

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

**[FILED UNDER SEAL]**

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2                   UNITED STATES DISTRICT COURT  
3                   SOUTHERN DISTRICT OF NEW YORK

4

5     CAPITOL RECORDS, LLC,                   )  
6    )  
7     Plaintiff,                                ) 12 Civ. 0095 (RJS)  
8    )  
9     vs.                                        )  
10    )  
11    )  
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13    )  
14    )  
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12                   \* CONFIDENTIAL - ATTORNEYS' EYES ONLY \*

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14                   \* CONTAINS OUTSIDE COUNSEL ONLY PORTIONS \*

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17                   DEPOSITION OF JOHN MARK OSSENMACHER

18                   New York, New York

19                   Tuesday, June 19, 2012

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

24

25                   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

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C E R T I F I C A T E

3

4 STATE OF NEW YORK )

5 ) ss.:

6 COUNTY OF NASSAU )

7

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

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

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

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

--- Ernst Koch ---

KRISTIN KOCH, RPR, RMR, CRR, CLR

25