

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,	:	DECLARATION OF
-against-	:	<u>RICHARD S. MANDEL, ESQ.</u>
REDIGI INC., JOHN OSSENMACHER and	:	
LARRY RUDOLPH a/k/a LAWRENCE S.	:	
ROGEL,	:	
Defendants.	:	

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

1. I am a shareholder in the firm of Cowan, Liebowitz & Latman, P.C., which represents Plaintiffs in this action. I submit this declaration in support of Plaintiffs' motion, pursuant to Fed. R. Civ. P. 54 and 17 U.S.C. § 505, for an award of attorneys' fees in the amount of \$500,000. I have personal knowledge of the facts set forth herein.

2. Plaintiff Capitol Records, LLC ("Capitol") commenced this action on January 6, 2012 against Defendant ReDigi Inc. ("ReDigi"), asserting claims for direct and secondary copyright infringement. See Docket No. 1. The complaint alleged that the ReDigi service, which invited users to upload their previously purchased digital music files to ReDigi's remote server in order to sell such files to other ReDigi users, infringed Capitol's copyright in numerous sound recordings.

3. Shortly after filing the complaint, Capitol moved for a preliminary injunction. ReDigi's opposition to the motion acknowledged that ReDigi made copies of Capitol's sound recordings, but sought to defend such copying based on various affirmative defenses, such as fair use and the essential step defense. See Docket No. 14 at 9. After conducting a lengthy oral

argument on Capitol’s preliminary injunction motion on February 6, 2012, the Court found that Capitol was likely to succeed on the merits of its infringement claims but denied the motion on the ground that Capitol had not established irreparable harm. See Docket No. 26.

4. Based on the record developed on the preliminary injunction motion, both sides believed that resolution of the case would likely turn on legal issues since the underlying facts concerning the operation of ReDigi’s technology were not in dispute. Accordingly, shortly after the preliminary injunction hearing and ruling, they submitted a joint case management plan providing for summary judgment motions to be filed following completion of fact discovery, with any expert disclosures and discovery to be deferred until after resolution of the summary judgment motion. The Court approved the parties’ case management plan on February 15, 2012. See Docket No. 31.

5. During depositions conducted at the end of fact discovery, it became apparent that ReDigi’s witnesses were attempting to backpedal from their prior factual admissions of copying. ReDigi’s witnesses sought to disavow or explain away the admission in their preliminary injunction papers and their own patent that the upload process involved copying of files, recasting the process as “data migration” in which electronic files are “moved” in “blocks” from one source to another rather than copied. See Docket No. 52-14 (Rudolph Dep. at 35, 37, 45, 51-54, 56-58, 76-78, 226-227; Ossenmacher Dep. at 45-46, 52).

6. In July 2012, following the completion of fact discovery, the parties cross-moved for summary judgment on liability. Although Capitol maintained that ReDigi’s revised description of its technology was legally irrelevant, Capitol also supported its summary judgment motion by arguing that ReDigi was bound by its prior judicial admissions and opposed ReDigi’s motion by introducing expert testimony from Doug Jacobson to counter ReDigi’s “data

migration” theory. See Docket No. 49 at 7-10; Docket No. 87 at 1-4; Docket No. 75. Capitol’s moving papers also addressed asserted affirmative defenses, such as essential step and DMCA defenses, which ReDigi only abandoned after Capitol was put to the task of briefing them. See Docket No. 49 at 18-20, 23.

7. On March 30, 2013, the Court granted Capitol’s motion for partial summary judgment and denied ReDigi’s cross-motion for summary judgment, holding that ReDigi was liable for direct and secondary copyright infringement and that the affirmative defenses of fair use and first sale did not shield ReDigi from liability. See Docket No. 109.

8. After the Court’s summary judgment opinion, Capitol sought to amend its complaint to add ReDigi’s two principals and founders, John Ossenmacher and Larry Rudolph (collectively, the “Individual Defendants”) on the ground that they had been personally involved in the infringing acts and therefore should be held liable. Capitol also sought to expand the universe of infringed recordings based on discovery identifying the particular Capitol owned tracks that had been sold or offered for sale on the ReDigi site. ReDigi opposed the amendment, arguing that the Court’s summary judgment ruling did not extend to recordings offered for sale, but not sold and that the Individual Defendants were not personally liable and should not be added as parties.

9. On August 9, 2013, the Court held a conference with respect to Capitol’s proposed amendment. Following an acknowledgement by ReDigi’s counsel, Gary Adelman, that additional discovery would not be required by the amendment, the Court permitted the Individual Defendants to be named as parties. The Court also agreed with Capitol that recordings that were reproduced and offered for sale, but not sold, were properly part of the case, explaining that the “whole opinion” on summary judgment had been about the reproduction right. On August 30,

2013, Capitol filed its First Amended Complaint adding the Individual Defendants as co-defendants and expanding the universe of claimed recordings.

10. Although it appeared that the only liability issue that remained to be adjudicated in the case was whether the Individual Defendants personally participated in the activity already held to be infringing, the Individual Defendants retained separate counsel and embarked on a course that repeatedly sought to derail and unnecessarily delay the resolution of the case. Ignoring the prior acknowledgment of ReDigi's counsel that no further discovery was needed to adjudicate the Individual Defendants' liability and despite the fact that ReDigi had itself chosen not to take any damages discovery at all, the Individual Defendants served a blizzard of pointless discovery requests ranging from audit reports for music publishing royalties to generalized demands for all of Plaintiffs' digital "policies" and contracts relating thereto. Copies of the discovery requests and the parties' joint October 25, 2013 letter to the Court addressing their dispute regarding such requests is attached hereto as Exhibit A.

11. The Individual Defendants also filed a motion to dismiss, which never acknowledged the settled standards for their joint and several liability under the Copyright Act based on their personal participation in the acts at issue. See Docket Nos. 126, 127. When the motion to dismiss was denied on September 2, 2014 (see Docket No. 148), the Individual Defendants moved for reconsideration by mischaracterizing both the Court's decision and the basic elements of copyright liability. See Docket Nos. 149, 150. On October 16, 2014, that motion was also denied. See Docket No. 155.

12. Following the denial of the Individual Defendants' pleading motion, they proceeded to assert some thirty affirmative defenses, the bulk of which had either been waived or abandoned by ReDigi as groundless or had already been determined against ReDigi on summary

judgment. See Docket No. 163. The Court held a conference on November 7, 2014 to address those defenses and the parties' discovery disputes. By that time, the Individual Defendants had voluntarily agreed to remove some of the most blatantly improper discovery requests which they had previously sought to justify. However, they were still insisting on extremely broad discovery, claiming the discovery was related to new affirmative defenses they wished to assert or to Plaintiffs' damage claim. At the conference, the Court expressed skepticism that the discovery was proper even if the affirmative defenses could be legally asserted. (A copy of the transcript from the conference is attached hereto as Exhibit B). Ultimately, the Court ruled on August 27, 2015 that the Individual Defendants were barred from asserting defenses that ReDigi had itself waived, and accordingly denied the voluminous discovery sought by the Individual Defendants with respect to such defenses. See Docket No. 175.

13. On November 2, 2015, over two years after first being joined in the action, the Individual Defendants finally agreed to be bound by the Court's summary judgment ruling (subject to an eventual right of appeal) and stipulated to liability for infringement, thereby clearing the way for a trial solely on the issue of damages.

14. However, even as the parties engaged in the process of preparing pre-trial submissions, Defendants continued to resist the import of the Court's earlier summary judgment ruling. Despite that ruling and the Court's subsequent approval of Capitol's amendment to include recordings offered for sale, but not sold, Defendants took the position that such recordings were outside the scope of the damages trial. The Court rejected Defendants' position in a February 17, 2016 order. See Docket No. 186. Undeterred by the Court's ruling, Defendants then asserted that they could maintain defenses such as fair use and implied license with respect to such recordings at trial. See, e.g., Docket No. 198 at 6-9. As a result, Plaintiffs

were required to brief these “liability” issues in connection with a trial that had long been understood to involve only the question of damages, and to address fair use and other unavailable defenses in connection with Defendants’ proposed jury instructions. See Docket Nos. 204 at 2-7, 208 at 4-7, 193, 197.

15. On April 4, 2016, one week before the damages trial was scheduled to commence, the parties advised the Court that they had reached a settlement with respect to the remedy portion of the case. On June 3, 2016, the Court endorsed a Stipulated Final Judgment in this case (the “Judgment”). See Docket No. 222. The Judgment sets forth the form of injunction to which the parties agreed, preserves Defendants’ right to appeal the Court’s prior liability finding on summary judgment and provides in paragraph 4 for stipulated damages to be awarded against Defendants jointly and severally in the amount of three million five hundred thousand dollars (\$3,500,000). 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.

16. By this motion, Plaintiffs now seek an award of attorneys’ fees in the amount of \$500,000, the agreed cap on any fee award under Paragraph 6 of the Judgment. Such amount constitutes less than half the actual fees expended by Plaintiffs in this case.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON NOVEMBER 21, 2016 AT NEW YORK, NEW YORK.



RICHARD S. MANDEL