instruct you on the law regarding damages under New York state law for common law infringement of the sound recordings you determine are owned by Plaintiffs [DEFENDANTS: if any] that were recorded prior to February 15, 1972. As I discussed earlier, works recorded before February 15, 1972 are subject to protection under New York state law, not federal copyright law.

[PLAINTIFFS: This Court has previously found that the Defendants are liable for common law copyright infringement of Plaintiffs' pre-1972 sound recordings. You must now consider]

[DEFENDANTS: If you find that Plaintiffs own pre-1972 sound recordings, but you are unable to fix the amount of damages with reasonable certainty based upon evidence,<sup>27</sup> you must consider]

whether to award Plaintiffs nominal damages—that is, symbolic damages—to signify that a wrong was done to Plaintiffs with respect to [PLAINTIFFS: these claims][DEFENDANTS: the number of sound recordings that you determine Plaintiffs own].

Nominal damages are typically one dollar per infringement (that is, per each pre-1972 sound recording that Plaintiffs own or are exclusively licensed and that has been infringed). Because nominal damages are symbolic, it is within your discretion whether to award them or not.

**Authority:** *CAR-FRESHNER Corp. v. Big Lots Stores, Inc.*, 314 F. Supp. 2d 145, 154 (N.D.N.Y. 2004); *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1361, 1363 (S.D.N.Y. 1991); *Brian E. Weiss, P.C. v. Miller*, 166 A.D.2d 283, 283 (1st Dep't 1990).

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<sup>27</sup> Adapted from *Branch v Ogilvy & Mather, Inc.*, 772 F Supp 1359, 1363 [SDNY 1991]

## E. PUNITIVE DAMAGES

Finally, I will instruct you on your option to award punitive damages for Plaintiffs' common law copyright infringement claims involving their pre-1972 sound recordings. If you do not award Plaintiffs nominal damages on their common law copyright infringement claims, you may not award punitive damages.

[PLAINTIFFS: The purpose of punitive damages is to punish the Defendants for egregious conduct and to serve as an example or warning to the Defendants and others not to engage in similar conduct in the future. You may award punitive damages if you find that the conduct of the Defendants evinced a high degree of moral culpability that manifested reckless disregard for Plaintiffs' copyright rights for their pre-1972 sound recordings.]

[DEFENDANTS: Additionally even if you do award Plaintiffs' nominal damages for pre-1972 sound recordings that you have found that they own, you are not required to award punitive damages. The award of punitive damages is an option only if you find that Plaintiffs have proved that there was "moral culpability" on the defendant's part, involving "evil and reprehensible motives" or "gross" fraud.<sup>28</sup>]

If you find that punitive damages are appropriate under this standard, then you must use sound reason in setting the amount of those damages, and it should not reflect bias or prejudice toward any party. In determining the amount of a punitive damage award, you should consider the following factors:

(1) [PLAINTIFFS; whether the conduct of the Defendants was reprehensible, and if so, the level of reprehensibility] [DEFENDANTS: <sup>29</sup>whether there was "moral culpability" on the Defendants' part involving "evil and reprehensible motives", and if so, the level of that evilness and reprehensibility];

(2) the impact on Plaintiffs of the conduct of the Defendants;

(3) the likelihood that the Defendants would repeat the conduct if an award of punitive damages were not made;

(4) the financial condition of the Defendants; and

(5) the relationship of the award of punitive damages to the amount of actual harm suffered by the Plaintiffs. [DEFENDANTS: As to this last factor if you choose to award

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<sup>28</sup> Quoting from Big Seven Music Corp. v Lennon, 554 F2d 504, 513 [2d Cir 1977], citing standard for punitive damages on New York common law copyright.

<sup>29</sup> *Id.*

punitive damages they should bear a reasonable relationship to the actual damage that Plaintiff proved it suffered.<sup>30]</sup>

**Authority:** 4 *MODERN FEDERAL JURY INSTRUCTIONS*, Chapter 77-5 “Punitive Damages”

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<sup>30</sup> *Capitol Records, Inc. v MP3tunes, LLC*, 48 F Supp 3d 703, 730 [SDNY 2014]

## **F. CLOSING INSTRUCTIONS**

I have now concluded my substantive instructions to you on the categories of damages to be determined in this case.

I remind you that under your oath as jurors, you are not to be swayed by fear, prejudice, bias, or sympathy. I also remind you that it would be improper for you to consider any personal feelings you may have about a party's race, national origin, sex, sexual orientation, or age.

Finally, I remind you that during your deliberations, if you want to see any of the exhibits, they will be sent to you in the jury room upon request. A list of the exhibits received in evidence will be forwarded to you in the jury room. If you want any of the testimony read, that can also be done and will occur in open court. But, please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of testimony which you may want.

Your requests for exhibits or testimony—in fact any communication with the court—must be made in writing, signed by your foreperson, and given to one of the marshals. I will respond to any questions or requests you have as promptly as possible, by having you return to the courtroom so I can speak with you in person.

Remember in your deliberations that the dispute between the parties is, for them, no passing matter. They and the court rely upon you to give full and conscientious deliberation and consideration to the issues and evidence before you. By doing that, you completely fulfill your oaths as jurors to well and truly try the issues of this case and render a true verdict.

This concludes my instructions to you. At this time, let me thank each of you for your thoughtful attention throughout this trial. I will ask you to wait for a few moments while I discuss with counsel whether there is anything further that I need to tell you before asking you to begin your deliberations.

Dated: March 11, 2016

By:

COWAN, LIEBOWITZ & LATMAN, P.C.

/s/ Richard S. Mandel

Richard S. Mandel, Esq.  
Jonathan Z. King, Esq.  
1133 Avenue of the Americas  
New York, NY 10036-679904  
Tel: (212) 79-9200  
Fax: (212) 575-0671  
[jzk@cll.com](mailto:jzk@cll.com)  
[rsm@cll.com](mailto:rsm@cll.com)

Attorneys for Plaintiffs Capitol Records, LLC,  
Christian Music Group, Inc. and Virgin Records IR  
Holdings, Inc.

ADELMAN MATZ P.C.

/s/ Gary Philip Adelman

Gary Philip Adelman, Esq.  
Sarah Matz, Esq.  
1173A Second Ave, Suite 153  
New York, NY 10065  
Tel: (646) 650-2207  
Fax: (646) 650-2108  
[g@adelmanmatz.com](mailto:g@adelmanmatz.com)  
[sarah@adelmanmatz.com](mailto:sarah@adelmanmatz.com)

Attorneys for Defendant ReDigi Inc.

/s/ John Ossenmacher

Defendant John Ossenmacher

/s/ Larry Rudolph

Defendant Larry Rudolph