UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.	:	12 Civ. 0095 (RJS)

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

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Plaintiffs Capitol Records, LLC, Capitol Christian Music Group, Inc. and Virgin Records IR Holdings, Inc. (collectively, "Plaintiffs") respectfully submit this reply memorandum in further support of their motion for attorneys' fees under Section 505 of the Copyright Act, 17 U.S.C. § 505.

Defendant John Ossenmacher submits an opposition to Plaintiffs' attorneys' fees motion in which he contends that Defendants advanced an objectively reasonable defense.[1] However, Ossenmacher's response fails to address the gist of Plaintiffs' motion that Defendants engaged in an inexcusable pattern of wasteful litigation conduct whose only purpose was to unnecessarily increase the time and resources expended on this matter. Rather than limit themselves to the legal issues raised by the application of the first sale doctrine in a digital context, Defendants disingenuously sought to redefine their technology when they realized the actual facts would lead to a result they didn't like. See Plaintiffs' Moving Brief (Docket No. 271) at 11-13. Defendants also sought to advance numerous groundless defenses and to take pointless discovery designed solely to delay the progress of the case. Id. at 13-14. This improper litigation conduct amply supports imposition of an award of attorneys' fees, even assuming there was some objectively reasonable defense buried within the avalanche of frivolous positions and harassing tactics adopted by Defendants. See id. at 14-15 (citing cases).

Mr. Ossenmacher also insists that Defendants acted in good faith and did not commit willful copyright infringement. However, the record does not support Mr. Ossenmacher's argument. Indeed, while he claims to have "consulted multiple copyright experts, each of whom

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[1]The other two defendants, ReDigi Inc. and Larry Rudolph, did not submit oppositions to Plaintiffs' attorneys' fees motion.

concluded that the ReDigi system was unique and lawful" (Ossemacher Opposition at 3), the Court explained at the summary judgment stage that the failure to offer any evidence of such supposed opinions undermined Defendants' claimed innocence:

> Indeed, though ReDigi attempts to use its consultations with counsel as a shield, it is telling that ReDigi declined to reveal any of the advice it received on the subject. (See Cap. Reply 9). ReDigi's lone rebuttal to this surfeit of evidence could only be that it "sincerely" believed in the legality of its service. However, the Court has not found and will not create a subjective, good faith defense to contributory liability's objective knowledge requirement, and therefore concludes that, based on the objective facts, ReDigi was aware of its users' infringement.

Docket No. 109 at 15-16. Likewise, Mr. Ossenmacher's claim to have had "extensive communications" with Capitol and to have received "uniformly positive responses about the ReDigi system" (Ossenmacher Opposition at 4) is belied by his own deposition testimony in this case that Capitol (EMI) had refused or was too busy to meet with him to hear any pitch about the service. See Docket No. 173 Exhibit B (Ossenmacher Dep. at 103-110).

While Mr. Ossenmacher claims that "Capitol has failed to present any credible evidence" of willful infringement, the Court's summary judgment ruling already found as a matter of law that ReDigi and its officers knew or should have known of their infringing conduct. Docket No. 109 at 15-16. The Court's opinion also held that "ReDigi's founders built a service where *only* copyrighted work could be sold." Id. at 14 (emphasis in original). These findings based on the undisputed evidence presented to the Court at the summary judgment stage compel the conclusion that Defendants were willful infringers. See Plaintiffs' Moving Brief (Docket No. 271) at 15-18. Whatever Defendants may have subjectively believed about their conduct, a finding of willfulness is appropriate here where the Court has already found as a matter of law that Defendants had constructive knowledge of their infringing activities. See, e.g., Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1010 (2d Cir. 1995) ("to show willfulness, Knitwaves was

not required to prove Lollytogs' actual knowledge that it was infringing. Knowledge of infringement may be constructive rather than actual"); N.A.S. Import Corp. v. Chenson Enterprises, Inc., 968 F.2d 250, 252 (2d Cir. 1992) (knowledge required for willfulness may be actual or constructive); Fitzgerald Publ'g Co. v. Baylor Publ'g Co., 807 F.2d 1110, 1115 (2d Cir. 1986) (willfulness proven by actual or constructive knowledge); Tornabene Art Publ'g Co. v. Pride Pros. Corp., 2007 WL 2469453, at *3 (S.D.N.Y. June 4, 2007) ("[a]cting 'willfuly' means acting with actual or constructive knowledge or 'reckless disregard of the high probability' that one's actions constitute copyright infringement"); ASA Music Prods. V. Thomsun Elecs., 49 U.S.P.Q.2d 1545, 1552 (S.D.N.Y. 1998) ("Willfulness consists of actual or constructive knowledge that defendants' actions constitute an infringement").

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' moving papers, Plaintiffs' motion for an award of attorneys' fees should be granted.

Dated: New York, New York
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Respectfully submitted,

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