

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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DECLARATION OF ALASDAIR J. McMULLAN, ESQ.

ALASDAIR J. McMULLAN, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am Senior Vice President of Universal Music Group (“UMG”). In my capacity as in-house counsel for UMG, I manage and supervise litigation for UMG and its affiliates, including Plaintiff Capitol Records, LLC (formerly Capitol Records, Inc.) (“Capitol”) and Capitol Christian Music Group, Inc. (“CCMG”). Through my employment at UMG and before that at EMI Music North America (“EMI”) since 1995, I am familiar with the books and records of EMI and its record label affiliates, such as Capitol, including documents such as copyright certificates and agreements (including those referenced in this Declaration) pursuant to which Capitol and CCMG possess rights in the sound recordings at issue in this litigation. I submit this declaration in support of Plaintiffs’ motion *in limine* excluding Defendants from challenging Plaintiffs’ ownership of the sound recordings at issue in this case. Reference will be made in this motion to Plaintiffs’ Trial Exhibits, which have been separately submitted to the Court in conjunction with today’s pretrial filings, including the motions *in limine*. If called upon to do so, I could and would competently testify to the matters stated herein.

2. Plaintiffs' Trial Exhibit 39 contains a summary chart listing the 489 sound recordings for which Plaintiffs seek an award of statutory damages under the U.S. Copyright Act. According to Plaintiffs' Trial Exhibits 22-23, 30-32 and 35, summary charts provided by Defendants in discovery, each of the sound recordings for which Plaintiffs seek an award of damages under the U.S. Copyright Act was uploaded to the ReDigi Cloud and offered for sale or sold by a ReDigi user. Plaintiffs have themselves offered each of these 489 recordings for sale as individual tracks available online through sources such as iTunes.

3. Plaintiffs' Trial Exhibit 122 is a summary chart listing the 55 pre-1972 sound recordings for which Plaintiff Capitol seeks to recover under New York common law. According to the summary charts referenced above that were produced in discovery by Defendants (Plaintiffs' Trial Exhibits 22-23, 30-32, 35), each of the recordings for which Plaintiffs seek an award of damages under New York common law was uploaded to the ReDigi Cloud by a ReDigi user and offered for sale or sold to other ReDigi users. Capitol has itself offered each of the 55 recordings for sale as individual tracks available online through sources such as iTunes.

Ownership of the Recordings in Plaintiffs' Trial Exhibit 39 (Federal Copyright Claim)

Recordings Owned by Capitol

4. Capitol owned the copyright or the exclusive right (by way of agreement) with respect to each of the recordings listed as numbers 1-418 in Plaintiffs' Trial Exhibit 39 as of the time of Defendants' infringement and continues to own the right to sue for past infringement with respect to each such recording.

5. Plaintiffs' Trial Exhibit 40 contains copies of the certificates of registration for each of the recordings listed as numbers 1-38 in Plaintiffs' Trial Exhibit 39. In each instance, the

registration was in the name of Plaintiff Capitol Records, LLC as of the time of Defendants' infringement.

6. Plaintiffs' Trial Exhibit 41 contains copies of the certificates of registration for each of the recordings listed as numbers 39-116 in Plaintiffs' Trial Exhibit 39. In each of these instances, the registration was in the name of Capitol Records, Inc. or a specifically identified "division of Capitol Records, Inc." as of the time of Defendants' infringement. The current plaintiff, Capitol Records, LLC, formerly was known as Capitol Records, Inc. A copy of the 2008 Certificate of Conversion to Limited Liability Company showing the name change from Capitol Records, Inc. to Capitol Records, LLC is contained in Plaintiffs' Trial Exhibit 42. Certain of the registrations in Plaintiffs' Trial Exhibit 41 do not list any of the specific recordings contained on the album that is the subject of the registration. Accordingly, Plaintiffs' Trial Exhibit 43 contains copies of the actual albums or label copy for the albums covered by the registrations for recordings 40, 57, 72, 74, 76, 80, 81, 84-88, 96, 99 and 103 in Plaintiffs' Trial Exhibit 39, showing that the recording in question is included on the album that is the subject of the registration. In addition, recordings 45 ("All Lifestyles") and 57 ("Three MC's And One DJ") in Plaintiffs' Trial Exhibit 39 are not listed among the recordings covered by the certificate of registration for the albums "To The Boroughs" and "Hello Nasty" registered by Capitol (CAP 1675-76). However, a printout from the U.S. Copyright Office website showing the information for these registrations confirms that both of the recordings in question do in fact appear on such albums and are covered by the registrations for such albums. Relevant pages from the U.S. Copyright Office website reflecting such ownership appear as pages CAP 8718-8721 within Plaintiffs' Trial Exhibit 43.

7. Recordings 117-118 in Plaintiffs' Trial Exhibit 39 were registered in the name of "Capitol Records" as of the time of Defendants' infringement, as reflected on the registrations contained in Plaintiffs' Trial Exhibit 44. Capitol Records is used as a shorthand and is also a d/b/a for the plaintiff corporate entity Capitol Records, LLC.

8. Recordings 119-129 in Plaintiffs' Trial Exhibit 39 were registered as of the time of infringement in the name of fictitious business names (or d/b/a's) of divisions or record labels through which Capitol conducted business. Copies of such registrations are contained in Plaintiffs' Trial Exhibit 44. Copies of the relevant assumed name filings covering names Virgin Records, Capitol Records Nashville, Capitol Latin and EMI Records that appear in the registrations for recordings 119-128 are contained in Plaintiffs' Trial Exhibit 45. Recording 129 was registered in the name of Suburban Noize Records, which was a joint developed label pursuant to an agreement between Capitol and the artist, Kottonmouth Kings. A copy of relevant portions of this agreement, which vests copyright ownership of the recordings in Capitol, is contained in Plaintiffs' Trial Exhibit 48. The registrations covering recordings 128-129 in Plaintiffs' Trial Exhibit 39 do not list the recordings contained on the album that is the subject of the registration. Accordingly, Plaintiffs' Trial Exhibit 47 contains label copy for the albums covered by such registrations showing that the recordings in question are included on the albums that are the subject of the registrations.

9. Recordings 130-188 in Plaintiffs' Trial Exhibit 39 were registered as of the time of Defendants' infringement in the names of entities that merged into Capitol. Recordings 130-166 were registered in the name of Virgin Records America, Inc. (or Virgin Records, a d/b/a of Capitol, as a shorthand for Virgin Records America, Inc.). Copies of the registrations for such recordings are contained in Plaintiffs' Trial Exhibit 49. Virgin Records America, Inc. merged

into Capitol Records, LLC in August 2011. A copy of the Certificate of Merger reflecting such merger is contained in Plaintiffs' Trial Exhibit 50. The registrations covering recordings 144-145, 147, 150-151 and 156-162 in Plaintiffs' Trial Exhibit 39 do not list the recordings contained on the albums that are the subject of the registration. Accordingly, Plaintiffs' Trial Exhibit 51 contains copies of the actual albums or the label copy for the albums covered by the registrations for recordings 144-145, 147, 150-151 and 156-162, showing that the recordings in question are included on the albums that are the subject of the registrations. Recording 167 was registered as of the time of Defendants' infringement in the name of Forefront Communications (an assumed name of CCMG), but the copyright was assigned to Virgin Records America, Inc., as referenced in the January 1, 2005 agreement between Virgin Records America, Inc. and Stacie Orrico contained in Plaintiffs' Trial Exhibit 52.

10. Recordings 168-170 in Plaintiffs' Trial Exhibit 39 were registered in the name of Charisma Records America, Inc. as of the time of Defendants' infringement. Copies of the registrations for such recordings are contained in Plaintiffs' Trial Exhibit 53. Charisma Records America, Inc. merged into Virgin Records America, Inc. in March 2004, as reflected by the Agreement and Plan of Merger contained in Plaintiffs' Trial Exhibit 54. As noted in paragraph 9 above, Virgin Records America, Inc. merged into Capitol Records, LLC in August 2011. The registration for recordings 168-169 does not list the recordings contained on the album "The Cross of Changes" that is the subject of such registration. Accordingly, Plaintiffs' Trial Exhibit 55 contains a copy of the actual album showing that the recordings in question are included on the album that is the subject of the registration.

11. Recordings 171-183 in Plaintiffs' Trial Exhibit 39 were registered in the name of "Astralwerks, division of Caroline Records" as of the time of Defendants' infringement. Copies

of the registrations covering such recordings are included in Plaintiffs' Trial Exhibit 56.

Astralwerks, which is an assumed name of Capitol (as reflected by the assumed name filing contained in Plaintiffs' Trial Exhibit 56), was a division of Caroline Records, Inc., which merged into Capitol Records, Inc. (now Capitol Records, LLC) in August 2011 by virtue of the same merger as Virgin Records America, Inc. reflected in Plaintiffs' Trial Exhibit 50.

12. Recording 184 in Plaintiffs' Trial Exhibit 39 was registered in the name of International Record Syndicate, Inc. as of the time of Defendants' infringement. A copy of such registration is contained in Plaintiffs' Trial Exhibit 64. Seventh Avenue Music, Inc. purchased all the assets of International Record Syndicate, Inc. in March 1992, as reflected in the relevant portions of the Purchase Agreement contained in Plaintiffs' Trial Exhibit 65. Seventh Avenue Music, Inc. merged into Capitol Records, Inc. in March 1993, as reflected by the Certificate of Merger contained in Plaintiffs' Trial Exhibit 66. Because the registration for recording 184 ("It's The End Of The World As We Know It (And I Feel Fine)") does not list the recordings contained on the album ("Document"), Plaintiffs' Trial Exhibit 67 contains a copy of the actual album "Document" showing that recording 184 was included on the album covered by the registration for such album.

13. Recordings 185-188 in Plaintiffs' Trial Exhibit 39 were registered in the name of Chrysalis Records, Inc. as of the time of Defendants' infringement. Copies of such registrations are contained in Plaintiffs' Trial Exhibit 68. Chrysalis Records, Inc. merged into Capitol Records, Inc. in March 2007, as reflected by the Certificate of Merger contained in Plaintiffs' Trial Exhibit 69. The registrations for recordings 187-188 do not list the recordings contained on the albums that are the subject of the registrations. Accordingly, Plaintiffs' Trial Exhibit 70 contains copies of the label copy for the albums covered by the registrations for recordings 1879-

188, showing that the recordings in question were included on the albums that are the subject of the registrations.

14. With respect to each of the recordings listed as numbers 189-418 in Plaintiffs' Trial Exhibit 39, Capitol was the exclusive U.S. licensee as of the time of infringement and continues to own the right to sue for past infringements. Recordings 189-196 were exclusively licensed directly to Capitol (or one of its divisions/dba's or an entity that merged into it) from an unrelated third party copyright owner. Copies of the registrations for such recordings are contained in Plaintiffs' Trial Exhibit 71. Copies of the relevant portions of such agreements granting such rights are contained in Plaintiffs' Trial Exhibits 72-73 and 75-78. Plaintiffs' Trial Exhibit 74 contains a copy of a fictitious business name filing showing that EMI Music North America (the named licensee on certain of the exclusive licenses referenced in this paragraph) is a fictitious business name of Capitol Records, LLC. The registration covering recordings 195-196 do not list the recordings contained on the album ("Fly Like An Eagle") that is the subject of the cited registration on which Capitol relies. Accordingly, Plaintiffs' Trial Exhibit 79 contains a copy of the actual album covered by such registration showing that recordings 195-196 are included on the album that is the subject of the registration.

15. Recordings 197-353 in Plaintiffs' Trial Exhibit 39 were all registered in the names of foreign affiliates of Capitol as of the time of Defendants' infringement. Copies of the registrations for such recordings are contained in Plaintiffs' Trial Exhibit 80. Capitol obtained an exclusive U.S. license to such works from the listed copyright owner by virtue of a written intra-company license agreement, referred to internally as the Matrix Exchange Agreement, or "MEA." Copies of relevant portions of the June 1, 2003 and later February 28, 2012 version of the MEA (along with the related side agreements between EMI Records Ltd. and Virgin Records

Ltd.) are contained in Plaintiffs' Trial Exhibit 81. Recording no. 310 lists The Gramophone Company, Ltd. as the copyright owner. That entity changed its name to EMI Records Limited in 1973, as reflected by the Certificate of Incorporation on Change of Name contained in Plaintiffs' Trial Exhibit 84. The entity that is listed as the copyright owner with respect to recordings 203-207, Virgin Records Sweden, merged into EMI Music Sweden (the listed licensor under the MEA), in 2002, as reflected by the documents contained in Plaintiffs' Trial Exhibit 82. The registrations covering recordings 228, 269-278, 310, 322-24 and 352 in Plaintiffs' Trial Exhibit 39 do not list the recordings contained on the album that is the subject of the registration. Accordingly, Plaintiffs' Trial Exhibit 83 contains copies of the actual albums or label copy for the albums covered by the registration for recordings 228, 269-278, 310, 322-24 and 352, showing that these recordings are included on the albums that are the subject of the registrations.

16. Recordings 354-418 in Plaintiffs' Trial Exhibit 39 were exclusively licensed to Capitol by an affiliated foreign company by virtue of the MEA as of the time of Defendants' infringement. Copies of the registrations for such recordings are contained in Plaintiffs' Trial Exhibit 85. Copies of relevant portions of the underlying agreements by which Capitol's licensor obtained rights in the recordings are contained in Plaintiffs' Trial Exhibits 87-98. The registrations covering recordings 354, 376-378, 387-389 and 399-412 do not list the recordings contained on the album that is the subject of the registration. Accordingly, Plaintiffs' Trial Exhibit 86 contains copies of the actual albums or the label copy for the albums covered by the registrations for recordings 354, 376-378, 387-389 and 399-412, showing that the recording in question is included on the album that is the subject of the registration.

Recordings Owned by CCMG

17. CCMG owns the copyright or the exclusive right (by way of agreement) with respect to each of the recordings listed as numbers 419-489 in Plaintiffs' Trial Exhibit 39, and either owned such right as of the time of infringement or has acquired the copyright, along with the right to sue for past infringements, from the entity that owned such rights as of the time of infringement.

18. Recording 419 was registered in the name of EMI Christian Music Group, Inc. as of the time of Defendants' infringement. A copy of the registration for such recording is contained in Plaintiffs' Trial Exhibit 99. EMI Christian Music Group, Inc. changed its name to Capitol Christian Music Group, Inc. as of August 2013, as reflected by the Certificate of Amendment contained in Plaintiffs' Trial Exhibit 100.

19. Recordings 420-427 in Plaintiffs' Trial Exhibit 39 were registered in the name of the BEC and Tooth & Nail record labels as of the time of Defendants' infringement. Copies of such registrations are contained in Plaintiffs' Trial Exhibit 101. The BEC and Tooth & Nail record labels were originally owned by Brandon Ebel and his companies before all such assets were contributed in 2001 to a new company named Tooth & Nail LLC ("Tooth & Nail") in which Plaintiff Virgin Records IR Holdings, Inc. obtained a 50% interest. A copy of the relevant portions of the limited liability company agreement reflecting that transaction is contained in Plaintiffs' Trial Exhibit 102. Tooth & Nail continued to use the Tooth & Nail and BEC names as record labels for its artists, including those reflected on the registrations for recordings 420-427. Virgin Records IR Holdings, Inc. eventually obtained 100% ownership of Tooth & Nail, obtaining an additional 25% interest in 2005 and the last remaining 25% interest in 2013, as reflected in the relevant portions of the agreements contained in Plaintiffs' Trial Exhibits 104 and

105 respectively. In February 2013, Tooth & Nail assigned its copyrights as well as the right to sue for past infringements in virtually all of Tooth & Nail's sound recordings, including each of those listed in numbers 420-427 in Plaintiffs' Trial Exhibit 39, to EMI Christian Music Group, Inc. (which as referenced in paragraph 18 above is now known as CCMG). A copy of the February 2013 copyright assignment is contained in Plaintiffs' Trial Exhibit 106. The registration for recording no. 427 does not list the recordings contained on the album covered by such registration. Accordingly, Plaintiffs' Exhibit 107 contains label copy for such album showing that the recording in question ("We're At The Top of the World") was included on the album ("Emotion Is Dead") covered by such registration.

20. Recordings 428-458 in Plaintiffs' Trial Exhibit 39 were registered in the name of Sparrow Records as of the time of Defendants' infringement. Copies of those registrations are contained in Plaintiffs' Trial Exhibit 108. Sparrow Records is an assumed name of EMI Christian Music Group, Inc. (now CCMG), as reflected by the assumed name filing contained in Plaintiffs' Trial Exhibit 109. The registration for recording no. 439 does not list the "Oh, Happiness" recording among the titles contained on the "Church Music" album that is the subject of the registration. However, Plaintiffs' Trial Exhibit 110 contains a copy of the actual "Church Music" album that was submitted for registration, showing that this recording was included on the album as registered.

21. Recordings 459-487 in Plaintiffs' Trial Exhibit 39 were registered in the name of The Forefront Communications Group, Inc. or Forefront Records as of the time of Defendants' infringement. Copies of those registrations are contained in Plaintiffs' Trial Exhibit 111. The Forefront Communications Group, Inc. merged into EMI Christian Music Group, Inc. (now CCMG) in 2007, as reflected by the Agreement of Merger contained in Plaintiffs' Trial Exhibit

112, and Forefront Records was an assumed name of EMI Christian Music Group, Inc. (now CCMG), as reflected by the assumed name filing contained in Plaintiffs' Trial Exhibit 113.

22. Recording 488 in Plaintiffs' Trial Exhibit 39 was registered in the name of Jubilee Communications, Inc. as of the time of Defendants' infringement. A copy of such registration is contained in Plaintiffs' Trial Exhibit 114. Jubilee Communications, Inc. merged into EMI Christian Music Group, Inc. (now CCMG) in 2007 by virtue of the same merger referenced above with respect to The Forefront Communications Group, Inc., as reflected in Plaintiffs' Trial Exhibit 112. The registration for recording 488 does not contain the recordings listed on the album covered by such registration. Accordingly, Plaintiffs' Trial Exhibit 115 contains a copy of the label copy for such album showing that recording 488 is included on the album that is the subject of the registration.

23. Recording 489 was originally registered in the name of Word, Inc., as reflected by the registration contained in Plaintiffs' Trial Exhibit 116. However, as reflected by the record of assignment filed in the Copyright Office and contained in Plaintiffs' Trial Exhibit 117, the copyright in the album covered by such registration was assigned by Word, Inc. to Amy Grant in 1987. Amy Grant granted an exclusive license to EMI Christian Music Group, Inc. (now CCMG) in 2007 covering the recordings on the "Straight Ahead" album. A copy containing relevant portions of the license agreement is contained in Plaintiffs' Trial Exhibit 118. The registration for the "Straight Ahead" album shown in Plaintiffs' Trial Exhibit 116 does not list the recordings contained on that album. Accordingly, Plaintiffs' Trial Exhibit 119 contains a copy of the actual "Straight Ahead" album showing that recording 489 ("Angels") was included on such album.

Ownership of the Recordings in Plaintiffs' Trial Exhibit 122 (Common Law Claim)

24. Capitol also owned the exclusive rights (by way of agreement) with respect to each of the pre-1972 sound recordings listed in Plaintiffs' Trial Exhibit 122 as of the time of Defendants' infringement, and has the right to enforce the common law copyrights in such recordings.

25. Capitol owns such common law rights by way of direct agreements with the artists (or their companies or representatives) with respect to recordings 1, 12-26, 28-32 and 43-55. Copies of relevant portions of such agreements concerning these rights are contained in Plaintiffs' Trial Exhibits 123 (Bob Seger – recording 1); 124 (Dean Martin – recording 12); 125 (Frank Sinatra – recordings 13-16), 126 (George Harrison, Beatles – recordings 17, 54-55); 127 (John Lennon/Plastic Ono Band – recordings 18-26, 28-31); 129 (Steve Miller Band—recording 32); 131 (The Band – recordings 43-45); and 132 (The Beach Boys – recordings 46-53).

26. Capitol owns such common law rights by way of exclusive licenses from affiliated foreign companies under the MEA (as described in paragraph 16 above) with respect to recordings 2-11, 27 and 33-42 in Plaintiffs' Exhibit 22. Copies of relevant portions of such agreements concerning the foreign affiliates' underlying rights in these recordings are contained in Plaintiffs' Trial Exhibits 91 (David Bowie – recordings 2-11); 128 (Edith Piaf – recording 27); and 130 (members of band Ten Years After – recordings 33-42).

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON MARCH 10, 2016 AT NEW YORK, NEW YORK.



ALASDAIR J. McMULLAN