UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR RECONSIDERATION AND REARGUMENT

COWAN, LIEBOWITZ & LATMAN, P.C.
1133 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-6799
(212) 790-9200

Attorneys for Plaintiff
CAPITOL RECORDS, LLC

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Plaintiff Capitol Records, LLC ("Capitol") submits this memorandum of law in opposition to the motion by Defendant ReDigi Inc. ("ReDigi") for reconsideration of the Court's June 13, 2012 order compelling ReDigi to comply with document request no. 13 of Capitol's first set of document requests.

REDIGI'S MOTION FOR RECONSIDERATION SHOULD BE DENIED

A motion for reconsideration "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." McRae v. Norton, 2012 WL 1744849, at *1 (E.D.N.Y. May 16, 2012) (citation and internal quotations omitted). "It is black letter law that a 'motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court.'" Nat'l Union Fire Ins. Co. v. Las Vegas Prof'l Football L.P., 409 F. App'x 401, 403 (2d Cir. 2010). See also Vornado Realty Trust v. Castlton Envtl. Contractors, LLC, 2011 WL 5825688, at *1 (E.D.N.Y. Nov. 16, 2011) ("Reconsideration is not a proper tool to repackage and relitigate arguments and issues already considered by the court in deciding the original motion.").

As ReDigi itself acknowledges, reconsideration is proper in very limited circumstances. The case law holds that "[r]econsideration is appropriate only where there is 'an intervening change of controlling law, newly available evidence, or the need to correct a clear error or prevent manifest injustice.'" Sutherland v. Ernst & Young LLP, 2012 WL 130420, at *1 (S.D.N.Y. Jan. 13, 2012) (emphasis added). None of these rare circumstances is present here. Rather, ReDigi simply seeks to relitigate an issue it already lost, based on an identical factual and legal record. Accordingly, its motion for reconsideration should be denied. See, e.g., Williams v. Regus Mgmt. Group, LLC, 2012 WL 1711378, at *3 (S.D.N.Y. May 15, 2012) (denying

motion for reconsideration where "dissatisfied with the Court's first ruling, [the movant] merely seeks a second bite at the apple").

I. REDIGI'S SUPPOSED "NEW EVIDENCE" CONSISTS OF NOTHING MORE THAN ALLEGATIONS THAT CAPITOL HAS MADE FROM THE OUTSET

In a futile bid to invent "new evidence" to support its plea for reconsideration, ReDigi feigns surprise that Capitol's deposition witness deems ReDigi users to be infringers. See ReDigi Br. at 4 ("... at his deposition [Capitol's witness] squarely levied the charge that it was Capitol's position that ReDigi's customers were 'infringers.'"). However, there is absolutely nothing "new" about such allegations. To the contrary, a predicate act of infringement by the users of the ReDigi system was and remains a necessary element of Capitol's claims of secondary liability against ReDigi based on inducement of copyright infringement, contributory copyright infringement and vicarious copyright infringement. See, e.g., Arista Records LLC v. USENET.com, Inc., 633 F. Supp. 2d 124, 149 (S.D.N.Y. 2009) ("For all three theories of secondary copyright infringement, there must be the direct infringement of a third party").

While ReDigi claims to have learned from depositions that Capitol considers ReDigi users to be "infringers," it need only have looked to the allegations of the complaint to have found such supposed new "evidence." See Complaint (Docket No. 1) ¶ ¶ 52, 62, 72 ("ReDigi users have engaged and continue to engage in the unauthorized reproduction and distribution of Plaintiff's copyrighted sound recordings and distribution and public display of Plaintiff's associated artwork.... As a result, such users are liable for direct copyright infringement of Plaintiff's exclusive rights of reproduction and distribution under 17 U.S.C. § 106.").

Because ReDigi has failed to present any "new" information that was not already available at the time of the original hearing, its motion must be denied. Rodick v. City of Schenectady, 155 F.R.D. 29, 29 (N.D.N.Y. 1994) (denying motion for reconsideration where

movant "present[ed] no new law or facts which were not available at [the time of the original argument]").

Nor is there any basis for ReDigi's inflammatory speculation about Capitol's alleged intention to "harass" or "embarrass" ReDigi's users by threatening "multimillion dollar judgments" against them. See ReDigi Br. at 4. Such allegations are supported by nothing but ReDigi's unfounded assumptions and unfair characterizations regarding Capitol's motives. ReDigi's "evidence" for this alleged conspiracy were responses by Capitol's witnesses when questioned by ReDigi about Capitol's enforcement activities in connection with the well-publicized "file sharing" cases, such as Limewire. Capitol's witnesses never testified that Capitol intended to sue individual ReDigi users or even threaten them with suit. They simply answered tangential questions repeatedly posed about other lawsuits, presumably as a set-up for the instant motion.

Indeed, it would be premature for Capitol to make any such determinations about naming individual ReDigi users as defendants at this stage, where Capitol has no information regarding the number of different users that have sold or offered Capitol recordings for sale, the number of recordings any particular users have sold or offered for sale, and the extent to which users may have abused the ReDigi system by retaining copies of Capitol recordings they are selling or offering for sale. It is precisely ReDigi's refusal to abide by its discovery obligations and this Court's Order that have kept Capitol in the dark about how individuals are using the ReDigi system to infringe Capitol's copyrights. And as noted below, the so called "aggregate" information ReDigi has provided reveals none of this information.[1]

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[1]ReDigi disingenuously argues that the concerns of "embarrassment" are especially acute for "individuals who have merely used ReDigi for cloud storage purposes." See ReDigi Br. at 5. *(footnote continued)*

In any event, regardless of the individual liability of ReDigi users, those users are highly relevant witnesses where ReDigi seeks to rely on their purported defenses to avoid any claim of secondary liability. See Point II infra. Surely, the fact that these witnesses may themselves be liable for infringement does not somehow shield them from discovery as relevant fact witnesses.

The cases relied on by ReDigi in arguing for protection of Internet user identities do not support its position here. While ReDigi cites to Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) as support for its claim that the discovery sought by Capitol presents a risk of "coercing unjust settlements from innocent defendants" (ReDigi Brief at 4), the Digital Sun Court actually ruled that the Plaintiff had established "good cause" to obtain the name, physical address, and e-mail address of Internet users, subject to the terms of an appropriate protective order. Id. As the Digital Sin Court acknowledged, numerous courts have granted plaintiffs discovery seeking the identities of Internet users potentially engaged in illegal acts of copyright infringement. 279 F.R.D. at 240 n.2 (citing, *e.g.*, Order Permitting Expedited Discovery in Media Prods., Inc. v. Does 1-59, 12-CV-125 (S.D.N.Y. Jan. 11, 2012); Order Permitting Expedited Discovery in Next Phase Distrib., Inc. v. Does 1-138, 11-CV-9706 (S.D.N.Y. Jan. 6, 2012); and Order Permitting Expedited Discovery in Patrick Collins, Inc. v. Does 1-115, 11-CV-9705 (S.D.N.Y. Jan. 5, 2012)).

Similarly unavailing is ReDigi's reliance on K-Beech, Inc. v. Does 1-85, 2011 U.S. Dist. LEXIS 124581 (E.D. Va. Oct. 5, 2011) (unavailable on Westlaw). In that case, the Court quashed the subpoenas served on the Joe Doe defendants only where the record was clear that

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Even though the Court ordered ReDigi to answer Capitol's document request No. 13 in full, Capitol voluntarily agreed to limit ReDigi's response only to users who had sold or offered to sell Capitol's recordings, eliminating those who simply store the recordings for personal, non-commercial use.

Plaintiffs had engaged in an overarching egregious pattern of conduct indicating "an improper purpose for the suits," including making harassing telephone calls to Joe Does demanding settlement payments and also dropping suit against any Joe Doe who was willing to litigate so as to avoid the costs of litigation. Id. at *6-7. There is no comparable evidence of any kind suggesting Capitol will act improperly in this case. ReDigi's hyperbolic characterizations aside, Capitol seeks identification of individuals in possession of evidence relevant to defenses that ReDigi has chosen to assert and ReDigi cannot escape its obligations by imagining that Capitol will abuse the discovery or litigation process.

II. REDIGI USERS HAVE RELEVANT AND DISCOVERABLE INFORMATION BEARING ON REDIGI'S FAIR USE AND ESSENTIAL STEP DEFENSES

ReDigi next protests that the information sought is only tangentially relevant and is already available to Capitol in "aggregate data" ReDigi believes substitutes for what it should now provide. ReDigi is wrong on both scores. It already failed to persuade the Court that the information was irrelevant and thus not discoverable, and the information it has provided is a very far cry from what Capitol is rightfully entitled to evaluate in meeting ReDigi's defenses.

ReDigi has asserted fair use as a defense justifying the copies of Capitol recordings that its users make during the process of uploading and downloading music files to the ReDigi cloud. The Court will recall that such uploads are the necessary first step a user must take before offering his or her song file for sale, and ReDigi would shield that act of uploading from liability by reference first to the fair use doctrine. See Answer (Docket No. 6) ¶¶ 64, 68 (asserting fair use as Fourth and Eight Affirmative Defenses); ReDigi's Memorandum of Law in Opposition to Motion for Preliminary Injunction (Docket No. 14) at 9-13 (arguing that user uploads to and downloads from ReDigi's service is fair use).

Pursuant to 17 U.S.C. § 107(1), the first factor to be assessed in any fair use analysis is the "purpose and character of the use, including whether the use is of a commercial nature ...." Where ReDigi purports to assert the alleged fair use rights of its users, Capitol should be entitled to question users on the "purpose and character" of their use of ReDigi to sell Capitol recordings for personal gain and their practices in retaining infringing copies. Among other things, Capitol should be free to question selected users about why they were drawn to ReDigi; how they have used ReDigi to sell purportedly "used" copies of Capitol's recordings; their practices in downloading those recordings from ReDigi's cloud after purchasing them; their practices in complying with ReDigi's policies regarding deleting extra copies of the recordings they sell; their general habits or tendencies regarding retaining additional copies of song files on other hard drives, compact discs, or third party cloud storage services; their practices in "ordering" Capitol recordings for purchase when those recordings are not currently available on the ReDigi site; their responses to ReDigi's various encouragements to "sell your unwanted music!" or other promotions designed to induce infringement; any gaps in time between users' uploading of files and subsequent offers to sell those files; and other conduct that bears on whether their use of ReDigi is in any sense fair.

In short, in order to meet ReDigi's fair use defense, Capitol is entitled to look at the real-world facts concerning ReDigi users' actual conduct, in the context of how they really use the system, rather than ReDigi's unsupported characterizations of how its users behave. Evidence of such conduct by ReDigi users could undermine any purported claim of fair use, which is an "equitable rule of reason" that must be tailored to the particular factual circumstances of each case. See, e.g., Fin. Info., Inc. v. Moody's Investors Serv., Inc., 751 F.2d 501, 508 (2d Cir. 1984) (court must employ an "equitable rule of reason" in assessing fair use defense); Lish v.

Harper's Magazine Found., 807 F. Supp. 1090, 1105 (S.D.N.Y. 1992) ("The fair use test is 'a totality inquiry, tailored to the particular facts of each case'"); Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 11 (S.D.N.Y. 1992) ("Courts and commentators have repeatedly observed that a fair use inquiry is highly fact-specific and does not readily admit of bright line generalizations"). Capitol should thus be allowed to explore the full range of factual details that color the way in which the ReDigi system has actually been used in practice, rather than being confined to a static and limited summary that fails to capture key discoverable information.

ReDigi's second basis for excusing user uploads and downloads is the so-called "essential step" doctrine codified at 17 U.S.C. 117(a), which permits the owner of a "computer program" to make a copy of that program only to the extent necessary to use the program. See Answer (Docket No. 6) ¶¶65, 69 (fifth and ninth affirmative defenses); ReDigi's Memorandum of Law in Opposition to Motion for Preliminary Injunction (Docket No. 14) at 13-14 (arguing that user uploads to and downloads from ReDigi's service is protected by essential step doctrine). The key statutory limitation on this right is that the program will be "used in no other manner," which language has consistently been interpreted to mean that the owner of a copy of such a program can make such a copy only for "internal use" and most decidedly not for purposes of redistribution to third parties. See Reply Memorandum in Further Support of Plaintiff's Motion for Preliminary Injunction (Docket No. 21) at 4-5 (citing cases).

Insofar as ReDigi continues to press this defense – and even insisted that Capitol designate a 30(b)(6) witness on the elements of the essential step defense – Capitol is likewise entitled to discovery into how ReDigi users are actually employing its service. More specifically, Capitol should be free to question select users about whether they are uploading Capitol's sound recording solely to "use" them as one would use a computer program for

"internal purposes," or instead whether they are uploading those song files to redistribute and sell them. As is the case with fair use, ReDigi has put these issues in play but asserting the essential step defense. Accordingly, it cannot block Capitol from seeking discovery relevant to answering those defenses.

Perhaps because ReDigi cannot genuinely refute the relevance of the user information, it insists that the "aggregate data" it has produced regarding its users provides sufficient information for Capitol's purposes. See ReDigi Br. at 7-8. Although ReDigi describes this aggregate data obliquely, it in fact is nowhere near as revealing as ReDigi suggests. The data consists of three spread sheets which separately list Capitol recordings that were stored in ReDigi's cloud with no offer for sale as of May 15, 2012 (roughly 200); those that were being offered for sale as of May 15, 2012 (roughly 900); and those that had been sold by May 15, 2012 (roughly 150). ReDigi's witness readily admitted that the spread sheets just showed a snapshot of activity as of a given date, so that, for instance, recordings that were not currently offered for sale may previously have been so offered on earlier dates.

Moreover, the spread sheet provided no information on a host of other key issues. For instance, they provide no information on the number of users uploading or selling these recordings. By way of example, for the 900 Capitol recordings being offered for sale as of that one day, Capitol has no way of determining whether there are many hundreds of users acting as sellers, or a smaller handful who are trafficking in these infringing files. Indeed, ReDigi has intimated that some users have uploaded a disproportionate number of Capitol recordings for sale, but again refuses to identify those users to permit Capitol to question them. The "aggregate" data also provides no insight into how or whether users are ordering Capitol recordings not currently available as "used tracks," or whether those who purchase Capitol

recordings have downloaded them to home computers, thereby making additional copies. Finally, the aggregate data also provides no information regarding whether users who sell Capitol recordings on ReDigi are retaining infringing copies of those recordings in other storage media, such as disconnected hard drives, iPods, CDs or third party cloud services. In short, the aggregate data provides little of the kind of real-world facts Capitol is entitled to discover to counter ReDigi's defenses.

While ReDigi would surely like to confine Capitol's discovery to what it unilaterally determines should be relevant, Capitol is entitled to discovery into matters reasonably calculated to lead to the discovery of admissible evidence. Beyond its wild accusations that Capitol is on a witch hunt to intimidate users, ReDigi has thus provided no legitimate concern that justifies its stubborn refusal to provide any discovery into the identity of relevant witnesses and potential infringers of Capitol's copyrights. Accordingly, ReDigi's motion for reconsideration should be denied.

CONCLUSION

For the foregoing reasons, ReDigi's motion for reconsideration should be denied.

Dated: New York, New York
July 6, 2012

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiff

By: _____
Richard S. Mandel
Jonathan Z. King
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200