

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, CAPITOL
CHRISTIAN MUSIC GROUP, INC. and
VIRGIN RECORDS IR HOLDINGS, INC.,
Plaintiff,

-- against --

REDIGI, INC., JOHN OSSENENMACHER
and LARRY RUDOLPH a/k/a LAWRENCE
S. ROGEL
Defendants.

Docket No. 12-cv-00095 (RJS)

DEFENDANT JOHN OSSENMACHER'S MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES

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**DEFENDANT JOHN OSSENMACHER'S MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS' FEES**

This Memorandum is submitted by defendant John Ossenmacher, appearing *pro se*, in opposition to the Motion for Award of Attorneys' Fees (the "Fee Motion") that has been filed by plaintiffs Capitol Records, et al. ("Capitol") against me and co-defendants ReDigi, Inc. and Lawrence Rudolph, aka Lawrence Rogel (collectively, "Defendants").

As grounds for my objection to the Fee Motion, I respectfully submit and invite the Court's attention to the letter response that was filed on June 16, 2016, Docket No. 224, against Capitol's pre-motion letter regarding a fee award, (the "Opposition to Fees Letter"). The Opposition to Fees Letter was filed on behalf of ReDigi by its predecessor counsel Gary Adelman, Esq. of Adelman Matz P.C., and on behalf of me and co-defendant Lawrence Rudolph by our predecessor counsel Michael DeVincenzo, Esq. of Mishcon De Reya L.L.P. The Opposition to Fees Letter cites and discusses the controlling legal precedents with regard to the factors that a court must weigh in determining whether to award attorneys' fees to a prevailing party in a copyright infringement case, and the Letter presents the arguments demonstrating that these authorities strongly counsel against an award of attorneys' fees to Capitol on the facts of this case. For the Court's convenient reference, a true, correct and complete copy of the Opposition to Fees Letter is attached hereto as Attachment "A" and incorporated in this Opposition by this reference.

The award of fees is discretionary not mandatory so therefore the court would act within its discretion by denying Capitols motion. As Capitol has put forth when assessing a fees motion in a copyright case, courts are open to consider the following Fogerty factors: (Fogerty v. Fantasy,

510 U.S. 517, 533-34 (1994)). Therefore if such case is to be relied upon the following must also be considered:

(1) "The frivolousness of the non-prevailing party's claims or defenses"; it is the Defendants position that the basic principle articulated in the cases discussed in the Opposition to Fees Letter is that, in order to encourage legitimate debate leading to the informed evolution of copyright law and jurisprudence, attorneys' fees ought not to be awarded in a case presenting novel issues, in which the losing party advanced an objectively reasonable position based on an application of existing law to unprecedented circumstances. I submit that the course of this litigation before your Honor amply establishes that Defendants have consistently presented a well-reasoned and objectively reasonable argument that the ReDigi system was thoughtfully and very purposefully designed to come within the first sale doctrine. We continue to believe that our technology actually achieved that objective. We acknowledge and respect that the Court came to a different conclusion. But we do not believe that an objective observer could conclude that this was not a close case. As the Court acknowledged, this dispute presents a question of first impression, and Defendants acted in good faith and advanced an objectively reasonable position, so that fees ought not be awarded to Capitol.

(2) "The party's motivation"; As the president and founder of ReDigi, I affirm to the Court that from day one, the company and myself have acted in good faith, within the limits of copyright law. The evidence shows our commitment to this due diligence. We designed and built a system to enable lawful buyers of digital music to sell their digital songs in a way that we believed conformed to every element of the first sale doctrine that allows for the lawful re-sale of every other kind of lawfully purchased copyrighted material. I consulted multiple copyright experts, each of whom concluded that the ReDigi system was unique and lawful. We partnered with

Goodwill industries and other organizations, after their vetting, to provide lawful users a charitable outlet for their no longer used digital music. I also had extensive communications with each of the major labels up to two years prior to the ReDigi service launching -- including Capitol under predecessor management to the individuals who later elected to bring the instant copyright infringement lawsuit -- and received uniformly positive responses about the ReDigi system, with no claim that it would infringe the record companies' copyrights. With our place in the market and our open, visible and thorough vetting of the ReDigi system, I was asked to serve on the Copyright Office's Blue Ribbon Panel for digital copyright law as a spokesperson for the advanced technology viewpoint, and also on the Congressional Internet Caucus's advisory board for the same reason and later to even testify directly to members of Congress. . My motivation was to build a profitable company on a solid foundation that operated openly and lawfully for the good of the company while providing a real benefit to creators, provided a charitable outlet and supported lawful public interest and commerce. Capitol has failed to present any credible evidence to sustain their assertion that Defendants have engaged in willful, deliberate copyright infringement that warrants additional punishment in the form of an award of attorneys' fees.

(3) "Whether the claims or defenses were objectively unreasonable"; as presented earlier a true, correct and complete copy of the Opposition to Fees Letter is attached hereto as Attachment "A" and incorporated in this Opposition by this reference. I again submit that the course of this litigation before your Honor amply establishes that Defendants have consistently presented a well-reasoned and objectively reasonable argument that the ReDigi system was thoughtfully and very purposefully designed to come within the first sale doctrine. We continue to believe that our technology actually achieved that objective. We acknowledge and respect

that the Court came to a different conclusion. As the Court acknowledged, this dispute presents a question of first impression, and Defendants acted in good faith and advanced an objectively reasonable position, so that fees ought not be awarded to Capitol.

(4) "Compensation and deterrence"; Any claim by Capitol that I acted willfully is certainly not correct, copyright law may provide for additional punishments for those found in violation but I want to assure you and the court that not only is Capitol's claim of willfulness patently untrue, they have provided no such evidence of such a malicious and false claim. Additionally, the plaintiffs currently were awarded an amount of \$3,500,000 which has caused both ReDigi and myself to file for Bankruptcy protection, this significant award to Capitol and resulting consequences to the defendants is a tremendous deterrent for others that may consider doing business in the technology / copyright field and serves to deter even the most legitimate business from entering these markets. For all the reasons presented here and in the Opposition to Fees Letter, I respectfully urge the Court to deny Capitol's Fee Motion in its entirety as to all Defendants. An additional award to Capitol of \$500,000 in attorneys fees is unnecessary additional punishment.

Also, for information and transparency to the court, be it known that Capitol has filed an Adversary Procedure against the Pro Se Defendant in the Southern District of Florida Federal Court Case No. 16-20810-PGH filed by Capitol Records 11.14.2016 and that the attorneys fee motion is a transparent attempt to get a finding from the New York Federal Court that my "state of mind" has already been established. Furthermore, there will be a trial in Florida to address this matter directly in which I have denied, and will continue to deny Capitols claims of acting willfully and with malice as false and untrue.

In light of these historical facts, any claim by Capitol that Defendants have acted as “willful infringers” is unfounded and incorrect. Precisely the opposite is true, as I submit the entire record in the case affirms. Indeed, other than conclusory accusations, Capitol has failed to present any credible evidence to sustain their assertion that Defendants have engaged in willful, deliberate copyright infringement that warrants additional punishment in the form of an award of attorneys’ fees.

For all the reasons presented here and in the Opposition to Fees Letter, I respectfully urge the Court to deny Capitol’s Fee Motion in its entirety as to all Defendants.

Dated: December 13, 2016

Respectfully submitted,

John Ossenmacher, appearing *Pro Se*

By: 

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June 16, 2016

VIA ELECTRONIC MAIL AND ECF

Hon. Richard J. Sullivan

sullivannysdchambers@nysd.uscourts.gov

Re: *Capitol Records LLC v. ReDigi Inc., et al.* (12 Civ. 00095) (RJS)

Hon. Judge Sullivan:

This letter constitutes Defendants' response to Plaintiffs' June 13, 2016 pre-motion conference request.¹ Defendants oppose Plaintiffs' claim of entitlement to an award of attorneys' fees. Such an award on the unique facts of this case would contravene the purposes of the Copyright Act.

Today, the U.S. Supreme Court unanimously approved the Second Circuit's approach to determining whether to award attorneys' fees in copyright cases holding that federal courts are required to give "substantial weight to the objective (un)reasonableness of a losing party's litigating position." *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375, Slip Opinion at p. 2. As Justice Kagan explained in her unanimous opinion for the Court, "placing substantial weight on objective reasonableness also treats plaintiffs and defendants even-handedly [because] [n]o matter which side wins a case, the court must assess whether the other side's position was (un)reasonable." The Supreme Court made clear that the question whether the losing party's position was objectively reasonable cannot be answered by whether or not the party has been found to infringe copyright.²

This lawsuit was never a run-of-the-mill copyright infringement case. ReDigi developed new, patented technology intended to enable consumers of lawfully purchased copyrighted digital music files to lawfully buy, sell or otherwise transfer these pre-owned music files—just as consumers are free to sell their legitimately purchased cd's. ReDigi believed, and argued to the Court, that its technology successfully accomplished this worthwhile purpose. As this Court recognized "[t]he novel question presented in this action is whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine" . . . "courts have not previously addressed whether the unauthorized transfer of a digital music file over the Internet – where only one file exists before and after the transfer – constitutes reproduction within the meaning of the Copyright Act." See 3/30/13 Order p. 4-5 [DE 109]. See also TR: 2/6/12 p. 3:4-6 [DE 26] ("I find this to be a fascinating issue. We raised a lot of

¹ As an initial matter the Court's April 28, 2016 Order, directed the parties to submit "any contemplated motions regarding costs and fees by June 3, 2016".

² "Courts every day see reasonable defenses that ultimately fail (just as they see reasonable claims that come to nothing); in this context, as in any other, they are capable of distinguishing between those defenses (or claims) and the objectively unreasonable variety. And if some court confuses the issue of liability with that of reasonableness, its fee award should be reversed for abuse of discretion." *Id.* at p. 10.

Attachment "A"

technical and statutory issues that make this kind of a niche case”); TR: 10/5/12 p. 3 [DE 107] (“there are honest disagreements as to what the law says and how it ought to be applied”).

The fact that the Court found that ReDigi’s technology did not fully accomplish its copyright-conforming objective does not retroactively make Defendants’ arguments and defenses objectively unreasonable.³ To the contrary, the just-announced *Kirtsaeng* decision makes clear that this is precisely the kind of case where the objectively reasonable arguments that ReDigi advanced militate strongly against an award of attorneys’ fees. As *Kirtsaeng* declares, attorneys’ fees awards “are a double-edged sword.” Penalizing losing parties who advance objectively reasonable albeit unsuccessful positions in hard and novel cases is contrary to the Copyright Act’s goal of “enriching the general public through access to creative works.” *Id.* at p. 6. The prevailing party (*Kirtsaeng*) argued that attorneys’ fees should be awarded in hard and novel cases because it resulted in some clarification of the law. The Supreme Court reached the opposite conclusion, holding that an award of attorneys’ fees in hard and novel cases “could just as easily discourage as encourage parties to pursue the kinds of suits that ‘meaningfully clarif[y]’ copyright law.” *Id.* at p. 8.

ReDigi’s fair use defense was also not objectively unreasonable. Indeed, while the parties disputed the application of fair use to works uploaded to ReDigi and later offered for sale or sold, Plaintiffs did not contest that works uploaded to ReDigi for storage was fair use. *See* 3/30/13 Order at p. 10. Nor was ReDigi’s position that fair use applied objectively unreasonable given, *inter alia*, the factually sensitive, and evolving, nature of the fair use defense, and that the iTunes Store Terms and Conditions (as cited in ReDigi’s briefs) authorized the practice of using and transferring purchased music to other devices. *See* ReDigi 7/20/12 Br. at 16-17.

Further, the resolution of ReDigi’s defenses on summary judgment is not tantamount to a determination that these defenses were objectively unreasonable or devoid of legal or factual support. Courts in this Circuit have previously held that a summary judgment decision against a party, i.e. a “finding that no reasonable juror could find in favor of one party is *not the same* as a finding that the losing party’s claim was objectively unreasonable-something more is required.” *Belair v MGA Entertainment, Inc.*, 2012 Copr. L Dec P 30253 (S.D.N.Y. May 10, 2012) (citing *Fogerty*, 510 U.S. at 527) (emphasis added). Here, although the Court found the facts not disputed, the application of the law to the facts was, and remains, disputed.

Plaintiffs are unable to demonstrate anything more than that Defendants’ arguments did not prevail. Defendants have not litigated this case in an objectively unreasonable manner. Contrary to Capitol’s assertions, ReDigi did not backpedal on key factual admissions. Moreover, for Capitol to characterize ReDigi’s explanation as a “semantic play” or imply surprise is without

³ Courts have routinely held that “only those claims that are clearly without merit or otherwise patently devoid of legal or factual basis ought to be deemed objectively unreasonable.” *Jovani Fashion, Ltd. v Cinderella Divine, Inc.*, 820 F Supp. 2d 569, 573 (S.D.N.Y. 2011) (rejecting the argument that because plaintiff’s theory of copyright ability shifted over the course of litigation, plaintiff never had a reasonable claim in the first place and holding that without more, the claim was not “clearly without merit”); *Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor Ltd.*, No. 96 Civ. 4126, 2004 WL 728878, at *3 (S.D.N.Y. Apr. 6, 2004) (“[O]nly those claims that are clearly without merit or otherwise patently devoid of legal or factual basis ought to be deemed objectively unreasonable”). Defendants’ honestly held legal position that ReDigi 1.0 does not violate the Copyright Act, supported by Defendants’ technical understanding of how the system works, was not “patently devoid of legal or factual basis,” even though, in the end, the Court reached a different conclusion.

foundation. As set forth in ReDigi's opposition to Capitol's motion for summary judgment, and as acknowledged by Capitol, the highly technical nature of ReDigi's transfer process was fully explained during depositions. Moreover, Plaintiffs' claim that the information obtained during discovery forced them to undertake additional work, is belied by Capitol's own arguments that the alleged "semantic shift is legally irrelevant". See Pl. 7/20/12 Br. at p. 8. Capitol chose not to explore these technology issues further during discovery, and even admitted that the previously undisclosed expert whom they first introduced with their opposition to ReDigi's summary judgment papers was not necessary.

The argument that ReDigi maintained absurd affirmative defenses until Plaintiff was "put to task on briefing them on summary judgment" is also wholly without merit. To cite but one example, there was ample support for ReDigi's contention that tracks uploaded to the cloud and offered for sale but not sold would ultimately be held not infringing: Capitol conceded that fair use applied to tracks uploaded to the cloud for storage, and as this Court noted, other decisions have cast significant doubt on the "make available" theory of distribution. See 3/30/13 Order p. 8 n.6, p. 10. There is no pattern of unreasonable conduct on Defendants part in this action.

Plaintiff's accusations of delay are unfounded. In most instances, the parties *jointly* asked the court for extensions and Defendants routinely attempted to streamline the action. For example, following the second amended complaint, in the interests of conserving resources, the individual defendants stipulated to reserve their right to appeal the issues previously raised in their motion to dismiss and motion for reconsideration, thus avoiding a second motion to dismiss. See 11/13/14 Stipulation & Order [DE 165]. Similarly following the Court's August 27, 2015 Order, the individual defendants entered into the joint conditional stipulation as to liability so that the case could proceed to trial on damages and appeal. See 10/30/15 Stipulation & Order [DE 178]. Perhaps most significantly, the parties agreed to a stipulated final judgment subject to reservation of right to appeal which avoided the significant additional time, effort and expense of a damages trial. See 6/3/16 Stipulated Final Judgment Subject to Reservation of Right to Appeal [DE 222].

The other factors to be considered on a claim for fees similarly do not support Plaintiff's claim. There has been no finding nor is there evidence of frivolousness or improper motivation on Defendants' part, nor is there a need for deterrence here given the novel issues raised in this case. Capitol raises the issue of willfulness, but there has been no finding of willfulness. On the contrary, that issue was to be adjudicated at the damages trial, which was obviated by the parties' conditional stipulated judgment. See Joint Proposed Jury Instructions at 51, [DE 193]; Parties Proposed Special Verdict Form at 2; [DE 197]; Plaintiff's Motion in Limine at 7, [DE 195].

We greatly appreciate Your Honor's time and consideration in this matter.

Respectfully Submitted,

ADELMAN MATZ P.C.


Gary Adelman
Attorneys for ReDigi Inc.

MISHCON DE REYA NEW YORK LLP


Michael S. DeVincenzo
Attorneys for Defendants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 ss:
COUNTY OF NEW YORK)

CHRISTINA I. BELANGER, being duly sworn, deposes and says:

I am over 18 years of age, not a party to this proceeding and am a resident of the State of New York.

On December 14, 2016, I served a true copy of the foregoing Defendant John Ossenmacher's Memorandum of Law in Opposition to Plaintiffs' Motion for Award of Attorneys' Fees upon the following via first class mail:

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by depositing a true copy in first class, postpaid, properly addressed, sealed envelopes, in an

official depository of the United States Postal Service, located in the State of New York.


CHRISTINA I. BELANGER

Sworn to before me this
14th day of December, 2016


Notary Public

NEHA SUNDARAM
Notary Public in the State of New York
Qualified in New York County
No. 01SU6343955
Commission Expires 20 June 2020