

**EXHIBIT 1 TO THE DECLARATION OF
RICHARD S. MANDEL, ESQ.**

[FILED UNDER SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTIFIED COPY

CAPITOL RECORDS, LLC,)
)
Plaintiff,) 12 Civ. 0095 (RJS)
)
vs.)
)
REDIGI INC.,)
)
Defendant.)
-----)

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* CONTAINS OUTSIDE COUNSEL ONLY PORTIONS *

DEPOSITION OF JOHN MARK OSSENMACHER

New York, New York

Tuesday, June 19, 2012

Reported by: KRISTIN KOCH, RPR, RMR, CRR, CLR

JOB NO. 50450

1 Ossenmacher - Confidential - Attorneys' Eyes Only
2 about digital for sale.

3 Q. Was there a report that the
4 copyright office had commissioned that actually
5 looked at the question of First Sale Doctrine
6 in the digital context?

7 A. I do recall reading some
8 documentation in that area and I recall reading
9 some things about finding robust forward and
10 delete systems and, you know, recommendations
11 of such which, again, we believe we comply
12 with.

13 Q. Do you recall that the copyright
14 office actually in the early 2000s studied the
15 question of how, if at all, the First Sale
16 Doctrine applied in a digital context?

17 MR. ADELMAN: Objection to form.

18 You can answer.

19 A. I may have read it, but technology
20 changed significantly from 2000 forward, and so
21 the information they had when they did their
22 studies in 2000 certainly wasn't anywhere near
23 what was happening in --

24 Q. Okay, but I am going to ask you, if
25 you can, I appreciate the narrative and I

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2 really do want to get your understanding, but I
3 am also asking you -- separate and apart from I
4 understand there may be reasons why what they
5 concluded you think doesn't apply, there may be
6 a lot of things you have to say about it and we
7 can talk about that, but I just want to first
8 understand very specifically did you actually
9 have occasion to look at that document and read
10 it?

11 A. I don't recall the specific
12 document, but I recall reading so many
13 documents and my thoughts are what I had said
14 there.

15 Q. But I assume you understand that the
16 copyright office has a particular role with
17 respect to the administration of the copyright
18 statute; right?

19 MR. ADELMAN: Objection to the form.
20 You can answer.

21 A. I understand that the copyright
22 office obviously has a lot to do with copyright
23 law.

24 Q. And I would assume that if the
25 copyright office is studying the very question

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2 that you are trying to answer, that would be
3 something that might be of particular interest;
4 correct?

5 A. Definitely, absolutely of interest,
6 and that's part of the reason for the reading
7 of those documents, but, again, when we read
8 what people write and what their thoughts are
9 at the time, those thoughts actually helped
10 guide us to build the system we built.

11 Q. Okay. That's fair. We will get to
12 that.

13 Let me ask you first did you
14 understand that the copyright office's
15 conclusion when it looked at the question was
16 that the statute as it existed did not provide
17 a First Sale defense in a digital context?

18 MR. ADELMAN: Objection to form.

19 A. Absolutely not.

20 Q. That wasn't your reading of it?

21 A. Absolutely not.

22 Q. Did you have any understanding of
23 whether the copyright office evaluated whether
24 making a copy had any impact on whether the
25 First Sale Doctrine would apply?

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2 MR. ADELMAN: Objection to form, but
3 you can answer.

4 A. Yes.

5 Q. When did they prepare a written
6 opinion?

7 A. It was probably late 2009.

8 Q. And is it only --

9 A. Maybe early 2010. Somewhere in that
10 range.

11 Q. And is it only one written opinion
12 that they have ever prepared?

13 A. I believe they provided more than
14 one.

15 Q. How many have they provided?

16 A. I think two.

17 Q. When was the second one provided?

18 A. Maybe within six months of the
19 first.

20 Q. Was it on the same issue or
21 different issues?

22 A. Same.

23 Q. When did ReDigi get formed as a
24 corporate entity?

25 A. In May -- April, May of 2011.

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2 Q. And you described the evolution of
3 your idea with the gift of music. How did that
4 evolve into the ReDigi concept? Can you
5 describe how that transformation took place?

6 A. So I would say in early 2011 we
7 started to do a little bit more work with --
8 once we felt we had a technological solution we
9 wanted to look at how would we bring gift music
10 to market and what we realized through user
11 groups -- we did some student user groups when
12 we had students. What we learned through those
13 was people thought it was a cool idea, but they
14 probably wouldn't use it that regularly to
15 donate music, and so then the idea came
16 basically from that was, you know, if you guys
17 would allow us to be able to resell our music,
18 then we would be coming to your site regularly
19 and we would probably donate more, because it
20 would be something we would feel more
21 comfortable doing, so the whole concept then of
22 making the business a marketplace where people
23 could buy and sell used digital music and
24 donate used digital music, that's where that
25 really evolved, is that became more of an ideal

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2 for how we could actually launch a successful
3 business rather than have something that nobody
4 would use.

5 Q. You made reference to a
6 technological solution. How did -- describe
7 for me the process of how that came to be
8 formed.

9 A. Again, with Larry, you know, we
10 spent a lot of time trying to figure out that
11 issue we talked about, many issues, but the key
12 issue that we wanted a solution to was how do
13 we exchange title of a good autonomically or
14 simultaneously with the exchange of cash or
15 ownership and so the whole idea of the
16 in-the-cloud transaction was what we solved and
17 that was some of the patent matter that
18 Jonathan went over with Larry yesterday.

19 Q. How did you meet Larry Rudolph?

20 A. I met Larry in an airport and, you
21 know, we started talking about various things.
22 It's just a matter of how small the world is.
23 I had read his book on bluetooth, because in
24 the arena business bluetooth communications was
25 key to some of the app development we were

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2 A. Larry can better answer that than I.

3 Q. To your understanding in terms of
4 how long it took.

5 A. I think it was reasonably complex,
6 yes.

7 Q. Now, once you had settled on the
8 idea that this transaction was going to take
9 place in the cloud, I take it you also had to
10 discuss how is the digital file going to get to
11 the cloud to be transferred; correct?

12 A. Correct.

13 Q. And did you then at that point when
14 you realized that you would need to get
15 something to the cloud to transfer, did you
16 discuss with Mr. Rudolph how to implement that?

17 A. Yes.

18 Q. Tell me everything you can remember
19 about that discussion.

20 A. It was more than one discussion. We
21 had numerous discussions on all of these
22 topics. I mean, discussion ranged anywhere
23 from how are people getting things to the
24 cloud. At that point in time there were other
25 cloud services that existed. How do people get

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2 leave the ReDigi site and they are taken to the
3 iTunes site?

4 A. The iTunes store, yes.

5 Q. The iTunes store. And if they make
6 a purchase, that file is then delivered to them
7 in their iTunes account?

8 A. It's delivered to the user and it
9 may be delivered to their ReDigi account, but
10 it's delivered to the user who purchased it.

11 Q. When you say it may be delivered to
12 the ReDigi account, would it go directly into
13 the ReDigi account when they purchase it on
14 iTunes?

15 A. Yes.

16 Q. So are you saying the technology is
17 set so that when that person who came to the
18 iTunes site from ReDigi purchases that track on
19 iTunes, it automatically goes into their ReDigi
20 account?

21 A. I am.

22 Q. And how does that happen? Do they
23 have to check some box on ReDigi to make that
24 happen?

25 A. They agree to it as part of their

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2 user agreement.

3 Q. With ReDigi?

4 A. Yes, they do it as part of their
5 ReDigi user agreement.

6 Q. Does the affiliate agreement between
7 iTunes and ReDigi permit a copy to actually be
8 placed in an account on some other service?

9 A. Does the affiliate agreement?

10 Q. Yes.

11 A. The affiliate agreement doesn't
12 specify.

13 Q. Is it correct that a copy of the
14 digital file that is purchased on iTunes is
15 made and put in the ReDigi account?

16 A. When you say a copy made and put in
17 the ReDigi account, the copy is delivered to
18 the ReDigi account when they use that service.

19 Q. So you are saying it never goes
20 into -- does the user also have it on their
21 hard drive at that point?

22 A. We then deliver it to their hard
23 drive.

24 Q. So you have the technology to ensure
25 that when the person makes the purchase on

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2 iTunes, the delivery actually is to the ReDigi
3 account?

4 A. That's correct.

5 Q. And so the purchase goes -- in
6 effect, it's directly on the hard drive where
7 ReDigi -- the ReDigi cloud, as it were, at that
8 point?

9 A. It's on the ReDigi server, yes.

10 Q. The ReDigi server. And that's the
11 only place it exists at the point when it's
12 purchased?

13 A. We then, if the user wants to, we
14 deliver it to their iTunes library also.

15 Q. Does that happen simultaneously with
16 the delivery to the ReDigi cloud?

17 A. It happens after delivery to the
18 ReDigi cloud.

19 Q. How much after?

20 A. Seconds.

21 Q. So effectively simultaneously in
22 terms of as far as the user is aware?

23 MR. ADELMAN: Objection.

24 You can answer.

25 A. It happens very quickly.

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2 Q. I mean, as a practical matter the
3 idea is that the user makes the purchase and
4 the file is then subsequent to the purchase in
5 both the ReDigi cloud and on their hard drive;
6 correct?

7 MR. ADELMAN: Objection to form.

8 A. If a user selects, it will go to the
9 ReDigi cloud and also to their iTunes library.

10 Q. So that they are effectively
11 immediately available in both places correct?

12 MR. ADELMAN: Objection. Asked and
13 answered.

14 You can answer.

15 A. Yes.

16 Q. Now, the copy that is in the ReDigi
17 cloud at that point, can it be offered for sale
18 by the user?

19 MR. ADELMAN: What point are we
20 talking about?

21 Q. After they have purchased something
22 from iTunes.

23 MR. ADELMAN: Okay.

24 A. So in Jonathan's words the source
25 file that was delivered to ReDigi, if the user

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2 A. I believe so.

3 Q. And what happened with respect to
4 that agreement?

5 A. We paid 7digital a significant
6 amount of money to be able to be one of the
7 resellers of their music under distribution.
8 They provided their APIs to us of music that
9 was allowable, of work that was allowable, mini
10 clips that were allowable, and we spent a
11 significant amount of time building out our
12 system so that we could accommodate those.

13 Q. And was the site ever launched with
14 new music available via 7digital?

15 A. On October 13th we launched the site
16 with new music available from 7digital.

17 Q. And what happened then?

18 A. For some odd and strange reason
19 7digital decided to stop providing all of the
20 music to us that they were providing.

21 Q. And how did you learn of that?

22 A. A phone call.

23 Q. From whom?

24 A. I don't remember the man's name at
25 7digital. Whoever our account person was

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2 there.

3 Q. And that was on October 13th or 14th
4 of 2011?

5 A. It was, yes.

6 Q. And you spoke to the person?

7 A. I did.

8 Q. Can you tell me what transpired in
9 that conversation, as best as you can recall
10 it?

11 A. They said that one of the labels was
12 giving them a hard time about, you know, ReDigi
13 and they didn't want to until they had some
14 more meetings give us that full global catalog,
15 so they said "would it be okay if we gave you
16 our" -- I don't remember which catalog it was.
17 It was like the world catalog, but maybe not
18 U.S. or something. I actually don't remember.
19 And so at the time we said "no, we need -- you
20 know, you guys told us you could deliver" and
21 they said "we are not gonna do it," and so they
22 made the arbitrary decision to -- or encouraged
23 by someone, I don't know, but they made the
24 decision to change the APIs so that the APIs
25 that we had access to previously we were

C E R T I F I C A T E

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

I, KRISTIN KOCH, a Notary Public
within and for the State of New York, do
hereby certify:

That JOHN MARK OSSENMACHER, the
witness whose deposition is hereinbefore
set forth, was duly sworn by me and that
such deposition is a true record of the
testimony given by such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I am
in no way interested in the outcome of this
matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 29th day of June, 2012.

KRISTIN KOCH, RPR, RMR, CRR, CLR