

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 REDIGI INC., :  
 :  
 Defendant. :  
----- X

12 Civ. 0095 (RJS)

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

**[FILED UNDER SEAL]**

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 Plaintiff Capitol Records, LLC (“Capitol”) in this matter. I submit this declaration in opposition to the motion by Defendant ReDigi Inc. (“ReDigi”) for summary judgment. I am familiar with the facts set forth in this declaration based on my personal knowledge and the documents attached hereto as exhibits.

**ReDigi 2.0**

2. In its motion for summary judgment, ReDigi seeks relief with respect to a new service, “ReDigi 2.0,” which ReDigi claims to have implemented as of June 11, 2012. Capitol never asserted any claims with respect to this service, which did not even exist at the time of Capitol’s complaint in this action. Indeed, there is no evidence that any recordings generally, much less any Capitol recordings, have been delivered to ReDigi users via this new service or thereafter sold or offered for sale by any ReDigi user.

3. ReDigi disclosed this new service for the first time during the deposition of John Ossenmacher on June 19, 2012, one day before the close of fact discovery in this case. ReDigi never produced a single document mentioning this service. Capitol has not had an adequate

opportunity to assess how ReDigi 2.0 works in practice; whether it operates as described in ReDigi's papers or has additional or contrary operations that have not been disclosed; whether it has been used solely to store purchased iTunes files or also to sell them; its function of delivering copies of music files both to the ReDigi cloud and user's hard drives and the timing of those deliveries; whether ReDigi has communicated with or notified Apple that it "intercepts" Apple's downloads and delivers them outside the iTunes application; the extent to which the service interferes with Capitol's agreement with Apple or Apple's terms of service for users; and whether Capitol's recordings themselves have been delivered to the ReDigi cloud via this service.

4. To the extent the "ReDigi 2.0" service is deemed part of this case at all, Capitol should be afforded an opportunity to take further discovery regarding such service in order to respond fully to factual allegations concerning this new practice and to present the complete factual record necessary to oppose ReDigi's motion. Discovery on the specific issues identified above can reasonably be expected to create genuine issues of fact regarding whether ReDigi's description of the service is complete or accurate; whether and the extent to which Capitol's recordings are being unlawfully "intercepted" and delivered without authorization to ReDigi's cloud and whether and the extent to which multiple copies are being made; and whether those files are additionally being distributed without Capitol's authorization.

#### **Deposition Excerpts and Other Exhibits**

5. Attached hereto as Exhibit 1 are additional excerpts (beyond those previously submitted in support of Capitol's motion for partial summary judgment) from the deposition of John Ossenmacher taken by Capitol on June 19, 2012.

6. Attached hereto as Exhibit 2 are additional excerpts (beyond those previously

submitted in support of Capitol's motion for partial summary judgment) from the deposition of Larry Rudolph taken by Capitol on June 18, 2012.

7. Attached hereto as Exhibit 3 are excerpts from the deposition of Mark Piibe taken by ReDigi on June 14, 2012 in which Mr. Piibe authenticates the agreement between EMI and Apple, along with relevant excerpts of such agreement.

8. Attached hereto as Exhibit 4 is a true and accurate copy of Plaintiff's Deposition Exhibit 13, the Rdio API terms of use pursuant to which ReDigi was previously licensed by Rdio.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON AUGUST 9, 2012 AT NEW YORK, NEW YORK.



RICHARD S. MANDEL