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PLAINTIFFS' MOTIONS *IN LIMINE*

Plaintiffs Capitol Records, LLC, Capitol Christian Music Group, Inc. and Virgin Records

IR Holdings, Inc. (collectively, "Plaintiffs") hereby submit the following motions *in limine*:

- To exclude all evidence or argument at trial relating to Defendants' affirmative defense that the award of statutory damages for copyright infringement should be limited by their "innocent intent," and correspondingly to instruct the jury that Defendants' actions have been found "willful" for purposes of assessing statutory damages.
- To exclude at trial all evidence or argument relating to any purported advice of counsel received by Defendants.
- To exclude at trial all evidence or argument relating to any purported fair use or license defense asserted by Defendants.
- To exclude at trial all evidence and argument seeking to challenge Plaintiffs' ownership of the sound recordings for which it has brought suit.

Each motion is addressed in turn below.

I. DEFENDANTS ARE NOT ENTITLED TO AN "INNOCENT INFRINGEMENT" DEFENSE AND THE JURY SHOULD BE INSTRUCTED THAT DEFENDANTS' INFRINGEMENT HAS BEEN FOUND WILLFUL

Defendants have asserted the affirmative defense that damages should be limited by their "innocent intent." *See* Docket No. 164 at 11 (ReDigi Answer to Second Amended Complaint); Docket No. 163 at 14 (Ossenmacher and Rudolph's Answer to Second Amended Complaint). By this defense, Defendants presumably intend to invoke 17 U.S.C. § 504(c)(2), which provides that the range of statutory damages may be adjusted downwards when the infringer was unaware and had no reason to believe that its acts constituted infringement. However, this defense is barred as a matter of law under 17 U.S.C. §402(d), because the published phonorecords from which the digital audio files were taken bore proper notices that such works were subject to copyright protection.

Additionally, based on the Court's determinations regarding Defendants' guilty state of mind made in its Memorandum and Order dated March 30, 2013 granting Plaintiffs summary judgment (the "Order"), which constitute the law of the case, not only is a defense of "innocent intent" unavailable but the Court's prior determinations mandate the finding that Defendants' infringement was "willful" under the Copyright Act. Thus, Plaintiffs respectfully request that the Court instruct the jury that Defendants' actions have been found "willful" for purposes of assessing statutory damages.

**A. INNOCENT AND WILLFUL INFRINGEMENT UNDER THE
COPYRIGHT ACT**

The standard dollar range for statutory damages set by the Copyright Act is not less than \$750 and not more than \$30,000 per each work infringed. 17 U.S.C. § 504(c). However, that range can be adjusted upwards or downwards, depending on whether the infringements were "willful" or "innocent," respectively.

If an infringement is found to be "innocent," the range of statutory damages shifts to an amount not less than \$200 per work to not more than \$30,000 per work. However, Section 402(d) of the Copyright Act provides that, "[i]f a notice of copyright in the form and position specified by this section appears on the published phonorecord or phonorecords to which a defendant in a copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages[.]" 17 U.S.C. § 402(d). Section 402(d) thus ensures that, "[c]opyright proprietors using the prescribed notice will *absolutely defeat* a defense in an infringement action based on allegedly innocent infringement in mitigation of actual or statutory damages, when such a defense is urged by a defendant who had access to the noticed copies of phonorecords." 2 M. & D. Nimmer, *Nimmer on Copyright*, § 7.02[C][3], at 7-16 – 7-17 (2015 ed.) (emphasis added).

Even where the Section 402(d) bar does not apply, an infringement may be found innocent only where the defendant sustains its burden of showing that it “was not aware and had no reason to believe that [its] acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). “[A] defendant’s burden of proving innocent infringement has been described by one commentator as ‘a heavy one.’” *NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 476 (S.D.N.Y. 2001) (citing 2 William F. Patry, *Copyright Law & Practice* at 1175 (1994)). Use of the “innocent infringement” defense has been generally limited to cases where the defendant proves that it did not know about the plaintiff’s copyright and immediately ceased its infringing conduct upon being made aware of the plaintiff’s copyright claim. *See id.* at 477. *See also, e.g., D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29, 31-32 (2d Cir. 1990) (recent immigrants spoke little or no English and had no reason to know the merchandise they were selling infringed copyrights); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 763 (S.D.N.Y. 1988) (immigrant shopkeepers who spoke little English and never saw any movies had no reason to know the dolls they bought from wholesaler were infringing movie characters), aff’d in relevant part and reversed in part on other grounds, 877 F.2d 1120 (2d Cir. 1989).

Meanwhile, if an infringement is found to be “willful,” the amount of statutory damages may be increased up to \$150,000 per work infringed. An infringement is “willful” if: (1) the defendant was actually aware of the infringing activity, or (2) the defendant’s actions were the result of “reckless disregard” for, or “willful blindness” to, the copyright holder’s rights. *Island Software & Computer Serv. Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).

B. DEFENDANTS’ INNOCENT INFRINGEMENT DEFENSE IS BARRED AS A MATTER OF LAW BY REASON OF PLAINTIFFS’ COPYRIGHT NOTICES

Defendants’ claim of innocent infringement is precluded by Section 402(d), because it is undisputed that Plaintiffs’ publicly released sound recordings— both in physical and digital form

– bore proper copyright notices. Defendant obviously had “access” to (or the opportunity to review) copies of the phonorecords bearing notice. *See* Nimmer, § 702.[C][3], at 7-17 n.25 (“access,” for purposes of Section 402(d), “means that the means existed whereby the defendant *could* have obtained possession of the subject work”; “it is unnecessary to prove that a defendant had physical possession of a particular noticed copy or phonorecord, as long as noticed copies or phonorecords were in circulation available to that defendant”) (emphasis added).

Because Plaintiffs’ legitimate copies of the sound recordings bore the requisite copyright notices, the Section 402(d) bar applies regardless of whether the versions of the digital audio files “resold” on the ReDigi website contained those notices. In fact, the Seventh Circuit considered this very issue in *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005), another digital download case. In *Gonzalez*, the defendant argued that the district court should reduce her statutory damages under Section 504(c)(2). The Seventh Circuit rejected this argument, holding that, because the copyright holders complied with the notice provisions of Section 402(d), and because the infringer had access to the copyright notices on the published works, the infringer was precluded from asserting an innocent infringement defense:

It is undisputed that BMG Music gave copyright notice as required—“on the surface of the phonorecord, or on the phonorecord label or container” (§ 402(c)). It is likewise undisputed that Gonzalez had “access” to records and compact disks bearing the proper notice. She downloaded data rather than discs, and the data lacked copyright notices, but the statutory question is whether “access” to legitimate works was available rather than whether infringers earlier in the chain attached copyright notices to the pirated works. Gonzalez readily could have learned, had she inquired, that the music was under copyright.

Id. at 892. *See also Maverick Recording Co. v. Harper*, 598 F.3d 193, 198-99 (5th Cir. 2010) (holding in digital download case that “[Section] 402(d) forecloses, as a matter of law, [defendant’s] innocent infringer defense” where “Plaintiffs provided proper notice on each of the published phonorecords from which the audio files were taken”).

Likewise here, “no weight shall be given” to Defendants’ request for reduction of statutory damages, 17 U.S.C. § 402(d). Plaintiffs’ inclusion of proper copyright notices on phonorecords precludes Defendants from arguing that they are entitled to reduce statutory damages as innocent infringers.

C. THE COURT’S PREVIOUS RULINGS ALSO PRECLUDE DEFENDANTS’ INNOCENT INFRINGEMENT DEFENSE

Even if the Section 402(d) bar was unavailable, a defense of innocent infringement fails under the “law of the case” doctrine. As outlined below, this Court made numerous express findings in the Order regarding Defendants’ state of mind and active role in infringement.¹ The Court’s prior determinations on summary judgment constitute “the law of the case” and are thus binding on the upcoming trial and the jury instructions attendant thereto. *See, e.g., Spencer v. Int’l Shoppes, Inc.*, 902 F. Supp. 2d 287, 288 n.2 (E.D.N.Y. 2012) (noting that the court’s factual findings made in connection with prior summary judgment decision were “the law of the case”); *Cary Oil Co., Inc. v. MG Refining & Mktg, Inc.*, 257 F. Supp. 2d 751, 764 (S.D.N.Y. 2003) (excluding from trial evidence and argument regarding defenses that were rejected in a previous ruling on summary judgment); *Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 716-17 (S.D.N.Y. 1997) (“The doctrine of law of the case dictates that . . . unreversed factual findings and legal conclusions . . . in the same case should not be disturbed absent changed law, changed

¹Although the Order was issued prior to the joinder of Defendants Ossenmacher and Rudolph and thus technically was directed only to ReDigi, the Court’s findings regarding Defendants’ state of mind were necessarily attributed to Ossenmacher and Rudolph, the individuals who ran the company’s day-to-day affairs. Moreover, Defendants Ossenmacher and Rudolph later agreed to be bound by the Court’s Order when they stipulated to liability for infringement (Docket No. 178). Insofar as they are jointly and severally liable with ReDigi, their level of intent is inseparable from the company’s.

circumstances or clear error”). Many of the Court’s express findings dispose of any claim of innocence at trial, as set forth below.

Direct Infringement. First, in finding ReDigi liable for direct infringement as an “active participant ... in the process of copyright infringement,” the Court ruled that:

- (1) “ReDigi’s founders built a service where *only* copyrighted works could be sold”;
- (2) ReDigi played a “fundamental and deliberate role” in providing the “infrastructure for its users infringing sales”; and
- (3) ReDigi “affirmatively brokered sales by connecting users who are seeking unavailable songs with potential sellers.”

Order at 14.

Contributory Infringement. Second, in finding ReDigi liable for contributory infringement, the Court rejected the defense that it had acted in subjective good faith, holding squarely that, “based on the objective facts, *ReDigi was aware* of its users’ infringement.” Order at 16 (emphasis added). The Court further held that ReDigi “knew or should have known that its service would encourage infringement” based upon the following facts:

- Defendants warned investors that the ReDigi service might be deemed to commit copyright infringement;
- Defendants received a cease-and-desist letter in November 2011 advising ReDigi that its website violated Plaintiffs’ and other record companies’ copyrights;
- Defendants knew that copyright protected content was being sold on the ReDigi website; and
- Defendants had educated themselves on copyright law and understood the likelihood that use of ReDigi's service would result in infringement.

Order at 15.

Vicarious Infringement. Finally, in finding the Defendants liable for vicarious infringement, the Court held that ReDigi (1) had the right and ability to supervise the infringing

activity occurring on the ReDigi website, since it “exercised complete control” over ReDigi’s website’s content, user access, and sales; and (2) was “intimately involved” in supervising the steps involved in making the music available for sale and selling it. Order at 17.

Thus, a defense of innocent infringement would be squarely incompatible with the law of this case. As set forth above, an infringer may be found “innocent” under the Copyright Act only where it “was not aware and had no reason to believe that [its] acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2). Here, where the Court has expressly held that Defendants objectively knew of the infringing activity occurring on ReDigi’s website and had multiple reasons to believe that such infringement was occurring, Defendants are precluded from seeking a reduction in statutory damages. Stated otherwise, the Court’s findings, which remain binding in this litigation, necessarily bar any assertion that Defendants had “innocent intent” within the meaning of the statute.

D. THE LAW OF THE CASE FURTHER WARRANTS AN INSTRUCTION THAT DEFENDANTS’ INFRINGEMENT WAS WILLFUL

The Court’s prior determinations on summary judgment do not just preclude an assertion of “innocent intent,” they affirmatively compel a jury instruction that Defendants’ infringement has been found “willful” for purposes of assessing statutory damages. As noted above, an infringement is “willful” if: (1) the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of “reckless disregard” for, or “willful blindness” to, the copyright holder’s rights. *Island Software*, 413 F.3d at 263. Here, the Court expressly held that Defendants were actually aware of the infringing activity, thereby satisfying the definition of willfulness. *See* Order at 16 (“based on the objective facts, ReDigi was aware of its users’ infringements”). Additionally, the Court held that ReDigi (which of course can only act through those who run it) “knew or should have known that its service would encourage infringement.”

Finally, the Court’s various factual determinations regarding Defendants’ guilty state of mind -- including their warning to investors, receipt of a cease-and-desist letter, knowledge of the availability of copyright-protected content on the ReDigi website, and knowledge of copyright law – establish as a matter of law that Defendants acted in reckless disregard of, or were willfully blind to, Plaintiffs’ rights in the sound recordings. Accordingly, Plaintiffs respectfully request that the Court instruct the jury at trial that it has already determined that Defendants’ infringement was “willful.”

II. DEFENDANTS SHOULD BE PRECLUDED FROM OFFERING EVIDENCE REGARDING THE ADVICE OF COUNSEL

In connection with Plaintiffs’ motion for summary judgment on the issue of liability, Defendants asserted that they had acted in good faith and did not believe they had committed infringement based on, among other things, their having “consulted with attorneys.” Memorandum of Law in Opposition to Capitol Records LLC’s Partial Motion for Summary Judgment (Docket No. 79) at 21. However, Defendants refused to disclose any legal advice they had received on privilege grounds; they did not provide opinion letters in response to document requests specifically calling for such legal opinions and ignored additional requests for such opinions made at depositions and by email. *See* Reply Declaration of Richard S. Mandel in Further Support of Motion for Partial Summary Judgment (Docket No. 88) ¶¶ 2-4 and Exs. 1-2. In its Order granting summary judgment in Plaintiffs’ favor, the Court expressly acknowledged Defendants’ refusal to disclose any legal advice that they had received. Order at 15 (“though ReDigi attempts to use its consultations with counsel as a shield, it is telling that ReDigi declined to reveal any of the advice it received on the subject”).

It is black-letter law that a party may not invoke the attorney-client privilege as both a sword and a shield. “[A] party may not assert that it believed its conduct was lawful, and

simultaneously claim privilege to block inquiry into the basis for the party's state of mind or belief." *Arista Records LLC v. Lime Group LLC*, 2011 WL 1642434, at *2 (S.D.N.Y. April 14, 2011) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). Rather, "[a] party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense." *Vicinanzo v. Brunshwig & Fils, Inc.*, 739 F. Supp. 891, 894 (S.D.N.Y. 1990). Thus, in *Arista Records, supra*, the Court barred the defendant from introducing at trial evidence of its alleged "good faith" based in part on an advice of counsel defense where the defendant had refused to disclose any privileged communications that could have formed the basis of such defense. *Id.* at *2.

The same ruling should apply here. Having refused in discovery to disclose any legal advice received by Defendants that could conceivably form the basis of an advice of counsel defense, Defendants are now precluded from introducing at trial any evidence of their alleged "good faith" that is based upon an advice of counsel defense.

III. DEFENDANTS SHOULD BE PRECLUDED FROM OFFERING EVIDENCE PURPORTING TO SUPPORT FAIR USE AND LICENSE DEFENSES

Defendants' jury instructions purport to include instructions on defenses of fair use and "license." However, neither of these defenses are available or relevant at this remedy stage of the case. The Court already rejected fair use as a viable defense in its summary judgment ruling. See Order at 9-11. Moreover, as the Court pointed out in its August 27, 2015 order concerning the individual defendants' available affirmative defenses, "the Individual Defendants have disavowed attempting to assert those affirmative defenses that the Court had already considered and rejected in its March 30 opinion – namely, defenses based on the first sale doctrine and fair use." Docket No. 175 at 3. And any purported license defense was not even asserted by ReDigi in its initial answer in this case. See Docket No. 6. Accordingly, it has been waived and may not

somehow be revived now by Defendants after they are already liable and all that remains to be tried is damages.

Defendants apparently believe that they are permitted to raise these defenses as grounds for avoiding liability with respect to any recordings that were uploaded to the ReDigi site and offered for sale, but not actually sold, by ReDigi users. However, not only was that precise issue resolved on summary judgment by the Order, but it has also been addressed twice by the Court since that time. The parties set forth their respective positions on this issue in letters submitted in August 2013 in connection with Plaintiffs' motion to amend the complaint in this action. Docket Nos. 188-191. At an August 9, 2013 conference, the Court allowed Capitol to add recordings offered for sale to its amended complaint and rejected ReDigi's argument that tracks offered for sale were not actionable. As the Court stated at that time, its "whole opinion" was predicated on reproduction, so that recordings that were "reproduced into the cloud and then offered for sale" were certainly "fair game" for inclusion in the amended complaint. Docket No. 116 at 2-3.

More recently, the Court reiterated this ruling, stating in its February 17, 2016 endorsed order (Docket No. 186) that "Plaintiffs may introduce evidence about recordings that were uploaded to the ReDigi server and offered for sale. The jury may then decide what, if any, damages are appropriate for such recordings." Defendants somehow interpret the Court's use of the words "if any" to have opened the door for them to insert affirmative defenses that have previously been rejected or waived into this damages trial. However, the simpler and more reasonable explanation of such wording is that Plaintiffs would only be entitled to a damage award if they proved their ownership of a recording offered for sale. Moreover, the Court would not necessarily have been aware at that point that Plaintiffs have elected statutory damages as their sole remedy rather than an award of actual damages or Defendants' profits, where an award

of zero damages would be a possibility.² Given the underlying arguments spelled out by both sides on this issue on multiple occasions, there is no plausible basis on which to conclude that fair use or any other defense remains available on the question of liability with respect to recordings concededly reproduced and then offered for sale by ReDigi users.

Defendants continue to insist, and apparently seek to argue to the jury, that merely storing recordings on the ReDigi server is a fair use for which no damages should be awarded. However, Defendants simply ignore the fact that Plaintiffs do not seek damages with respect to recordings that were only stored on the ReDigi site, but for recordings that were uploaded to the site and then offered for sale. The Court's fair use analysis on summary judgment – that ReDigi's purposes are commercial, that its service “transforms” nothing, and that the entire creative work is appropriated in a fashion that devalues the market for legitimate digital distribution – applies regardless of whether a track offered for sale is ultimately sold. Accordingly, Defendants should be precluded from arguing fair use, license or any other defense with respect to recordings that were reproduced within the meaning of the Order and then offered for sale.

IV. DEFENDANTS SHOULD BE PRECLUDED FROM OFFERING EVIDENCE CHALLENGING PLAINTIFFS' OWNERSHIP OF THE INFRINGED RECORDINGS

Plaintiffs attempted to engage Defendants in a dialogue about ownership with the goal of reaching a stipulated universe of recordings that could be presented to the jury for a ruling on an appropriate damage award. However, clinging to the faulty theory addressed above, Defendants

²Such an award would not be possible with respect to statutory damages once a violation has been established, as the proscribed range of statutory damages does not allow for such a possibility. See 17 U.S.C. § 504(c).

insisted that they were only willing to discuss stipulations with respect to the limited group of recordings that were actually sold (not just offered for sale), provided such sales were made to parties other than Capitol's paralegal. Moreover, Defendants were only willing to consider stipulations with respect to even this grossly under-inclusive universe if Plaintiffs agreed to limit their claims solely to such recordings and to forego any relief with respect to any other recordings, including the much larger group of recordings that were concededly reproduced and offered for sale by ReDigi users.

Defendants insisted it was too much work to go through questions of ownership with respect to such a large group of recordings and accordingly refused to address whether they have any actual basis to dispute any particular recordings. Because Defendants' position would end up potentially wasting large chunks of trial time with testimony that should not be necessary concerning matters that are not legitimately in dispute, Plaintiffs have brought this motion to force Defendants to confront the actual evidence that exists and dispose of ownership issues in advance of trial. The accompanying Declaration of Alasdair J. McMullan sets out in detail the proof supporting Plaintiffs' claims of ownership, while referencing the specific trial exhibits submitted by Plaintiffs as part of their pre-trial filings. Because the record confirms that Plaintiffs own the recordings they say they do, all of which were indisputably reproduced by ReDigi users and offered for sale or sold to other ReDigi users, the Court should resolve this issue in advance of trial to permit a more efficient and manageable trial process involving a much more limited number of exhibits and testimony.

Under the Copyright Act, the owner of an exclusive right under copyright is entitled to bring suit for any infringement of that right committed while it is the owner of such right. 17 U.S.C. § 501(b). A certificate of registration constitutes prima facie evidence of the valid

ownership of a copyright. *See Rogers v. Koons*, 960 F.2d 301, 306 (2d Cir. 1992) (citing 17 U.S.C. § 410(c)). An assignee of a valid copyright who is not named on the registration as the owner has the additional burden of proving valid chain of title because the registration certificate does not itself evidence his right to claim through the original copyright claimant. *See, e.g., Int'l Media Films, Inc. v. Lucas Entm't, Inc.*, 703 F. Supp. 2d 456, 463 (S.D.N.Y. 2010). Once a plaintiff has offered valid evidence establishing ownership (and/or chain of title), the burden shifts to the defendant to establish the invalidity of plaintiffs' alleged title. *See, e.g., In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 829 n. 11 (S.D.N.Y. 1991).

Plaintiffs have offered evidence through the accompanying McMullan Declaration detailing their ownership of the recordings at issue as of the time of Defendants' infringements. They have included certificates of registration for each of the recordings, and have spelled out in detail how the particular plaintiff entity traces its claim with relation to the entity named in the certificates, including through appropriate name change documents, assumed name filings, agreements of merger and other agreements and documentary evidence. They have done the same with respect to the pre-1972 recordings on which they bring their state law claim. Defendants should not be permitted to ignore this evidence based on their unjustified view that Plaintiffs can only recover with respect to culminated sales transactions. Nor should they be permitted to waste valuable trial time requiring Plaintiffs to go through voluminous evidence because they don't feel like making the necessary effort to address such evidence as part of the pre-trial process. If Defendants have legitimate grounds to challenge Plaintiffs' rights, they should be required to come forward with such evidence now. Because they cannot do so, and Plaintiffs do in fact enjoy the right to enforce their rights with respect to the recordings on which

they seek to recover damages, the Court should resolve the ownership issue in Plaintiffs' favor as part of the pre-trial motions and instruct the jury accordingly at trial.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motions in *limine*: (1) precluding Defendants from introducing any evidence or argument at trial regarding the affirmative defense of innocent infringement and further instructing the jury that Defendants' infringement was willful; (2) precluding Defendants from introducing any evidence or argument at trial regarding their alleged "good faith" based upon an advice of counsel defense; (3) precluding Defendants from introducing any evidence or argument at trial regarding an alleged fair use or consent defense; and (4) precluding Defendants from introducing any evidence or argument at trial challenging Plaintiffs' ownership of the recordings at issue.

Dated: New York, New York
March 11, 2016

Respectfully submitted,

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