

**PLAINTIFF'S STATEMENT OF UNDISPUTED
FACTS PURSUANT TO LOCAL RULE 56.1**

[FILED UNDER SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, : 12 Civ. 0095 (RJS)
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 Plaintiff, :
 :
 -against- : **PLAINTIFF’S STATEMENT OF**
 : **UNDISPUTED FACTS PURSUANT**
 REDIGI INC., : **TO LOCAL RULE 56.1**
 :
 Defendant. :
 :
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Plaintiff Capitol Records, LLC (“Capitol”) submits this statement of undisputed facts pursuant to Local Rule 56.1 in support of its motion for partial summary judgment.

UNDISPUTED FACTS

I. THE BUSINESS OF CAPITOL AND ITS COPYRIGHTS

1. Capitol is a global rights management company which is engaged, among other things, in producing, manufacturing, distributing, selling, licensing and facilitating the distribution and sale of sound recordings. McMullan Decl. ¶ 2.

2. Capitol is the copyright owner or owner of exclusive rights (by way of agreement) with respect to an extensive and diverse catalog of sound recordings first fixed after February 15, 1972. Among such recordings are those identified in Exhibit 1 to the Declaration of Alasdair J. McMullan (the “Copyrighted Recordings”). McMullan Decl. ¶ 3 and Ex. 1.

3. Each of the Copyrighted Recordings has been registered with the United States Copyright Office before or within five years after first publication of the works covered by such certificates. McMullan Decl. ¶ 4 and Ex. 1; Complaint Ex. A.

4. Capitol has also entered into various agreements by which it obtained the common law copyrights in sound recordings embodying performances initially “fixed” prior to

February 15, 1972. Among such recordings owned by Capitol are “What A Little Moonlight Can Do” by Peggy Lee and “The Christmas Song (Merry Christmas To You)” by Nat King Cole. McMullan Decl. ¶ 5.

II. THE BUSINESS OF REDIGI

A. Background of ReDigi and its Founders

5. Defendant ReDigi Inc. (“ReDigi”) was founded by two individuals, John Ossenmacher and Larry Rudolph, who serve respectively as the company’s Chief Executive Officer and Chief Technology Officer. Declaration of John Ossenmacher in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶1; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 11) ¶1.

6. ReDigi claims that it was created to “provide a marketplace for the buying and selling of used digital music.” Its website has advertised its service as “the world’s first and only online marketplace for used digital music.” Its press releases have likewise touted its service as “the world’s first online marketplace for used digital music” that allows users to “sell their legally acquired digital music files, and buy used digital music from others at a fraction of the price currently available on iTunes.” Mandel Decl. Exs. A, B; Rudolph Dep. at 21; Ossenmacher Dep. at 145, 235.

7. ReDigi’s business depends upon sales of music taking place on its website as its sole source of revenue. As John Ossenmacher summarized it in a November 2011 interview with the New York Times, “If nothing in ReDigi sells, we’re dead.” Ossenmacher Dep. at 192-94; Mandel Decl. Ex. C.

8. ReDigi's service also offers free cloud storage of music files to its users, but its business would not be viable as merely a cloud storage service; its business model depends upon revenue generated from sales. Ossenmacher Dep. at 194.

9. ReDigi operates its service through its website that first went live on October 13, 2011. Rudolph Dep. at 159.

B. How the ReDigi Service Works

1. ReDigi's Initial Scan of User Computers to Determine Which Music Files Are Eligible To Be Uploaded

10. In order to begin uploading and selling digital music files on ReDigi, a user must first download ReDigi's "Media Manager" software to his or her home computer. Plaintiff's Dep. Ex. 5; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 2, 5.

11. As described on the ReDigi website, after Media Manager is installed, "ReDigi will analyze your music library and create a list of songs that are eligible on ReDigi." Mandel Decl. Ex. D; Rudolph Dep. at 128.

12. In practice, ReDigi's Media Manager software scans the user's computer for any resident music files, analyzes those files to determine which are "eligible" under ReDigi's rules to be uploaded to ReDigi, and then presents the user with a list of recordings he or she may upload to the ReDigi "cloud," a remote server described more fully below. Rudolph Dep. at 129-31; Mandel Decl. Ex. D.

13. In addition to this initial scan, ReDigi's Media Manager software continuously runs in the background on a user's computer and scans the user's hard drive. It "look[s] for things that are music files and when it discovers a music file, it analyzes it and then gives it a thumbs up or a thumbs down" as to "eligibility" for upload under ReDigi's rules. Rudolph Dep.

at 130; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 6, 28.

14. ReDigi controls what can and cannot be uploaded to its cloud. When first vetting music files on users' computers, ReDigi's validation process determines if those files were purchased from iTunes or on ReDigi, and are thus eligible for uploading to the ReDigi cloud. ReDigi's software also analyzes the file's ownership, source, purchase dates, modification history (if any) and metadata. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 4, 5.

15. ReDigi has the technical ability to block users from employing its system, including if their music files do not meet ReDigi's criteria. Rudolph Dep. at 91-92.

2. Uploading and Copying Music Files to ReDigi's Cloud

16. Once music files are determined to be "eligible, the ReDigi software lists those files in a box displaying an "Eligible Songs" tab. As the website's instructions explain, "From the eligible tab, select the songs you wish to upload to your ReDigi cloud and press the 'send to ReDigi' button." Mandel Decl. Ex. D; Rudolph Dep. at 131.

17. In practice, the user clicks a box next to the name of the music file she wishes to upload to the ReDigi cloud and then clicks a "send to ReDigi" button to commence the upload process. Rudolph Dep. at 131.

18. After clicking the "send to ReDigi" button, the user is prompted to delete the music file in order for it to be uploaded to the ReDigi cloud. Rudolph Dep. at 60; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 6.

19. Upon the upload of any "eligible" file to the ReDigi cloud, that file is deleted from the user's computer. Declaration of Larry Rudolph in Opposition to Motion for

Preliminary Injunction (Docket No. 10) ¶ 6; Answer (Docket No. 6) ¶ 47; Rudolph Dep. at 131-32, 150-51, 236.

20. For the upload to succeed as a technical matter, the music file to be uploaded cannot be deleted prior to upload. Rudolph Dep. at 46, 60.

21. As Mr. Rudolph described, when a music file is selected for upload, it is uploaded from the user's personal computer to the user's storage "locker" in ReDigi's cloud-based storage system, referred to as the ReDigi cloud. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 2, 5; Rudolph Dep. at 52-54.

22. The ReDigi cloud is comprised of a remote server and disc space ReDigi rents from Amazon's cloud service, likely located in Arizona. Rudolph Dep. at 50-52.

23. Thus, in a typical scenario, the ReDigi user starts with a music file on a physical disc on the hard drive of his or her private computer. When that file is uploaded to the ReDigi cloud by ReDigi's software, the music file then is stored on a different physical disc in a different physical location where ReDigi's cloud server resides (likely in Arizona). Rudolph Dep. at 55-56; Ossenmacher Dep. at 266.

24. When the music file is first on the user's home computer, or when it is subsequently on the ReDigi cloud server, it can be streamed, performed and perceived. However, during the time when it is being uploaded from the user's home computer to the ReDigi cloud – usually a matter of several seconds – the music file cannot be played or perceived in any way. Rudolph Dep. at 56, 67-68, 69-70; Ossenmacher Dep. at 267-68.

25. ReDigi has not invented a new method of uploading files. Mr. Rudolph testified that "in fact it may be a very old way" of uploading content. Rudolph Dep. at 58, 229.

26. In opposing Capitol's motion for a preliminary injunction, ReDigi stated in its brief that uploading and downloading music files to the ReDigi cloud constitutes the making of copies of those music files: "The only copying which takes place in the ReDigi service occurs when a user uploads music files to the ReDigi Cloud, thereby storing copies thereof in the user's personal Cloud Locker, or downloads music files from the user's Cloud Locker, thereby placing copies of the files on his or her computer. Such copying is paradigmatic noncommercial personal use excepted from copyright infringement liability under by (sic) the Fair Use Doctrine." Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 14) at 9 (emphasis added).

27. ReDigi applied for a patent to cover its technology. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 2; Mandel Decl. Ex. E; Rudolph Dep. at 35.

28. Mr. Rudolph helped prepare the disclosures and diagrams in the patent application, including Figure 2, which describes at a high level how the ReDigi system works. Rudolph Dep. at 37, 45; Mandel Decl. Ex. E.

29. When applied to the ReDigi system, the patent application's references to "DMOs" or "digital media objects" mean music files, and references to "the remote server" mean the ReDigi cloud. Rudolph Dep. at 51-54.

30. The patent application states that "For a DMO to be offered for sale, it is first copied to the remote server and stored on the disc." Although Mr. Rudolph claimed at his deposition that this statement did not accurately reflect how the ReDigi service works in practice, his earlier declaration at the preliminary injunction stage specifically touted the fact that ReDigi had applied for a patent to cover the technology being described to the Court. Mandel Decl. Ex.

E at p. 4, ¶ 71 (emphasis added); Rudolph Dep. at 56-57; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 2.

3. ReDigi's Second, Deeper Analysis of Music Files on its Cloud Server

31. Once a music file has been successfully uploaded to the ReDigi cloud, it is subjected to a second process of analysis and verification by ReDigi. Rudolph Dep. at 89-92.

32. The purpose of this second round of analysis on the ReDigi server is to ensure that the uploaded music file has not already been offered for sale and also to do a “deeper” verification that the file meets ReDigi’s criteria for upload and sale. Rudolph Dep. at 89-90.

33. More specifically, this “additional and more intensive analysis” on the ReDigi server is designed to “confirm eligibility, including validating file source and ownership, and verifying that the file was not modified or tampered with.” Among other things, ReDigi checks the file’s metadata and acoustics for validity and to ensure that no other user has sold, offered to sell or stored a file with the same metadata. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 5, 18.

34. If ReDigi’s criteria are satisfied, the file is stored in the user’s “locker” on the ReDigi cloud, the user's locker is updated to include the relevant metadata of the file, and a record is made of the file’s relevant metadata to ensure no other user attempts to upload a file with this same relevant metadata. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 18.

35. Based upon these various steps, Mr. Rudolph agreed that, perhaps “more than any other website that permits the sale of music, ReDigi is intimately involved in examining the content that will be sold and supervising the steps involved in making the music available for sale and selling it.” Rudolph Dep. at 100.

4. Offering Songs For Sale on ReDigi

36. As the ReDigi website instructs its users, “Once your selected songs are successfully uploaded to the ReDigi cloud, a display will ask you if you would like to keep your songs on your cloud for storage and streaming, or put the songs up for sale in the ReDigi marketplace.” Rudolph Dep. at 132-33; Mandel Decl. Ex. D.

37. Likewise, users who have successfully uploaded music files to the ReDigi cloud will see a display with a “cloud tab,” which will offer users the option either to download the music files back to their home computers or to sell those files in the “ReDigi marketplace.” Rudolph Dep. at 134-35; Mandel Decl. Ex. D.

38. Offering recordings for sale in the ReDigi marketplace is an easy and straightforward process, in which the user simply selects the recordings to be sold from the “cloud tab” and clicks the corresponding button to designate them for sale. Indeed, the ReDigi interface has been designed to make it easy for the user to offer recordings for sale and to “get users to offer their songs for sale.” Rudolph Dep. at 134-36.

39. ReDigi offers users various incentives and encouragements to offer their music files for sale or otherwise participate in the ReDigi marketplace. For example, it gives users 20 cent coupons in consideration for offering recordings for sale. Those coupons can be used toward the purchase of other music files. Rudolph Dep. at 210.

40. When users sign up for ReDigi, they receive a welcome email that advises them, “**Cash in** on the music that you no longer listen to. With the click of a button, you can sell music straight from your cloud or personal music library.” The purpose of this email is, among other things, to encourage users that they can sell their existing music files for credit that can be used to purchase new music. Rudolph Dep. at 137-39; Mandel Decl. Ex. F (emphasis in original).

41. ReDigi has set up this system of coupons and credits so that “users [are] rewarded for contributing to the ReDigi library” and to “encourage them to both buy and sell.” Ossenmacher Dep. at 226.

42. ReDigi has offered promotions in which users who upload 10 or more music files to the ReDigi cloud are entered into contests to win various prizes. The purpose of these promotions was to build up an inventory of music files available for purchase and sale. Ossenmacher Dep. at 247-50; Mandel Decl. Exs. A, G.

43. When it appears that a number of ReDigi users have also ordered a particular recording (a process described below), ReDigi “keep[s] track of the most popular ordered song” and posts the name of that song on the ReDigi website or lists it in a newsletter so that other users who may own a copy of that song can make it available for sale. Rudolph Dep. at 145.

44. For example, ReDigi’s newsletter identifies “**In Demand Songs** so that you know which songs you can SELL NOW to earn some quick credits for new music.” It then lists those songs and explains, “In demand songs are songs that have been ordered by other users on ReDigi. If you act fast you can make an instant sale on any of the tracks below!” Ossenmacher Dep. at 215-19; Mandel Decl. Ex. H (emphasis in original).

45. ReDigi also notifies its users by email when they are low on credits, which may be increased either by purchase with a credit card or selling music files. The purpose of the notification is to encourage users to upload more recordings for sale, buy more recordings, and more generally to stimulate activity in the ReDigi marketplace. Rudolph Dep. at 147-49; Mandel Decl. Ex. I.

5. Ordering Songs Not Currently Available For Purchase From ReDigi

46. A ReDigi user may order a recording that is not at that moment being offered for sale by any other ReDigi user. Upon placing such an order, the user receives an email confirming receipt of the order for the recording and stating “ReDigi is looking for a seller.” Rudolph Dep. at 143-145; Plaintiff’s Dep. Ex. J.

47. ReDigi then places the order for purchase into its system, and if any other user makes the ordered recording available for sale, ReDigi creates a “match” and processes the sale. Rudolph Dep. at 144.

48. As noted above, ReDigi also keeps track of and notifies its users of the “most popular ordered songs,” so that if other users have copies of those popular songs, those music files can be made available for sale. Rudolph Dep. at 145.

6. Purchasing and Downloading Music Files on ReDigi

49. When one user purchases a music file from another on ReDigi, the “file pointer” associating that file with the seller user is modified to associate the file with the purchaser. After such a sale, the seller no longer has any access to the file, and “ownership” is transferred to the purchaser. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 10-11.

50. After a ReDigi user purchases a music file from another user, the purchaser can store the file, listen to it, offer it for sale, download it to his or her home computer, or make an additional copy of that file on other devices, such as an iPod, portable hard drive, or a compact disc. Rudolph Dep. at 80-81; Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 11.

51. The “used” digital music file that purchasers buy on ReDigi is functionally equivalent in sound quality to a “new” music file, and will have none of the degradation or detriments of a scratched and used CD. Ossenmacher Dep. 183-89; Plaintiff’s Dep. Ex. K.

52. Mr. Rudolph estimates that after purchasers buy music files on ReDigi, a majority of between 60 and 90% of those purchasers download the files to their home computers rather than simply keeping them in the ReDigi cloud. Rudolph Dep. at 82.

53. When a user downloads a music file from the ReDigi cloud to the user’s home computer, the user is permitted to retain a separate copy of the downloaded file in the ReDigi cloud. Accordingly, ReDigi permits the user to retain a copy of the music file on both the ReDigi cloud and on the user’s personal computer. Rudolph Dep. at 150-52.

7. Redigi’s Transaction Fee For Every Sale

54. ReDigi earns a transaction fee for each sale processed through the ReDigi website and service. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶ 12; Answer (Docket No. 6) ¶¶ 22, 36, 59.

55. When a purchaser pays for a music file (with credit), usually priced at 79 or 59 cents, the fee is divided up so that 20% is allocated to the seller, 20% is allocated to an artist’s “escrow” fund, and the remaining 60% is ReDigi’s commission or transaction fee for managing the sale. Rudolph Dep. at 209-10.

C. Redigi’s Inability To Prevent Users From Retaining Copies of Files They Sell

56. ReDigi claims that its system seeks to ensure that users do not retain copies of any music file they upload and offer for sale on ReDigi. Declaration of Larry Rudolph in Opposition to Motion for Preliminary Injunction (Docket No. 10) ¶¶ 6, 7; Answer (Docket No. 6) ¶¶ 47-49.

57. Despite ReDigi's efforts, it concedes that users can take steps to circumvent its system and retain copies of the songs they sell on ReDigi. Indeed, Mr. Ossenmacher acknowledged as much in an November 2011 interview with The New York Times. Mandel Decl. Ex. C; Ossenmacher Dep. at 155, 157-59; Rudolph Dep. at 102-103.

58. Mr. Rudolph acknowledged that "my gosh, EMI must know that really well, that people are trying all sorts of ways of getting around the system." Rudolph Dep. at 93.

59. Thus, for example, a ReDigi user could first burn an iTunes music file to a compact disc, then upload that file to the ReDigi cloud and sell it on ReDigi without ReDigi detecting that the user had retained a copy of the file. Rudolph Dep. at 103-104.

60. Likewise, a ReDigi user could have additional copies of a music file on iPods, external hard drives, or other MP3 players that were not connected to the computer when the ReDigi Media Manager software originally scanned the computer. If the user uploads the file from her computer to the ReDigi cloud and sells that file without ever reconnecting the iPods, external drives or MP3 players on which the additional copies are stored, ReDigi has no means of detecting that the user has retained such copies. Rudolph Dep. at 96-97, 104-105.

61. Additionally, a ReDigi user can store additional copies of a music file in various third party cloud services, but also upload a different copy from his or her computer to the ReDigi cloud and sell it. Depending upon which third party cloud service the user chooses, ReDigi may be unable to detect that the user has retained a copy of the music file in the third party cloud service. Rudolph Dep. at 109-10.

62. Apple's iCloud service permits users to re-download past purchases made on iTunes for free. In another scenario acknowledged by Mr. Ossenmacher, a ReDigi user could sell 1000 songs (previously purchased from iTunes) on ReDigi, delete ReDigi's software from

her computer, and then re-download those 1000 songs to her computer for free from the iCloud. Ossenmacher Dep. at 180.

63. ReDigi's software cannot determine the user's copying activities with respect to a music file prior to installation of the Media Manager. Accordingly, ReDigi cannot determine whether a music file has previously been burned to a CD, copied onto an unconnected external hard drive, or stored in one of the cloud services that ReDigi is unable to monitor. Rudolph Dep. at 123.

64. If ReDigi does detect that a user has a copy of a recording that the user has previously sold on ReDigi, ReDigi asks the user to delete that copy, failing which his or her account will be suspended. However, even if the account is suspended, the user will still be able to keep the copy of the recording already sold on ReDigi. Rudolph Dep. at 155.

D. ReDigi's Marketing Concerning the Lawfulness of its Service

65. ReDigi's subscription agreement, which investors had to sign before investing in ReDigi, states that "the law cannot be said to be well-settled" in the area of copyright law pertaining to ReDigi's business, and that ReDigi could provide no assurance that "the major distributors of digital music" will not claim a violation of their rights of copyright or that ReDigi "will ultimately be able to defend against such claims successfully." Ossenmacher Dep. at 142-44; Mandel Decl. Ex. L at 7.

66. In contrast, ReDigi's website and marketing materials have repeatedly reassured users that its service is legal and complies with copyright law. In a website section entitled "ReDigi ... The Legal Alternative," the text begins, "YES, ReDigi is LEGAL" and describes at length, with no hint of any legal uncertainties, how ReDigi's service complies with the law. Ossenmacher Dep. at 148-49; Mandel Decl. Ex. A (emphasis in original).

67. ReDigi justifies making such unequivocal assurances to consumers of the legality of its service on the grounds that such statements were made in the context of “marketing materials.” Ossenmacher Dep. at 149-151.

III. USE AND INFRINGEMENT OF CAPITOL’S SOUND RECORDINGS ON REDIGI

68. In December 2011, Capitol’s paralegal, Colleen Hall, visited the ReDigi website, signed up for a user account, and located copies of each of the recordings listed in Exhibit A to the Complaint in this action (each of which is included among the list of Copyrighted Recordings set forth in Exhibit 1 to the McMullan Declaration on this motion) being offered for sale as “used” files. Ms. Hall also identified at that time each of the Pre-1972 Recordings being offered for sale as “used” files on the ReDigi site. Hall Decl. ¶¶ 2-3.

69. In December 2011, Ms. Hall purchased from the ReDigi website each of the recordings referenced in paragraph 70 above and downloaded them onto the hard drive of her computer at work. She listened to the downloads and verified that they contained the actual recordings owned and distributed by Capitol. Hall Decl. ¶¶ 4-5.

70. In discovery, ReDigi also provided three spreadsheets listing recordings on the ReDigi service that it had been able to identify as potentially being Capitol recordings based on identifying information contained in the metadata for such recordings. The three spreadsheets listed, as of May 15, 2012, any Capitol recordings that (1) were then being stored in the ReDigi cloud without being offered for sale, (2) were then being stored in the ReDigi cloud while also being offered for sale, or (3) had been actually sold through the ReDigi website. Rudolph Dep. at 204-206.

71. To the extent that ReDigi has accurately identified these recordings as owned or exclusively licensed by Capitol in the United States, the spreadsheets show that, as of May 15,

2012, approximately 200 Capitol recordings were being stored in the ReDigi cloud without being offered for sale; approximately another 900 Capitol recordings were being stored in the ReDigi cloud and were also being offered for sale; and approximately 150 additional Capitol recordings had actually been sold. Rudolph Dep. at 204-206.

72. Accordingly, of the approximately 1250 Capitol recordings identified on the ReDigi service, about 900 had been offered for sale and another 150 had been actually sold, with only 200 being stored without any offer of sale or actual sale. Rudolph Dep. at 206-207.

73. The approximately 150 recordings that had been sold through the ReDigi site included numerous recordings that were purchased by individuals other than Capitol's paralegal, including, for example, "Princess of China" and "Yes" by Coldplay; "Wichita Lineman" by Glen Campbell; and "Littlest Things" by Lily Allen (each of which is included among the list of Copyrighted Recordings set forth in Exhibit 1 to the McMullan Declaration on this motion). Hall Decl. ¶ 5; Mandel Decl. Ex. M.

Dated: New York, New York
July 20, 2012

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