UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC,	:	12 Civ. 0095 (RJS)
Plaintiff,	:	
-against-	:	
REDIGI INC.,	:	
Defendant.	:	

REPLY MEMORANDUM IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COWAN, LIEBOWITZ & LATMAN, P.C.
1133 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-6799
(212) 790-9200

Attorneys for Plaintiff
CAPITOL RECORDS, LLC

TABLE OF CONTENTS

I. REDIGI VIOLATES CAPITOL'S REPRODUCTION RIGHT

A. ReDigi Admits Violating Capitol's Reproduction Right

ReDigi admits that "copying ... in the ReDigi service occurs when a user uploads music files to the ReDigi Cloud ... or downloads music files from the user's Cloud Locker." ReDigi Br. at 9. Those copies are the bedrock of ReDigi's infringing "marketplace," for without them, ReDigi and its users would have nothing to sell or buy, and ReDigi would not earn its handsome "transaction fee" for each copy peddled. Unless ReDigi can identify a plausible defense for this copying, it is an infringer who must be enjoined. It offers no such defense.

Rather than acknowledge what its service really does, ReDigi recasts itself as a benign "cloud" storage medium. It dissects its service into isolated components, where users upload and download songs to "space shift" for "personal, non-commercial" use, and "pointers" are "modified in the cloud" so that "no copying occurs during a resale transaction." ReDigi Br. at 3, 10, 12, 14. However, the very essence of ReDigi, touted in all its advertising, is to be "the world's first and only online marketplace for used digital music" that helps you "SELL the music you don't listen to. BUY previously listened to songs at used prices." See McMullan Decl. Ex. B. It was created not to provide free storage, but to effect "resale transactions," which are dependent upon a seller's upload and a buyer's download. It is this integrated scheme of infringement – not cloud storage or space shifting – that requires immediate redress.

B. ReDigi's Fair Use Claim Is Not Colorable

The fair use defense hinges on "whether the copyright laws's goal of promoting the Progress of Science and Useful Arts would be better served by allowing the use than by preventing it." Castle Rock Entm't, Inc. v. Carol Publ'g Group, 150 F.3d 132, 141 (2d Cir. 1998). It permits certain uses of a copyrighted work "for purposes such as criticism, comment,

news reporting, teaching ... scholarship, or research." 17 U.S.C. § 107. While the stated categories are only illustrative, they "should not be ignored," and a Court should consider whether a use falls within or "is similar to" any of those listed in the statute. See Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 78 (2d Cir. 1997).

Nothing ReDigi does satisfies these broader purposes. By simply duplicating sound recordings to undersell Capitol's legitimate retailers, ReDigi undermines the incentives for artistic creativity. Its commercial consignment shop is far removed from the kinds of uses, such as "criticism" or "scholarship," that add to the store of creative works. ReDigi is a commercial interloper whose conduct is not of the type that warrants serious consideration as fair use.

Rather than justify why its "marketplace" use is fair, ReDigi indulges in the fiction that it only provides "space shifting" where copying is "for personal, non-commercial use." ReDigi Br. at 10. This case has nothing to do with non-commercial storage of one's own files, but rather ReDigi's commercial enterprise of managing and profiting from sales transactions. The only "shifting" that takes place is of infringing music files from one user to another.

Not surprisingly, ReDigi does not even discuss the four fair use factors set forth in § 107. The first concerns "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). ReDigi's use is quintessentially commercial, as it earns a transaction fee on every sale. See UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000). Nor is ReDigi's duplication of Capitol's recordings "transformative." By offering interchangeable replicas of Capitol's sound recordings, ReDigi's copies "merely supercede" Capitol's works and add nothing "new, with a further purpose or different character." See Castle Rock, 150 F.3d at 141; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001) ("downloading MP3 files does not transform

the copyrighted work"); MP3.com, Inc., 92 F. Supp. 2d at 351 (copied MP3 recordings added no "new aesthetics, new insights and understandings").

The second statutory factor, "the nature of the copyrighted work," 17 U.S.C. § 107(2), disfavors fair use where creative works such as sound recordings are at issue. See, e.g., Napster, 239 F.3d at 1016; MP3.com, Inc., 92 F. Supp. 2d at 351-52 (sound recordings are "close to the core of intended copyright protection" and "far removed from the more factual or descriptive work more amenable to fair use"). And, where ReDigi duplicates entire recordings wholesale, it fails to satisfy the third fair use factor of "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). See MP3.com, Inc., 92 F. Supp. 2d at 351-52 (entire recordings taken).

Finally, ReDigi has a direct negative effect on "the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). The delivery of pristine digital recordings at "used" prices supplants the market for legitimate digital distribution. See Napster, 239 F.3d at 1017 ("deleterious effect on the present and future digital download market" defeats fair use).

C. The Essential Step Doctrine Does Not Apply

The "essential step" defense permits owners of a "computer program" to make "another copy or adaptation," provided "that such new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." 17 U.S.C. § 117(a). Because loading software into a computer necessarily entails making a copy, the section ensures that the owner of a computer program has a "legal right to copy it to that extent which will permit its use by that possessor." See 2 M. & D. Nimmer, Nimmer on Copyright § 8.08[B][1], at 8-134.3 (hereinafter "Nimmer") (quoting

legislative history). As is facially apparent, § 117(a) does not apply to copying sound recordings for resale.

First, sound recordings are not "computer programs": "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101. They are not akin to software, which instructs a computer to execute functions to bring about a result, but rather artistic works available in various formats. The fact that the recordings ReDigi copies are captured as MP3 files has no bearing on their defined status. "'Sound recordings' are works that result from the fixation of a series of musical ... sounds ... regardless of the nature of the material objects ... in which they are embodied." 17 U.S.C. § 101. Cf. Recording Indus. Ass'n of Am. v. Charter Communications, Inc., 393 F.3d 771, 773 (8th Cir. 2005) (referring to MP3 files as "a compressed digital format" of sound recordings). The purpose of § 117 was to permit owners of software to use that software functionally, not to permit duplication of artistic works simply because they are captured in a digital form.

Second, the copies made by ReDigi and its users are decidedly not "created as an essential step in the utilization" of the recordings and used "in no other manner." They are used for the express purpose of resale. Section § 117 only applies to copies made for the computer program owner's own "internal use" and not to those that are distributed, transferred or made accessible to unrelated third parties. See, e.g., Centrifugal Force, Inc. v. Softnet Communications, Inc., No. 08 Civ. 5463 (CM), 2011 WL 744732, at *6 (S.D.N.Y. Mar. 1, 2011) (§ 117 provides defense for "software user that makes a copy or adaptation of a program in their own use of that program") (emphasis added); Practiceworks, Inc. v. Professional Software Solutions Of Illinois, Inc., 72 U.S.P.Q.2d 1691, 1696 (D. Md. 2004) (§ 117(a) applies only to "uses that are internal, not external"); Expediters Int'l of Wash., Inc. v. Direct Line Cargo Mgmt.

Servs., Inc., 995 F. Supp. 468, 478 (D.N.J. 1998) (§ 117 exemption only applies to copy made for internal use and not for distribution); ISC--Bunker Ramo Corporation v. Altech, Inc., 765 F. Supp. 1310, 1332 (N.D. Ill. 1990) (§ 117 "gives the lawful owner of copyrighted software the limited right to make certain types of copies of the software for its own internal use on its own machines"); Apple Computer, Inc. v. Formula Int'l, Inc., 594 F. Supp. 617, 622 (C.D. Cal. 1984) (§ 117 exemption only permits the "owner-user" to make a copy for its own "internal use" and that copy "cannot be made accessible to others").

In the context of "adaptation," subject to the same restrictions as copying, the Second Circuit explained that § 117(a) "was intended to apply to modifications for internal use, as long as the adapted program is not distributed in an unauthorized manner." See Aymes v. Bonnelli, 47 F.3d 23, 26 (2d Cir. 1995). In determining that a defendant did qualify for the exemption, the Court noted that there was no evidence that the modified programs were "distributed, transferred, or used for any purpose other than [defendant's] own internal business needs." Id. at 27. Here, of course, the files are copied for the express purpose of resale, so § 117(a) cannot apply.

II. REDIGI VIOLATES CAPITOL'S DISTRIBUTION RIGHT

ReDigi argues that digital music files are not "copies" subject to Capitol's distribution right. However, "the courts have not hesitated to find copyright infringement by distribution in cases of ... electronic transmission of copyrighted works." Arista Records, LLC v. Greubel, 453 F. Supp. 2d 961, 968 (N.D. Tex. 2006) (citing cases). The Supreme Court found in New York Times Co. v. Tasini, 533 U.S. 483, 498 (2001), that defendant's sale of copyrighted articles through its NEXIS database violated the plaintiffs' distribution right.[1] As a sound recording is

[1]ReDigi's statement that the "principal distribution" in Tasini involved CDs and discs is wrong. Nothing in the decision indicates that online sale of NEXIS articles, which was found to violate the distribution right, was less significant than any other violation. Equally erroneous is

fixed in a material object (a computer hard drive) both before and after the transaction between users occurs, the transfer of the electronic file constitutes an infringing distribution of a copy. See London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 170-174 (D. Mass. 2008).

ReDigi alternatively claims that if there has been a distribution, it is protected under the first sale doctrine. However, it does not follow from the fact that a "copy" has been distributed that it is the "particular copy" owned by the seller which has been transferred to the buyer, as required by 17 U.S.C. § 109(a). To the contrary, the very fact that the particular copy with which the seller began has to be "deleted" from his computer confirms that it is a different copy which is conveyed to the buyer. Nor is such copy "lawfully made" under the statute, since there is no right to reproduce a copyrighted work for resale. See Capitol Moving Brief at 12-15.

III. REDIGI VIOLATES CAPITOL'S PERFORMANCE AND DISPLAY RIGHTS

ReDigi claims its display of Capitol's artwork and performance of Capitol's sound clips are licensed from a company name Rdio, Inc. ReDigi Br. at 6-7. However, the purported license agreement forbids ReDigi from using the licensed technology "in any manner that advocates, encourages, condones, promotes or facilitates the infringement of any third party intellectual property rights, including without limitation ... copyright rights." Ossenmacher Decl. Ex. B at 2. Since ReDigi's sole purpose in displaying the artwork and playing the clips is to encourage the purchase of infringing copies, ReDigi violates the very license on which it relies.[2]

ReDigi's characterization of Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009) as a "default judgment based on the spoliation of evidence." Usenet refused to enter judgment based on defendant's discovery violations, and granted summary judgment for infringement of the distribution right based on a careful legal analysis.

[2]ReDigi violates many other terms of the Rdio agreement, which also prohibits using the licensed technology or "Transmitted Content" to "populate any website" and "[m]onetizing any application using" the licensed technology. See Ossenmacher Decl. Ex. B at 2, 3, 4. ReDigi populates its site extensively with artwork and sound clips, and uses the Rdio service to

ReDigi's second argument about the "personal streaming by a ReDigi user of music files stored in his or her Cloud Locker" (ReDigi Br. at 7) is another red herring, as Capitol's complaint and moving papers were directed to playing clips to any interested purchaser, not streaming songs to people who already own them. See Complaint ¶3; Capitol's Moving Br. at 9. By making these clips available to any interested shoppers to entice them to purchase illegal copies, ReDigi clearly publicly performs the recordings within the meaning of the caselaw and the statute. See 17 U.S.C. § 101 (public performance includes transmission to the public "whether the members of the public ... receive it in the same place or in separate places and at the same time or at different times").

IV. REDIGI CAN CLAIM NO DMCA DEFENSE

ReDigi's claim that Capitol failed to "comply with the notification requirements" of the DMCA misreads the statute, which imposes no obligation on Capitol to provide any notification. Rather, 17 U.S.C. § 512(c)(1)(A)-(C) lists a series of conditions a "service provider" must meet to claim limitations on secondary liability for infringement "by reason of the storage at the direction of a user of material that resides on a system or network controlled" by that provider. See Nimmer § 12B.04, at 12B-49. Those conditions relate to the provider's knowledge of infringement, financial benefit from and ability to supervise the infringement, and prompt removal of infringing materials about which it is notified pursuant to 17 U.S.C. § 512(3). Under this section, the "notice and takedown" procedure is voluntary: "copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights." See Nimmer § 12B.04[A][3], at 12B-59 (quoting legislative history).

"monetize" its own services and encourage sales. ReDigi is thus in material breach of the alleged source of its authorization to use Capitol's copyrights.

Notably, while misreading the statute, ReDigi does not even attempt to argue that it qualifies under the other mandatory requirements for a limitation on liability, including that it "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B). Here, of course, ReDigi earns a fee for every sale, closely vets every file uploaded, and suspends users who violate its rules in a fashion that amply establishes its right and ability to control the infringing activity. See, e.g., Napster, 239 F.3d at 1023 (ability to block user access and terminate accounts constitutes right and ability to supervise infringing activity).

V. REDIGI'S KNOWING INFRINGEMENT CAUSES IRREPARABLE HARM TO CAPITOL, OUTWEIGHS ANY HARDSHIP REDIGI CAN CLAIM, AND DISSERVES THE PUBLIC INTEREST

ReDigi's argument that its scrupulous record-keeping will ensure that Capitol can calculate its money damages is illusory. ReDigi describes itself as a "fledgling startup" operating in "beta" mode (ReDigi Br. at 23; Ossenmacher Decl. § 12), and initial investigation reveals more than 100 Capitol recordings already available. If ReDigi's infringement continues unabated, by the time a permanent injunction is entered, ReDigi's liability will amount to many millions of dollars. There is little chance that ReDigi will be financially able to compensate Capitol adequately. See III Finance Ltd. v. Aegis Consumer Funding Group, Inc., No. 99 Civ. 2579 (DC), 1999 WL 461808, at *6 (S.D.N.Y. July 1, 1999) (irreparable harm "based on . . . the apparent inability of [defendant] to satisfy an eventual judgment"); Brenntag Int'l Chems., Inc. v. Norddeutsche Landesbank GZ, 9 F. Supp. 2d 331, 345 (S.D.N.Y. 1998) (irreparable injury where defendant may be unable to meet damage obligations); Benedict v. Amaducci, No. 92 Civ. 5239 (KMW), 1993 WL 87937, at *11 (S.D.N.Y. Mar. 18, 1993).

ReDigi also misconstrues the market confusion it causes, not by misrepresenting the content of music files (something Capitol never claimed), but by misinforming consumers that copying and selling digital files is legal and beneficial to the music industry. By promoting a supposed new mode of digital distribution, ReDigi encourages others to emulate its widespread infringement. No monetary award can compensate Capitol for opening that Pandora's box.

Capitol has also acted expeditiously. Mr. Ossenmacher's perfunctory discussions in 2010 with Capitol were only about a possible licensing deal, and Capitol never encouraged ReDigi to launch with no license in place. See Piibe Decl. ¶¶ 3-4, 6. Moreover, where ReDigi is a recently launched "startup" (Ossenmacher Decl. ¶ 12) still in "inventory build" and "beta testing" mode (ReDigi Answer ¶ 12), Capitol has acted within a reasonable time. See Guinness United Distillers & Vintners B.V. v. Anheuser-Busch, Inc., 64 U.S.P.Q. 2d 1039, 1044 (S.D.N.Y. 2002) ("[b]ased on the limited distribution and media penetration of [the infringing product] to date, this Court will not deny injunctive relief based on plaintiff's delay"). Prior to seeking relief, Capitol needed to investigate ReDigi's new service and sort through which Capitol songs had been uploaded for sale. See The Marks Org., Inc. v. Joles, 784 F. Supp. 2d 322, 333 (S.D.N.Y. 2011) (granting injunction after 16 months where "delay was caused by good faith efforts to investigate the facts and law"); Metlife, Inc. v. Metro. Nat'l Bank, 388 F. Supp. 2d 223, 237 (S.D.N.Y. 2005) (3 ½ month delay reasonable "to investigate facts relevant to this motion").

Finally, after the RIAA's November 10, 2011 demand letter, ReDigi's counsel responded on December 5, seeking a business relationship and urging, "What I'm suggesting is that you simply give my client a little time. If we can't come to satisfactory arrangements with your members in the near future, you can always sue ReDigi then." McMullan Reply Decl. Ex. B. Capitol then discussed settlement with ReDigi over the next month before commencing this

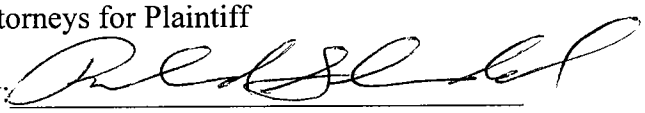
action on January 6. See McMullan Reply Decl. ¶¶ 4-6. Having pled for "a little time" to negotiate a deal, ReDigi is ill-situated now to claim inequitable delay. See Kraft Gen. Foods, Inc. v. Allied Old English, Inc., 831 F. Supp. 123, 136 n.12 (S.D.N.Y. 1993) (movant "should not be penalized for any delay arising out of settlement efforts").

ReDigi is likewise in no position to claim an imbalance of hardships in its favor, where it assumed the risk of almost certain legal challenge. The website's defensive descriptions about why its service is legal and Mr. Ossenmacher's interviews in articles recounting the concerns of "legal scholars" (McMullan Decl. ¶30 and Exs. 2, 5) make clear that ReDigi knew what it was undertaking. See Tucillo v. Geisha NYC, LLC, 635 F. Supp. 2d 227, 247 (E.D.N.Y. 2009) (balance of hardships weighs in movant's favor where defendant assumed risk of copying plaintiff's intellectual property). ReDigi's claim that it will now be put out of business and unable to enter into "new relationships" is also pure speculation. No other company has sued and only Capitol's recordings are at issue on this motion.

Finally, the public interest is not served by letting ReDigi line its pockets at the expense of an industry that survives by investing in creating and developing music. ReDigi's alleged goal of "consumer access to a new legitimate secondary market" (ReDigi Br. at 25) neglects the fee it charges for each instance of such access. Where ReDigi does nothing to advance the Copyright law's goal of promoting the arts, its plea to get a cut of others' efforts rings hollow.

Dated: New York, New York
February 1, 2012

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiff

By: 

Richard S. Mandel
Jonathan Z. King
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200