

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X	
CAPITOL RECORDS, LLC, CAPITOL	:
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.	:
----- X	

**REPLY DECLARATION OF RICHARD S. MANDEL, ESQ.**

RICHARD S. MANDEL, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a shareholder in Cowan, Liebowitz & Latman, P.C., attorneys for Plaintiffs.

I submit this reply declaration in further support of Plaintiffs’ motion *in limine* excluding Defendants from challenging Plaintiffs’ ownership of the sound recordings at issue in this case.

2. Defendants contend in opposition to Plaintiffs’ motion *in limine* that Plaintiffs’ rights depend on a “self-serving interpretation of numerous agreements that were only recently produced by Plaintiffs.” Defendants’ Opposition at 14. However, most of the relevant documents underlying Plaintiffs’ chain of title were produced years ago, with Plaintiffs having produced approximately 8800 of the approximately 9300 pages of documents produced in the case by November 2014. Moreover, Defendants have consistently displayed no interest in taking any discovery relating to any perceived ownership gaps or in engaging in the kind of dialogue the parties have repeatedly advised the Court they would be undertaking prior to trial in an effort to reach appropriate stipulations regarding the universe of recordings at issue.

3. In their opposition papers concerning ownership, Defendants raise only one specific defense regarding particular recordings, arguing that Capitol Records, LLC (“Capitol”) has not proved its rights as an exclusive U.S. licensee by virtue of the Matrix Exchange Agreement (“MEA”) with regard to recordings 197-353 in Plaintiffs’ Trial Exhibit 39.

4. Capitol produced examples of the MEA back in June 2012, including both the version signed between EMI Music International Services Limited (“EMIMIS”) and Capitol and the version signed between EMIMIS and the listed Repertoire Owner in the United Kingdom, Virgin Records Ltd. Mr. McMullan was not asked any questions about any of these agreements at his June 2012 deposition in which Defendants spent virtually no time on issues concerning ownership.

5. Nor did Defendants afford themselves the opportunity to take a further 30(b)(6) deposition regarding ownership issues during the damages discovery phase of this case or otherwise seek further clarification or information regarding the operation of the MEA. On October 9, 2015, the parties jointly advised the Court by letter (a copy of which is annexed hereto as Exhibit A) that they would “meet informally to identify any claimed gaps in [Plaintiffs’ damages document] production (and any other damages related discovery that may be needed) and provide any additional documentation and/or information that may be necessary to facilitate a full understanding of Plaintiffs’ claimed rights.” The purpose of this exercise, according to the letter, was to try to “identify a stipulated universe of recordings to present to the jury.” The letter also indicated that if the parties’ discussions were insufficient, “Plaintiffs would agree to produce a 30(b)(6) witness for a deposition limited to issues of chain of title/ownership.” The Court approved the parties’ proposed process in an order dated October 13, 2015 (Docket No. 177).

6. The parties reiterated their plan with respect to chain of title in a joint letter dated November 13, 2015 (Docket No. 184) in which they requested that the original trial date of April 11, 2016 be maintained rather than advancing such date as a result of the conditional stipulation reached with the individual defendants concerning their liability.

7. During the parties' discussions regarding damages discovery, Defendants advised Plaintiffs that they did not wish to take a 30(b)(6) deposition of Plaintiffs regarding ownership issues. Nor did they ever specify any particular areas where they believed Plaintiffs' document production on chain of title was deficient or where they had specific questions on how Plaintiffs claimed ownership of particular recordings. Instead, their focus shifted to a contention that under the Court's prior summary judgment ruling, the only recordings that should be considered for damages purposes were recordings in which there was a consummated sale to an individual other than Capitol's paralegal. That issue became the subject of further communication to the Court in the parties' joint February 16, 2016 letter (Docket No. 186) and is also addressed in the parties' *in limine* motions and pre-trial briefing.

8. Despite the absence of any specific requests or inquiries by Defendants regarding alleged deficiencies in Plaintiffs' prior production, Plaintiffs did their best to fill in any potential gaps by producing approximately 500 additional pages of documents between December 2015 and March 2016. On March 3, 2016, Plaintiffs also provided Defendants with a comprehensive summary (which eventually evolved into Plaintiffs' Trial Exhibit 39) setting forth the basis for Plaintiffs' claimed ownership in the approximately 500 recordings at issue. However, to date, Defendants' position regarding stipulations has been that it would only consider ownership stipulations to the extent Plaintiffs limit their claim of damages to the group of recordings actually sold on the ReDigi website (to individuals other than Capitol's paralegal). Accordingly,

because there has been no meaningful opportunity to reach an agreed universe of recordings for which ownership is conceded, Plaintiffs have filed the present *in limine* motion seeking to avoid an unnecessary waste of trial time on issues that should largely be undisputed.

9. Inasmuch as Defendants indicate in their opposition to Capitol's *in limine* motion their continuing intention to reach agreement with Plaintiffs prior to trial concerning ownership of particular recordings where there is no legitimate dispute as to ownership, the explanation set forth in the accompanying McMullan Reply Declaration should put to rest any triable issues concerning recordings 197-353. To the extent Defendants intend to continue pressing arguments regarding the MEA raised for the first time in connection with this motion, Plaintiffs request that they be permitted to replace Trial Exhibit 81 with a supplemental version (a copy of which is included on a disk accompanying these papers) that also includes relevant portions of the versions of the MEA agreement signed between EMIMIS and other Repertoire Owners referenced in the McMullan Reply Declaration.

10. Defendants have also raised in their Pretrial Memorandum (although not in their response to the motions *in limine*) an argument that Plaintiffs may have conveyed or sold their right to sue for the infringements at issue. This point was also never raised as part of any prior discussions concerning the ownership issues. To the extent Defendants continue to press this argument notwithstanding the response in paragraph 6 of the accompanying McMullan Reply

Declaration, Plaintiffs request that they be permitted to add Trial Exhibit 234 (a copy of which is included on a disk accompanying these papers) to their list of exhibits in the Pretrial Order.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON MARCH 29, 2016 AT NEW YORK, NEW YORK.

A handwritten signature in blue ink, appearing to read 'Richard S. Mandel', written over a horizontal line.

RICHARD S. MANDEL