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By E-mail (sullivannysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: Capitol Records, LLC v. ReDigi Inc., 12 cv. 0095 (RJS)

Dear Judge Sullivan:

We represent Plaintiffs in the above-captioned action and write in accordance with Rule 2.A of the Court's Individual Practices and Paragraph 6 of the Stipulated Final Judgment Subject to Reservation of Right to Appeal endorsed by the Court on June 3, 2016 (Docket No. 22) ("Judgment"). Paragraph 6 of the Judgment provides that Plaintiffs "shall have the right under this Judgment to move for an award of attorneys' fees" up to five hundred thousand dollars. Plaintiffs submit this pre-motion letter in connection with their proposed motion for an award of attorneys' fees in this amount. Pursuant to Fed. R. Civ. P. 54(d)(2)(B), a party must seek attorney's fees within 14 days after the entry of judgment unless a statute or Court order provides otherwise. Insofar as the Court's Individual Practices require an exchange of pre-motion letters and a conference in advance of filing of any such motion, Plaintiffs respectfully request that the Court treat this letter as satisfying the timing requirements of Rule 54 and request leave to file the contemplated motion by July 1, 2016 or such other date as the Court deems appropriate.

Pursuant to 17 U.S.C. §505, the Court may award reasonable attorneys' fees to the prevailing party in a copyright case. There is no dispute that Plaintiffs have prevailed on their direct and secondary copyright infringement claims. When assessing a fees motion in a copyright case, Courts in the Second Circuit consider "(1) the frivolousness of the non-prevailing party's claims or defenses; (2) the party's motivation; (3) whether the claims or defenses were objectively unreasonable; and (4) compensation and deterrence." Bryant v. Media Right Prods., Inc., 603 F.3d 135, 144 (2d Cir. 2010). Attorneys' fees are warranted in the instant matter based on the willful nature of Defendants' infringement and Defendants' assertion of objectively unreasonable legal and factual positions during the course of these proceedings.

"The Second Circuit has held that it is appropriate to award attorneys' fees where the infringement was willful." Broad. Music, Inc. v. Prana Hospitality, Inc., 2016 WL 280317, at *11 (S.D.N.Y. Jan. 21, 2016) (citing Kepner-Tregoe, Inc. v. Vroom, 186 F.3d 283, 289 (2d Cir. 1999)). Reckless disregard of a plaintiff's copyright interest constitutes evidence of willfulness.

See Beastie Boys v. Monster Energy Co., 112 F. Supp. 3d 31, 43 (S.D.N.Y. 2015) ("Courts have awarded fees based on willfulness even where the infringement was reckless rather than knowing") (collecting cases); Manno v. Tenn. Prod. Ctr., Inc., 657 F. Supp. 2d 425, 435 (S.D.N.Y. 2009) (defendant's "willful disregard of [plaintiff's] copyright interests"). Moreover, where a defendant ignores repeated warnings of copyright infringement, such "willful blindness" favors an award of attorneys' fees. See Broad. Music, Inc. v. Wexford INR LLC, 2014 WL 4626454, at *8-12 (N.D.N.Y. Sept. 15, 2014).

This Court has already found as a matter of law that ReDigi and its officers were aware of their infringing conduct. In finding ReDigi liable for contributory copyright infringement, the Court held that ReDigi "knew or should have known that its service would encourage infringement." March 31, 2013 Memorandum and Order (Docket No. 109) ("SJ Order") at 15. Among other facts, Defendants warned investors that the ReDigi service might be infringing, received a cease-and-desist letter that its website violated Plaintiffs' copyrights, knew that copyrighted content was being sold on the website, and "understood the likelihood that use of ReDigi's service would result in infringement." Id. These determinations constitute the law of this case, see Spencer v. Int'l Shoppes, Inc., 902 F. Supp. 2d 287, 288 n.2 (E.D.N.Y. 2012) (factual findings on summary judgment decision were "the law of the case"), and establish that ReDigi and the individual defendants acted knowingly and with reckless disregard for Plaintiffs' copyrights. An award of fees against this willful infringement will serve the policy purposes of the Copyright Act to "deter future infringers who will be put on notice that they may be called upon to compensate plaintiffs for the expenses" incurred in enforcing legitimate rights. Miroglio S.P.A. v. Conway Stores, Inc., 629 F. Supp. 2d 307, 311 (S.D.N.Y. 2009).

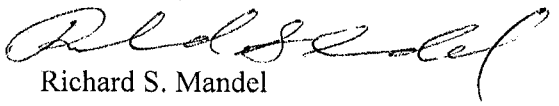
The third factor cited by the Second Circuit in assessing fees —objective unreasonableness—should likewise "be given substantial weight." Bryant, 603 F.3d at 144. "Indeed, many courts in this district have found that the objective unreasonableness of a party's claims or defenses is sufficient to subject a party to an award of attorney's fees under § 505 'without regard to any other equitable factor.'" Harrell v. Van Der Plas, 2009 WL 3756327, at *3 (S.D.N.Y. Nov. 9, 2009). Here, while Defendants frequently cast this dispute as posing "novel" issues of copyright law, they have defended this case in an objectively unreasonable manner, backpedaling on key factual admissions, variously abandoning and resuscitating pointless defenses, and seeking absurd discovery designed only to inflict expense. For example, while ReDigi conceded during the preliminary injunction phase of the case that its system "copied" and "deleted" music files during the uploading process, it disavowed that admission on summary judgment with its fanciful "data migration" theory, requiring Capitol to engage an expert to make sense of a transparent semantic play. See SJ. Order at 14 n. 7 (rejecting "data migration" theory and noting "ReDigi made numerous admissions to the contrary at the preliminary injunction stage"). ReDigi similarly maintained various facially absurd affirmative defenses from its preliminary injunction papers only to abandon them after Plaintiffs were put to the task of briefing them on summary judgment. See id. at 3-4 n. 4 ("ReDigi's arguments in this round of briefing differ markedly from those it asserted in opposition to Capitol's motion for a preliminary injunction," including its abandoned essential step, fair use "storage", and DMCA defenses). ReDigi likewise repeatedly sought to excise from this case music files uploaded and

offered for sale, despite the Court's repeated and abundantly clear admonitions that such uploads were clearly violations of the reproduction right. See, e.g., Docket No. 186 ("The Court agrees with Plaintiffs that Plaintiffs may introduce evidence about recordings that were uploaded to the ReDigi server and offered for sale").

This pattern of wasteful litigation conduct multiplied after Plaintiffs amended their complaint to add ReDigi's officers based on defense counsel's representation that the amendment would not require significant additional discovery. Those individuals proceeded to make a groundless motion to dismiss, followed by an equally groundless motion for reconsideration, both ignoring the very law upon which the Court permitted the amendment adding them in the first place. After the Court predictably denied both motions, see Docket Nos. 148 and 155, the individual defendants then asserted some thirty affirmative defenses, the bulk of which had either been waived or abandoned by ReDigi or were on their face already determined adversely, including the first sale defense, the essential step defense, and fair use. See Individual Defendants' Answer to Second Amended Complaint (Docket No. 163). They concomitantly sought far-reaching discovery on such remote topics as audits of Plaintiffs' royalty payments regarding musical compositions and various unrelated digital agreements. After they again backpedaled, insisting that they would not after all press defenses expressly rejected on summary judgment, the Court held that they were likewise barred from asserting defenses ReDigi had itself waived. See Docket No. 175. The net result was that the progress of the case was delayed and Plaintiffs were put to months of briefing and dispute that had no reasonable basis. These kinds of inconsistent, wasteful, and objectively unreasonable machinations supply an additional and independent ground for an award of fees. See Harrell, 2009 WL 3756327, at *4 (awarding fees where defendant filed "largely frivolous" motion to dismiss and advanced new defense inconsistent with previous position); Miroglio, 629 F. Supp. 2d at 311 (awarding fees where defendants had adopted unreasonable litigation positions that "forced [the plaintiff] to pursue this lengthy litigation in the face of an obviously losing position on the part of defendants").

For the forgoing reasons, Plaintiffs seek $500,000 in attorney's fees, which amount constitutes less than half the actual fees expended by Plaintiffs in this case, but will at least serve the policies of the Copyright Act and act as a deterrence against the kind of wasteful litigation conduct engaged in by Defendants. We thank the Court for its attention to the foregoing.

Respectfully,



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