

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC, :

Plaintiff, :

-against- :

12 CIV. 0095 (RJS)

REDIGI INC., :

Defendant. :

----- X

**APPENDIX TO THE DECLARATION OF
RICHARD S. MANDEL IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

[REDACTED]

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1133 Avenue of the Americas
New York, New York 10036-6799
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**EXCERPTS FROM THE DEPOSITION TRANSCRIPT OF
LAWRENCE S. RUDOLPH ROGEL**

[REDACTED]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC

CERTIFIED COPY

Plaintiff,

v.

No. 12 Civ. 0095 (RJS)

REDIGI INC.,

Defendant.
-----X

RULE 30(b)(6)
DEPOSITION OF LAWRENCE S. RUDOLPH ROGEL
New York, New York
Monday, June 18, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR
JOB NO. 50449

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June 18, 2012
10:00 a.m.

Rule 30(b)(6) deposition of REDIGI
INC., through its representative LAWRENCE
S. RUDOLPH ROGEL, held at the offices of
Cowan, Liebowitz & Latman, P.C., 1133
Avenue of the Americas, New York, New York
pursuant to Rule 30(b)(6) Notice and
individually, before Annette Arlequin, a
Certified Court Reporter, a Registered
Professional Reporter, a Certified LiveNote
Reporter, and a Notary Public of the State
of New York.

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A P P E A R A N C E S:

COWAN, LIEBOWITZ & LATMAN
Attorneys for Plaintiff
1133 Avenue of the Americas
New York, New York
BY: JONATHAN Z. KING, ESQ.

MEISTER SEELIG & FEIN
Attorneys for Defendant
140 East 45th Street
New York, New York 10017
BY: GARY ADELMAN, ESQ.

ALSO PRESENT:

JOHN OSSENMACHER, ReDigi, Inc.

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IT IS HEREBY STIPULATED AND AGREED by
and between the attorneys for the
respective parties herein, that filing and
sealing be and the same are hereby waived;

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial;

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized to
administer an oath, with the same force and
effect as if signed and sworn to before the
Court.

- o0o -

1 L. Rudolph
2 L A W R E N C E S. R U D O L P H R O G E L,
3 called as a witness, having been duly
4 sworn by a Notary Public, was examined
5 and testified as follows:

6 * * *

7 EXAMINATION BY

8 MR. KING:

9 Q. Good morning, Mr. Rudolph, or should
10 I call you Mr. Rogel?

11 A. Call me Rudolph.

12 Q. Okay. Mr. Rudolph. My name is
13 Jonathan King. We met before. I represent
14 Capitol Records along with my firm Cowan
15 Liebowitz & Latman and we're here to take your
16 deposition today.

17 You'll be appearing both in your
18 personal capacity as Mr. Rudolph and also as a
19 corporate designee on behalf of ReDigi Inc. and
20 we'll be asking you some questions.

21 I gather you've probably been deposed
22 before, but I always like to just set out the
23 ground rules.

24 I'll ask you questions and you are to
25 provide me answers to the best of your ability.

1 L. Rudolph

2 A. It was -- some of it was in
3 preparation for being able to sell used music.

4 Q. Okay. And ReDigi is, as you
5 described it, a startup company to provide a
6 marketplace for used digital music?

7 MR. ADELMAN: Object to the form.
8 You can answer.

9 A. ReDigi is a startup company for a,
10 provide a marketplace for buying and selling
11 used digital music.

12 Q. Okay. Prior to your experience with
13 ReDigi, did you have any experience in the music
14 industry?

15 A. No, I did not.

16 Q. So no involvement with music
17 licensing?

18 A. Correct.

19 Q. Or you mentioned or you made
20 reference to cloud computing, cloud storage, but
21 your prior experience with cloud computing,
22 cloud storage, none of that related specifically
23 to the music industry or the storage of music
24 files, correct?

25 MR. ADELMAN: Objection to form.

1 L. Rudolph

2 you Mr. Rudolph or you through companies you
3 participated in.

4 A. About two dozen.

5 Q. Okay. So you're very familiar with
6 the patent process?

7 A. Yes.

8 Q. Okay. So can you verify that
9 Plaintiff's Exhibit No. 2 is the patent
10 application that covers the ReDigi technology
11 that you just testified about?

12 MR. KING: Off the record for a
13 second.

14 (Discussion off the record.)

15 BY MR. KING:

16 Q. Have you had a chance to review --

17 A. It appears to be.

18 Q. Okay. And did you participate in the
19 preparation of the patent application that
20 appears in Plaintiff's Exhibit No. 2?
(Ex. E)

21 A. Yes, I did.

22 Q. Okay. And if you look at the first
23 page of Plaintiff's Exhibit No. 2, it lists as
24 inventor Lawrence Rogel.
(Ex. E)

25 That is you, sir?

1 L. Rudolph

2 that's listed as assignee?

3 A. It was the company that we were going
4 to form.

5 Q. Was IntellisysGroup never actually
6 formed as a formal corporation?

7 A. I don't know the answer to that. You
8 have to ask John.

9 Q. Okay. But is it fair to say that
10 whatever rights that IntellisysGroup has or had
11 in this patent application are now owned by
12 ReDigi?

13 A. Correct.

14 Q. Okay. Did you help draft some of the
15 disclosures in this patent application?

16 A. Yes, I did.

17 Q. Okay. And did you help prepare some
18 of the diagrams and charts in this application?

19 A. Yes, I did.

20 Q. Okay. And just to get the chronology
21 right, again, if you look at the first page of
22 Plaintiff's Exhibit 2, ^(EX E) it states that a
23 provisional application was filed back in
24 December 31st of 2009.

25 And you understand what a provisional

1 L. Rudolph

2 So if you'll flip in to Figures 2 and
3 3, let me ask you about them sequentially.

4 Does Figure 2 accurately show, at
5 least at a high level, how the ReDigi system
6 works as it pertains to a music file?

7 A. Give me a moment to refresh my -- to
8 read it.

9 Q. Sure.
10 (Document review.)

11 A. So you asked me both figures?

12 Q. I was just referring, my question
13 actually just related to Figure 2.

14 A. So yes, at a high level this
15 describes what ReDigi does.

16 Q. Okay. And Figure 3, again, I'm
17 drawing from the language used later in the
18 patent, does Figure 3 show the processing of a
19 music file in the ReDigi system?

20 MR. ADELMAN: Objection to form.

21 You can answer.

22 A. There are some variations between
23 what ReDigi does and what the flowchart explains
24 on Figure 3, but it's mostly right but not
25 perfect.

1 L. Rudolph

2 Q. Okay. Do you want to identify to me
3 where the flowchart varies?

4 And again, we're talking about Figure
5 3, Plaintiff's Exhibit 2. (Ex. E)

6 (Document review.)

7 A. So the steps 56 and 60 are we remove
8 all copies before we upload so that's slightly
9 different.

10 Q. So let me stop you and ask you, are
11 you saying that before -- you're referring to
12 the upload of a song file from a user's personal
13 computer to ReDigi's cloud server?

14 A. When we transfer a music file from
15 the user's personal computer up to a ReDigi
16 locker, we require the user to delete all the
17 files or any copies the user may have.

18 Q. And but you can't delete the file
19 first and then upload it, correct? That would
20 make no sense.

21 MR. ADELMAN: Objection to form.

22 A. Correct.

23 Q. So you're talking about additional
24 copies that might be on the computer.

25 A. The patent is talking about

1 L. Rudolph

2 In the case of ReDigi, would that be
3 what you colloquially call the ReDigi cloud?

4 A. Yes, it is.

5 Q. Okay. And a cloud, just for my
6 edification, a cloud is essentially a remote
7 server, right, at least for purposes of this, a
8 simple description?

9 A. Sure. Yes.

10 Q. Okay. And it is located, it's not up
11 in the clouds, it is located in a physical
12 location, correct?

13 A. Correct.

14 Q. Is --

15 A. Arizona.

16 Q. Where is yours?

17 A. I don't know but...

18 Q. Is yours in Cambridge, Massachusetts?
19 Is ReDigi's in Cambridge?

20 A. No, it's not.

21 Q. Where is it located?

22 A. We're using the Amazon cloud service.

23 Q. Okay.

24 A. Which is probably in Arizona
25 somewhere.

1 L. Rudolph

2 Q. So you're renting server space from
3 Amazon?

4 A. That is correct.

5 Q. Okay. And as the patent paragraph 70
6 says, it says that remote server, which we've
7 now identified as the ReDigi cloud, that's the
8 cloud where ReDigi users can store their music
9 files, correct?

10 A. That is correct.

11 Q. Okay. Now on item -- on Figure
12 No. 2, the server also has various icons or
13 discs attached to it.

14 Are those discs meant to represent
15 the physical storage space that's made available
16 via that server?

17 A. That is correct.

18 Q. Okay. And that again is a physical
19 storage entity on which computer files can be
20 stored?

21 A. Eventually.

22 Q. Is that also, you think, probably
23 located in Arizona?

24 A. Yes.

25 Q. Okay. And so music files, when a

1 L. Rudolph

2 ReDigi user stores music in the ReDigi cloud, he
3 or she is most likely storing on a physical disc
4 in Arizona or wherever the rented Amazon cloud
5 server space is, correct?

6 A. Correct.

7 Q. And from that disc, that physical
8 disc, the ReDigi user can stream the file back
9 to himself, correct?

10 A. Correct.

11 Q. He could also download the file back
12 to his computer, correct?

13 A. He can download a file from the
14 computer, yes.

15 Q. Okay. And now that same disclosure
16 we just read also made reference to a client
17 digital data processor, e.g. a private computer,
18 and that would be item No. 22 in Figure No. 2?

19 A. Correct.

20 Q. Okay. So the way it works is the
21 ReDigi user has the music file on item No. 22 in
22 Figure 2 and then uploads that music file via
23 the Internet, shown in the icon for 26, to the
24 remote server in item 20, which is the ReDigi
25 cloud server, correct?

1 L. Rudolph

2 A. Correct.

3 Q. And then if you continue in paragraph
4 -- I'll point you. If you go back to page 4 (Ex. E)
5 which is ReDigi00000419, Plaintiff's Exhibit 2,
6 it says, this is maybe three-quarters of the way
7 down the paragraph, it says "The user, a term
8 which is typically used herein to refer to an
9 act of the client digital data processor --

10 A. Wait. I lost you. Where are you?
11 I'm sorry.

12 Q. Okay. I'm still in paragraph 70,
13 maybe about halfway down.

14 A. The second sentence?

15 Q. It starts -- no, it's about -- .

16 A. The second --

17 Q. It starts -- it's after a long
18 parenthetical and it starts with the term, "The
19 user."

20 A. Oh, okay, yes.

21 Q. "The user..." I'll skip the
22 parenthetical, "...may upload or download his or
23 her DMOs between his or her private computer and
24 his or her storage area on the remote server."

25 Okay. So when the patent refers to

1 L. Rudolph

2 the "storage area on the remote server," in the
3 case of ReDigi, would that be what ReDigi refers
4 to as the user's cloud locker?

5 A. Yes. We talk about the user -- the
6 user's ReDigi cloud locker is on the disc
7 system, yes.

8 Q. Right. And that means, at least in
9 virtual terms that means that space on the disc
10 that stores the files associated with that
11 particular user, correct?

12 A. Correct.

13 Q. Okay. And again, the references in
14 the patent to DMO, digital media object, in the
15 case of ReDigi would mean music files, song
16 files, right?

17 A. That is correct.

18 Q. So the file, the music file first
19 resides in the ReDigi server as described in
20 this patent application, the file first resides
21 on the private user's computer, on a physical
22 disc on that private user's computer, correct?

23 A. Perhaps.

24 Q. Okay. Or in one, in one variation.
25 I've got my private computer at home and I've

1 L. Rudolph
2 got all my iTunes files stored on my hard drive.
3 That's certainly a plausible scenario, correct?

4 MR. ADELMAN: Objection. I'm not
5 clear whether you're talking about what the
6 patent says or what actually is happening
7 on --

8 MR. KING: Well, we're going to --

9 MR. ADELMAN: So are you just talking
10 about the patent right now?

11 MR. KING: I'll make it clear.

12 BY MR. KING:

13 Q. So let's talk about the ReDigi
14 service and then describe it in the terms of
15 this patent.

16 I'm a ReDigi user and I have a song
17 on my hard drive. That song is stored on my
18 hard drive on a physical disc, correct?

19 A. That's a plausible scenario.

20 Q. Okay. I upload it to the -- I became
21 a ReDigi member, I download the software, my
22 file is deemed eligible, I upload it to the
23 ReDigi cloud server.

24 Now that song is stored on a physical
25 disc somewhere wherever the ReDigi cloud server

1 L. Rudolph

2 is located, correct?

3 A. At the end of the transfer, yes.

4 That's correct.

5 Q. And either from -- and I can play it
6 when it's on my home computer, I can stream it
7 to myself, correct?

8 A. No.

9 Q. Or I can play it, I can perform it.

10 A. No.

11 Q. I can't?

12 If I have an iTunes file on my home
13 computer, I can't click it and play it through
14 my speakers?

15 A. If you just loaded --

16 Q. I'm saying before uploading.

17 A. Okay.

18 Q. Can I?

19 A. Yes, I presume so.

20 Q. And then if I upload it to the ReDigi
21 cloud also from that remote disc on which it's
22 now embodied, I can also play it back to myself,
23 correct?

24 A. That is correct.

25 Q. Now I refer you to paragraph 71 on

1 L. Rudolph (Ex. E)
2 page 4 of Plaintiff's Exhibit 2, which is again
3 ReDigi 419. It says, "For a DMO..." it's again
4 a digital media object "...to be offered for
5 sale, is it first copied to the remote server
6 and stored on the disc."

7 So is that the case in the ReDigi
8 system, that for a, in the case of a ReDigi, a
9 music file to be offered for sale, it is first
10 copied to the remote server, the ReDigi cloud
11 server and stored on a disc?

12 A. No.

13 Q. So that statement in here in
14 paragraph 71 does not describe what happens in
15 the ReDigi service?

16 A. Correct, it does not describe
17 accurately what happens in the ReDigi service.

18 Q. Okay. What is inaccurate about that
19 statement as it applies to ReDigi?

20 A. ReDigi doesn't copy the file from the
21 user's machine up to the locker. We transfer
22 the file so that when the file has migrated,
23 transferred from the user machine to the locker,
24 it's no longer on the user machine. There's
25 never the case that there are two copies, two

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L. Rudolph

instances of the file both on the user machine and the locker.

Q. Right. I understand it's never the case that there are -- well, strike that.

Has ReDigi invented a new method for uploading files?

A. ReDigi hasn't invented a new method, but we use non-standard methods.

Q. Okay. So it's ReDigi's position now that when the user uploads a file from his or her computer to the ReDigi cloud, there's no duplication of the file on the computer's -- on the user's computer to ensure that the file ends up in the ReDigi cloud? That's ReDigi's position?

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L. Rudolph

ReDigi filed when confronted with Capitol's preliminary injunction back in earlier this year?

A. It does look that way.

Q. Okay. And you recall that experience of defending a preliminary injunction motion?

A. Yes, I do.

Q. Did you review this brief before it went out?

A. Yes, I did.

Q. Could you turn to page 9, Plaintiff's Exhibit 3.

(Witness complies.)

Q. And if you look under item B, Roman numeral one, the brief reads, "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 file on his or her computer."

Do you see that sentence?

A. Yes.

1 L. Rudolph

2 Q. Okay. So you would agree with me
3 that that sentence suggests that indeed uploads
4 and downloads do involve copying, correct?

5 A. Yes.

6 MR. ADELMAN: Objection to form.

7 Go ahead.

8 BY MR. KING:

9 Q. Okay. Do you disavow that sentence?

10 MR. ADELMAN: Objection to form.

11 A. Yes, I disavow that sentence.

12 Q. Okay. Notwithstanding the fact that
13 you reviewed this brief before it was filed in
14 federal court?

15 A. Correct.

16 Q. So you prepared a patent application
17 which said for a file to be offered for sale,
18 it's first copied to a remote server and the
19 company submitted a brief in federal court which
20 says copies are made on ReDigi when files are
21 uploaded, but in preparing for this deposition
22 you've come up with a theory whereby without
23 having invented new method of uploading, you're
24 not providing any copies.

25 When did you come up with this

1 L. Rudolph

2 theory, sir?

3 MR. ADELMAN: Objection to form.

4 A. This is like when did you stop
5 beating your wife.

6 Can you ask the question so I can
7 answer it in a way I can answer it?

8 Q. Why has ReDigi had a change of view
9 about whether its system involves the making of
10 copies when users upload or download song files?

11 MR. ADELMAN: Objection to form.

12 A. It's much easier to explain how we do
13 things this way. There's lots and lots of
14 detail in the system that are sophisticated and
15 we don't use -- I don't use those terms all the
16 time when I talk to people explaining how the
17 system works.

18 Q. Okay. So you filed a brief to a
19 federal judge determining ReDigi's faith and
20 injunction motion by just using the easiest
21 vocabulary? Is that your testimony?

22 MR. ADELMAN: Objection to form.

23 A. Clearest? I don't know. Maybe.

24 Q. So the brief is the clearest and
25 easiest description of what ReDigi does?

1 L. Rudolph

2 Q. Is it the case after purchasing files
3 on ReDigi, users typically download the files to
4 their computers rather than leave them in the
5 cloud?

6 A. We have -- I would not use the word
7 "typical." There have been lots and lots of
8 users who have not downloaded files that they've
9 purchased from ReDigi.

10 Q. Do you have a sense of what the
11 numerical breakdown is or percentage breakdown
12 is?

13 A. No, I do not, but it's -- when I say
14 I have a sense, I can -- I know it's more than
15 10 percent. Maybe as high as 40 percent.

16 Q. Who have just kept the files in the
17 cloud?

18 A. Correct.

19 Q. Do you mean by user or by track?

20 A. By track.

21 Q. So you're saying somewhere between 10
22 and 40 percent of the tracks that have been
23 purchased have stayed in the cloud rather than
24 been downloaded to the purchaser's...

25 A. When I have looked at the data on the

1 L. Rudolph

2 I can buy the song Yesterday by the Beatles and
3 Push Push in the Bush by somebody, and switch
4 the acoustics between the two songs and try to
5 sell Yesterday by the Beatles but the music is
6 Push Push in the Bush.

7 Q. Okay. So you also want to make sure
8 that the file was not only bought from iTunes
9 but is exactly what it purports to be.

10 A. That is correct.

11 Q. Okay. Gotcha.

12 Then referring back to Figure 3 on
13 Plaintiff's Exhibit 2, ^(Ex. E) if it passes the
14 ownership test as indicated in item 54 in Figure
15 3, the song is uploaded to the ReDigi server and
16 then it's vetted once more?

17 A. That is correct.

18 Q. Okay. And what's the purpose of the
19 second round of vetting when the file is now on
20 the ReDigi cloud server in Arizona or wherever
21 that's located?

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L. Rudolph

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21 Q. And even after the song is uploaded,
22 I gather the Media Manager continues to run on
23 the computer's -- the user's computer
24 continuously?

25 A. There is software on the user's

1 L. Rudolph
2 computer which is running, to the best of our
3 ability, running all the time.

4 Q. So obviously the user doesn't
5 unilaterally get to decide whatever he or she
6 wants to upload. ReDigi has very stringent
7 rules of about what can and cannot be uploaded,
8 correct?

9 A. That is correct.

10 Q. And ReDigi has multiple ways to block
11 a user's access to the system, right?

12 A. It has ways of blocking a user from
13 the system. Multiple? I guess block them from
14 the system.

15 Q. Well, it can block you from the
16 get-go on your own computer. It can also block
17 you by a second vetting up at the cloud server
18 level, correct?

19 A. So did you ask how to block a user?
20 Is that the question?

21 Q. Let me rephrase the question.

22 ReDigi is vetting any content users
23 want to upload to the system at multiple levels,
24 correct?

25 A. Yes, ReDigi does verification both on

1 L. Rudolph

2 the user's machine and in the locker, correct.

3 Q. And continuing on with the chart at
4 Figure 3 on Plaintiff's Exhibit 2, ^(Ex. E) so after the
5 song is uploaded at item 56 and then it passes
6 the ownership test on the server at item 57,
7 it's then eligible for sale; is that correct?

8 A. Yes, that is correct. The reason why
9 I can't say absolutely that's correct is that we
10 reserve the right to add additional tests so --

11 Q. Is that indicated in this chart?

12 A. No, it's not.

13 Q. And what point in the process would
14 those tests be implemented?

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L. Rudolph

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Q. Well, going back to Figure 3, before you made a correction with respect to item 60. You said, "Remove all copies of song from attached discs."

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L. Rudolph

after selling a song, a user attaches some sort of external storage device which is detected to have a file that was already sold and ReDigi ensures that that file, a copy of a file was already sold, ReDigi ensures that that file is then deleted?

A. That was a long sentence, a long question.

Q. There's no other way to ask it more briefly unfortunately.

A. I believe the answer is yes to that.

Q. Okay. And what item 70 says is it says wait for file creation or an external disc attachment.

You do have to wait until the device is attached to determine whether such a rogue copy exists, correct?

A. Correct. We wait -- we do have to wait -- the device has to be attached for us to be able to examine it.

Q. Right.

Users could, to use your terminology, gain the system by just not reattaching that device, correct, keep a copy of the file they

1 L. Rudolph
2 sold on that device, correct?

3 A. If I knew how to go into your dresser
4 drawer and look at the contents of a flash drive
5 sitting in your dresser drawer, I'd write
6 another patent on how to do that. We don't know
7 how to do that just yet.

8 Q. So the answer to my question is yes
9 or no.

10 MR. ADELMAN: Objection to form.
11 This is a deposition.

12 MR. KING: It's a yes or no question.

13 MR. ADELMAN: He can't answer -- it's
14 not a yes or no. There's no yes or no
15 questions in a deposition.

16 He answered the question. Next
17 question.

18 MR. KING: No.

19 BY MR. KING:

20 Q. No, to be fair, I don't think there's
21 any mystery about this. If someone keeps a copy
22 of a file that they have sold on ReDigi on some
23 external device and they don't reattach that
24 device, ReDigi software, needless to say, cannot
25 detect the existence of that now infringing copy

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Q. Turn to page 2 of the patent.

(Witness complies.)

Q. ReDigi 417.

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2 A. There's no way we can guarantee that
3 under all circumstances the user does not --
4 cannot listen to that song. He might have it on
5 a different machine, a different universe. We
6 make our -- ReDigi makes its best effort to try
7 to do that.

8 The patent, forget about -- what
9 ReDigi does, the patent cannot, the patent is
10 focused on the fact that transfer of ownership
11 happens instantaneously. If I buy a car from
12 you and you have a car, before I buy it from
13 you, I may go over and get into your car and
14 drive it.

15 I mean there's no way I can say
16 before we've transferred ownership that I could
17 not drive your car. There's no way to say that
18 after we transfer ownership that there's no way
19 that you're not going to drive your car. And
20 that's -- the patent is saying we are making --
21 the ownership is transferred during that time.

22 Q. And the patent elsewhere acknowledges
23 as much by saying it's impossible to ensure that
24 for all purposes that the seller doesn't retain
25 a copy, but that ReDigi is making its best

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2 effort, correct?

3 MR. ADELMAN: Objection to form.

4 You can answer.

5 A. Yes, that is correct.

6 Q. So let's explore the ways in which a
7 ReDigi user can gain the system if he or she
8 wanted.

9 Prior to selling a song on ReDigi, I
10 could burn a copy of that song onto a disc,
11 correct?

12 MR. ADELMAN: I'm just going to
13 object to the use of the phrase "gain the
14 system," which is you're using differently
15 than he had originally used, but I'll allow
16 him to answer.

17 BY MR. KING:

18 Q. Okay. You know what, then actually
19 I'll withdraw the description. I picked it up
20 from you.

21 MR. ADELMAN: That's fine.

22 Q. What I want to determine is all the
23 possible ways in which a ReDigi seller, someone
24 who is selling a music file on ReDigi, can
25 retain copies of the music files that they're

1 L. Rudolph

2 selling and avoid detection by ReDigi.

3 So a ReDigi seller could burn an
4 iTunes file onto a compact disc, correct?

5 A. That's one thing -- yes, that is
6 correct.

7 Q. And then the ReDigi seller could
8 still upload that song to the ReDigi cloud and
9 sell it, correct?

10 A. Offer it for sale, correct.

11 Q. Right.

12 And ReDigi would not be able to
13 detect that the user was retaining a physical
14 CD, that the seller was retaining a physical CD
15 on which she had burned a copy of that song,
16 correct?

17 A. Yes, that's correct.

18 Q. Okay. We discussed one other
19 possibility before, which is that ReDigi users
20 also may have multiple copies of songs on
21 various different kinds of storage devices,
22 right?

23 A. The user might have it on different
24 storage devices, yes.

25 Q. They might have it on their iPod or

1 L. Rudolph

2 multiple iPods, correct?

3 A. At the time of sale, it might be on
4 multiple iPods, correct.

5 Q. It might be on external hard drives?

6 A. It certainly might be.

7 Q. Or other MP3 players?

8 A. That is a possibility.

9 Q. And if the ReDigi user does not have
10 those devices connected either at the time the
11 ReDigi user's computer is scanned or does not
12 reconnect, the ReDigi user can sell that file
13 and still retain copies without detection by
14 ReDigi, correct?

15 A. As we discussed before, the fact that
16 the Media Manager continues to run and scan,
17 any time in the future if the user reconnects an
18 iPod to ReDigi, that will delete it from their
19 file, from their iPod even without the Media
20 Manager being part of it, but if they don't
21 reconnect the iPod and they don't add more songs
22 to it, you know, correct, we could not see
23 what's going on in the iPod.

24 Q. Prior to selling, also a ReDigi user
25 can store copies of their songs in various cloud

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16 Do you have contractual arrangements
17 with either Apple or Google that permit you to
18 do this?

19 A. No, we do not.

20 Q. Okay.

21 MR. ADELMAN: Objection to form.

22 Q. Now with respect to -- let's talk
23 about Apple iCloud's service.

24 Am I correct that the way that
25 service works is once you purchase a song, it's

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A. Before ReDigi Media Manager was installed, we cannot detect activity. We do not collect any activity.

Q. Right.

My question relates to whether the ReDigi software can determine what conduct has taken place with respect to a music file in the past.

So it cannot determine whether that music file has previously been burned onto a CD, correct?

A. That is correct.

Q. And it cannot determine whether that music file has previously been stored on an external hard drive, assuming that the hard drive is not connected when you download Media Manager, correct?

A. That is correct.

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2 A. That is right.

3 Q. Okay.

4 MR. KING: Let's mark this as the
5 next deposition exhibit. (Ex. D)

6 (Plaintiff's Exhibit 5, Printout from
7 ReDigi website, marked for identification,
8 as of this date.)

9 BY MR. KING:

10 Q. And, Mr. Rudolph, I'm going to just
11 show you some pages I printed out from the
12 ReDigi website.

13 Because of the way the website is set
14 up, it's sometimes a little difficult to print
15 out pages but you should recognize more or less
16 where this comes from.

17 Are the pages in Exhibit 5 familiar
18 to you as we produced from the ReDigi website?

19 A. Yes.

20 Q. And is this the description on the
21 ReDigi website that helps users learn how to use
22 the Media Manager to upload songs?

23 A. What is the question? (Ex. D)

24 Q. Is this -- does Exhibit 5 come from
25 the section of the ReDigi website that helps

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users learn how to use the Media Manager software?

A. Most likely.

Q. And it helps tutor them in how to upload eligible songs to the ReDigi cloud?

A. Yes.

Q. This is currently available on the ReDigi website, correct, Exhibit 5?

A. I need to read it first.

(Document review.)

A. Okay.

Q. And I apologize if some pages were cut off.

A. Okay.

Q. I just printed this out a few days ago, so is this currently available on the ReDigi website?

A. I believe so.

Q. Okay. And if you'll go to the first page of the document it states that, "After you download the Media Manager, ReDigi will analyze your music library creating a list of songs that are eligible on ReDigi."

So is that the way it works in

1 L. Rudolph

2 practice; you download the Media Manager and it
3 scans your computer for music files, and then
4 determines which of those files would be
5 eligible to be uploaded on ReDigi?

6 A. Yes. It continually scans your drive
7 looking for things that are music files and when
8 it discovers a music file, it analyzes it and
9 then gives it a thumbs up or a thumbs down.

10 Q. Okay. And when it gives it a thumbs
11 up, that means it's passed your criteria for
12 eligibility to be uploaded to the ReDigi cloud,
13 correct?

14 A. That is correct.

15 Q. Okay. And then it lists those
16 eligible files for the users in a box that looks
17 like the box that we see on the right side of
18 the page on Plaintiff's Exhibit 5, right?
(Ex. D)

19 A. Yes, although I'm not sure which
20 version of the ReDigi Media Manager these are
21 pictures of. This may be an older version.

22 Q. Okay. But regardless of whether this
23 is the most current version, once the ReDigi
24 software has identified the files that it
25 determines to be eligible, it will present those

1 L. Rudolph

2 files in some form of a list to the user,
3 correct?

4 A. Yes.

5 Q. Okay. And then if you read the
6 description in the third paragraph down, it
7 says, "From the eligible tab, select the songs
8 you wish to upload to your ReDigi cloud and
9 press the send to ReDigi button."

10 So again, is that how it works in
11 practice; you check off, click the little box
12 next to the songs that you wish to upload to the
13 ReDigi cloud and then you press a send to ReDigi
14 button?

15 A. Yes.

16 Q. And then it says, "A confirmation
17 display will show you the songs you selected and
18 any copies of those songs located on your
19 computer, all of which will be deleted upon
20 upload to your ReDigi cloud."

21 So when you hit the send to ReDigi
22 button, you'll get a confirmation display; is
23 that correct?

24 A. A pop-up window will appear.

25 Q. Okay. And it will tell you how many

1 L. Rudolph

2 copies you have of that song?

3 A. It will tell you the copies that we
4 have identified of that song.

5 Q. Okay. And those copies --

6 A. Yes.

7 Q. And does that include the original
8 file and any additional copies?

9 A. Yes, it does.

10 Q. Okay. And that original file and
11 those additional copies will all be deleted upon
12 upload to the ReDigi cloud, correct?

13 MR. ADELMAN: Objection to form.

14 A. Those files would be deleted, yes.

15 Q. Okay. But we need to be precise.

16 When you say the files, it means the
17 original source file and then any other
18 additional copies, correct?

19 MR. ADELMAN: Asked and answered.

20 You can answer if you'd like.

21 A. Yes.

22 Q. Okay. And then if you go to the
23 bottom paragraph of that page, it says, "Once
24 your selected songs are successfully uploaded to
25 your ReDigi cloud, a display will ask you if you

1 L. Rudolph
2 would like to keep your songs on your cloud for
3 storage and streaming or put the songs for sale
4 in the ReDigi marketplace."

5 Again in practice, once the songs
6 have been successfully uploaded to the cloud,
7 the user gets a notification offering the user
8 the option to either keep it in the cloud or to
9 sell the song?

10 A. There's a two-step process; one is to
11 -- that's right. One is to migrate the file to
12 the locker and then the next one is to be able
13 to offer them for sale.

14 Q. That wasn't my question.

15 I'm saying what it says here at the
16 bottom of Plaintiff's Exhibit 5 is that once
17 your song has been successfully uploaded to your
18 ReDigi cloud, you as the user get a display that
19 gives you two options, either to keep it in the
20 cloud or to sell it; is that correct?

21 A. Yes.

22 Q. If you'll turn to the second page of
23 this document, which again, I'm sorry it was cut
24 off. It's because the banner across the screen
25 for some reason inhibits printing out the full

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2 page. I think it's the way the website scripts
3 are written out, but in any event, you see it
4 makes reference to the cloud tab.

5 Do you know what's being referred to
6 by the cloud tab? That's the button in the list
7 that says cloud?

8 A. The cloud tab, right, lists the
9 user's files that are sitting in their locker.

10 Q. Right.

11 And from that cloud tab the user has
12 the option of either downloading songs back onto
13 his or her computer or selling songs in the
14 marketplace as described in that first sentence
15 on page 2, correct?

16 A. Yes.

17 Q. Okay. And then to list a song in the
18 marketplace, it's an easy process, right? You
19 just select the song you wish to list from your
20 my cloud tab and press the corresponding button
21 that says sell songs, correct?

22 A. That is correct.

23 Q. So once a ReDigi user has uploaded a
24 song to the cloud, the ReDigi interface makes it
25 very easy for that user to sell that song,

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2 correct, or at least to offer it for sale.

3 A. It makes it very straightforward for
4 the user to offer it for sale.

5 Q. I mean it's the goal of the structure
6 of the website to make it easy for users to
7 offer their songs for sale, correct?

8 A. That is correct.

9 Q. And the very premise of ReDigi is to
10 encourage users to offer eligible songs for
11 sale, correct?

12 MR. ADELMAN: Objection to form.

13 A. That is one of the uses of ReDigi is
14 to offer -- to get users to offer their songs
15 for sale.

16 Q. And the ReDigi service is designed to
17 encourage users to offer their songs for sale,
18 correct?

19 MR. ADELMAN: Asked and answered.

20 You can answer.

21 A. I don't understand the difference
22 between the two questions.

23 Q. Just answer my question.

24 A. Then please read back.

25 (Question was read back as follows:

1 L. Rudolph

2 "QUESTION: And the ReDigi service is
3 designed to encourage users to offer their
4 songs for sale, correct?")

5 A. That's one of the uses for ReDigi,
6 yes.

7 Q. And my question wasn't whether that's
8 one of the uses for ReDigi.

9 My question was whether you designed
10 the service to actively encourage users to offer
11 their songs for sale.

12 MR. ADELMAN: Same objection. Asked
13 and answered.

14 A. Encourage is a strong word. We want
15 to make it as easy as possible for users to
16 offer their songs for sale.

17 Q. And you offer them various incentives
18 to offer their songs for sale?

19 A. At times we have. (Ex. F)
20 (Plaintiff's Exhibit 6, Welcome email
21 to ReDigi users, marked for identification,
22 as of this date.)

23 BY MR. KING:

24 Q. We've put in front of you an email
25 that apparently came from your files.

1 L. Rudolph

2 A. Um-hmm.

3 Q. We've marked it as Plaintiff's
4 Exhibit 6. (Ex. F)

5 Do you recognize this email?

6 A. Yes, I do.

7 Q. Can you tell me what it is?

8 A. It's an email that we send to when
9 users sign up.

10 Q. And in general, does ReDigi
11 communicate with its users via email?

12 A. Periodically we send out email
13 messages to people.

14 Q. And is one of those times when people
15 sign up?

16 A. Yes, it is.

17 Q. Okay. Is that when they just sign up
18 by providing an email address and a password or
19 is that when they download the software?

20 A. I hate to say I can't remember which.
21 Probably when they sign up, but I don't
22 remember.

23 Q. So Plaintiff's Exhibit 6 is for all
24 intents and purposes the welcome to ReDigi email
25 that users get to the best of your recollection?

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2 A. Yes, it is.

3 Q. Okay. And when you -- in welcoming
4 users, you welcome them to ReDigi, which you
5 describe in that first line as, quote, the
6 online marketplace for used digital music; is
7 that right?

8 A. Yes.

9 Q. And if you look at the various
10 services you offer to users, three bullet points
11 down in the list on the page, one thing you
12 advertise users is that they can, "...cash in on
13 the music you no longer listen to. With a click
14 of a button you can sell music straight from
15 your cloud or personal music library."

16 So this email, among other things,
17 encourages people that they can use ReDigi to
18 sell music for money or credit that they can use
19 to buy other music, correct?

20 A. Well, the way you stated the question
21 I'd have to say no because it does not offer
22 them money.

23 Q. What does cash in on, cash in mean?

24 A. It's just -- it's a colloquial phrase
25 that means that you can get something for the

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2 music that you sell and not necessarily cash.

3 Q. Okay. So the more complete
4 understanding of that would be you can sell your
5 music for credit that can then be used toward
6 the purchase of other music?

7 A. Yes, that's a more correct reading.

8 Q. Okay. The issue of cash or credit
9 aside, the purpose of this email is to encourage
10 users yes, you can come to our service, sell
11 your music for credit that you can use to
12 purchase something else, correct?

13 A. That is correct.

14 Q. Okay. It also encourages users that
15 they can come to ReDigi to buy music, right?

16 A. It states here that you can buy. We
17 tell users that they can buy.

18 Q. That's one of the attributes of
19 ReDigi that's being advertised in this email
20 welcoming ReDigi users to the service, correct?

21 A. It's one of the attributes that's
22 being cited, yes.

23 (Plaintiff's Exhibit 7, Email dated
24 3/20/12 sent to ReDigi users when a song is
25 offered for sale, marked for

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(Plaintiff's Exhibit 9, Email to ReDigi users when ordered song is not available, marked for identification, as of this date.)

(Plaintiff's Exhibit 10, Email to ReDigi users when transaction is completed, marked for identification, as of this date.)

BY MR. KING:

Q. Okay. If you'll look at Plaintiff's Exhibit's 9, ^(Ex. 5) I haven't been identifying Bates numbers but I probably should, it's ReDigi 341 at the bottom.

The subject of this email is "Order Received" and it says, "Congratulations. Your order for the following song has been received."

Is this also an email that's sent out to users?

A. Yes.

Q. Okay. And what triggers the sending of this email?

A. When a, when a user orders a song, wishes to buy a song but it's not available currently.

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2 Q. Okay. So the way the system works is
3 that if a user wishes to order a song that's not
4 available in ReDigi's inventory, ReDigi tracks
5 that order and looks for an available song file
6 for that user?

7 A. No.

8 Q. Then how does it work?

9 A. It puts an order in the system to say
10 that someone wants to sell the song and if
11 anyone offers that song for sale, we would make
12 a match.

13 Q. Okay.

14 A. We do not actively look for a seller
15 at the moment.

16 Q. Okay. If you look down this page it
17 says after a blank where I assume the name of
18 the file would be, it says, "ReDigi is looking
19 for a seller."

20 What does that mean?

21 A. The sentence says, "ReDigi is looking
22 for a seller" and at the moment the system does
23 not do anything, but it does not actively look
24 for a seller.

25 However, users can find out that

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there are people who want to buy their song.

Q. How do users find out that there are people who want to buy their song?

A. We keep track of the most popular ordered song and make that available to anyone who cares to look at it.

Q. You mean you advertise the fact that there are -- or you notify ReDigi users that there are a certain number of people looking for this particular song, so if you want to make it available for sale, now would be a good time to do so?

A. The website will post the songs that are most actively looked for.

Q. Do you also let users know by way of your newsletter what some of the most popular songs are, most popularly ordered songs are?

A. I believe we may have done that once or twice.

Q. And if you'll look at Plaintiff's Exhibit 9, which is the next email after this --

MR. ADELMAN: You mean 10?

MR. KING: I'm sorry. 10.

BY MR. KING:

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2 MR. KING: I think this exhibit has
3 too many pages in it but we'll mark this
4 11. (Ex. I)

5 (Plaintiff's Exhibit 11, Email from
6 customer service to Larry at ReDigi, marked
7 for identification, as of this date.)

8 BY MR. KING:

9 Q. And I'll really just focus your
10 attention on the first page of Plaintiff's
11 Exhibit 11. (Ex. I) Some other things are attached to
12 it that are redundant of what we've already
13 discussed.

14 This is an email from customer
15 service to Larry at ReDigi.

16 Are you Larry at ReDigi?

17 A. Yes, I am.

18 Q. And the subject of this email is "Low
19 on Credit."

20 Does ReDigi notify its users when
21 they are low on credit?

22 A. Periodically, yes, it does.

23 Q. Why?

24 A. We would like people to add more
25 credit, either buying it or getting more credit

1 L. Rudolph
2 by purchasing credit from us.

3 Q. And they can, and they can increase
4 the amount of credit they have either with money
5 or by obtaining credit by uploading songs?

6 A. Not by uploading -- they can increase
7 their credit by either selling songs or by
8 charging to their credit card.

9 Q. Okay. The reason you want them to
10 have credit is to encourage them to go buy
11 songs, correct?

12 A. That is correct.

13 Q. And also you want them to increase
14 the credit in their account by uploading songs
15 and offering them for sale as well, right?

16 MR. ADELMAN: Objection to form.

17 BY MR. KING:

18 Q. Because that's one way to increase
19 the credit in your account?

20 A. Yes, that's one way of increasing the
21 account.

22 Q. And that stimulates the marketplace
23 activity that you'd like ReDigi to encourage,
24 correct?

25 THE VIDEOGRAPHER: Object to the

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2 form.

3 You can answer.

4 A. Yes.

5 Q. In your preliminary injunction
6 declaration you described various ways in which
7 a user could have committed a, quote, unquote,
8 violation which may or may not result in a
9 suspension of their account.

10 Can you describe for me the
11 circumstances that would lead to a user
12 committing a violation?

13 A. A violation is when a song is offered
14 for sale or has been sold and we discover a copy
15 of that song on the user's machine. We call it
16 a violation.

17 Q. Okay. And is that only when the user
18 offers the song for sale or has just merely
19 uploaded it to the cloud?

20 A. We've changed the system now. It's
21 only when they offer a song for sale or sold.

22 Q. Okay. So if I've uploaded the song
23 to the cloud but haven't offered it for sale and
24 I'm a ReDigi user, it won't be deemed a
25 violation if you determine that I have other

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2 copies of that song.

3 A. Correct.

4 Q. Why the distinction?

5 A. At the time of the injunction, we
6 changed the system because we're constantly
7 fiddling with it, trying to get it to meet
8 users' complaints and the like.

9 And if a user has a file on the -- in
10 a locker and then downloads it to their machine,
11 we no longer delete the file from the locker.
12 We leave it in the locker and so the song can
13 both be on the user's machine and in the locker,
14 but we've noted it was downloaded so they cannot
15 offer it for sale through the website.

16 Q. Okay. So to that extent, that is I
17 believe different than what was described at the
18 time of the preliminary injunction, correct?

19 A. That is correct.

20 Q. Okay. So let me make sure I
21 understand this.

22 It's possible -- when I upload a song
23 to the ReDigi service, I'm talking about
24 initially uploading the song to the ReDigi
25 service, I believe you said that that song file

1 L. Rudolph
2 has to be deleted from my machine to get to the
3 ReDigi cloud in the first instance; is that
4 correct?

5 A. That is correct.

6 Q. Okay.

7 MR. ADELMAN: Objection to the form.

8 BY MR. KING:

9 Q. And then if I determine that I want
10 to -- and I've never offered that song for sale,
11 I want to download it back to my machine, it
12 won't be deleted from the cloud now, correct?

13 A. That is how the system works now.

14 Q. Okay. So the file is deleted upon
15 upload -- well, no. Strike that question.

16 So the difference -- how do I
17 describe this.

18 ReDigi now permits the cloud -- the
19 one difference your system is currently
20 constituted versus as described at the time of
21 your preliminary injunction declaration is that
22 the system now permits a copy to remain in the
23 cloud as long as that song has never been
24 offered for sale even if a user downloads it to
25 his machine.

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2 A. That is correct.

3 Q. Okay. And that is the sole instance
4 in which the user can have a copy both on his
5 machine and up in the cloud in the ReDigi
6 service?

7 A. Yes.

8 MR. KING: Just one moment. Can we
9 take a brief break?

10 THE WITNESS: It's good with me.

11 (Recess is taken.)

12 BY MR. KING:

13 Q. Have you ever suspended a user for
14 committing a violation?

15 A. We suspended one user account for
16 committing a violation.

17 Q. Okay. What was the nature of that
18 user's violation?

19 A. They offered a song for sale and we
20 found a violation and they -- we told them about
21 it and they refused to delete the file.

22 Q. Okay. So what happens in practice is
23 if you -- if the system detects that there's
24 still a file on the user's machine, that that
25 user has either offered for sale or sold, ReDigi

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2 is this the kind of email that I would receive?

3 A. Yes, I believe so.

4 Q. And then what are the consequences of
5 the suspension?

6 A. When we find -- well, the account is
7 suspended, but the main consequence is any songs
8 that have been offered for sale, that offer for
9 sale is cancelled so they're no longer offered
10 for sale.

11 The songs that have been sold are
12 more difficult to undo that and for songs that
13 have been sold, we block the user's access to
14 the song, to the ReDigi site. We just disable
15 their account.

16 Q. Right.

17 So the damage has been done, but they
18 can no longer enjoy the services of ReDigi?

19 A. That is correct.

20 Q. Okay. Apart from the one user that
21 you've suspended, have you had other users who
22 committed violations but then agreed to delete
23 the file that reappeared?

24 A. When the user is told that there's a
25 violation and they delete the file that is in

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L. Rudolph

machine and the software the user has?

A. Determined by the browser and the machine.

Q. Right.

And the streams that ReDigi has offered have been set to work with any of those three let's call them technologies, correct?

A. What was the first half of the question?

Q. You were saying those are -- strike the question.

When ReDigi launched -- ReDigi's website went live in October of 2011, right?

A. October 13th, correct.

Q. And did that website make available streams of any recordings?

A. Yes, it did.

Q. And where did it get the content to stream to ReDigi users?

A. When we launched, the user can stream their music that they had in the cloud or we allowed a stream from 7digital.

Q. 7digital.

Okay. Did you have an agreement with

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1 L. Rudolph

2 upload, user upload into the ReDigi Cloud differ
3 from of a regular upload where I upload a music
4 file let's say to another cloud storage service
5 and I retain a copy of the music file and also
6 end up with a copy in the cloud that I'm using?

7 A. Didn't I already answer that
8 question?

9 Q. Partially, but there's a lot of it I
10 didn't understand so I'd like to go ask you some
11 questions about it.

12 MR. ADELMAN: Objection.

13 But you can answer.

14 A. I think you answered your own
15 question is that the difference between standard
16 upload is that there's a copy kept and ReDigi
17 does not.

18 Q. Okay. I guess my question is, you
19 know, analogies aside to trains, what
20 technologically is different?

21 A. As pieces come off the file, the --
22 the analogy with trains is exactly right is that
23 the file is there and it consists of blocks of
24 data, and each block is a car in the train
25 analogy.

1 L. Rudolph

2 And as the train leaves the station,
3 that block is ripped -- is taken off from the
4 file and moved up and so it's no longer part of
5 the file.

6 Q. So once again, analogies aside, in
7 the ReDigi upload process, is the file uploaded
8 in pieces or parts?

9 A. Yes.

10 Q. A number of different component
11 parts?

12 A. A number, correct.

13 Q. Is there a specified number of
14 component parts that are uploaded?

15 A. No.

16 Q. Okay. Are they uploaded
17 simultaneously or sequentially?

18 A. Sequentially.

19 Q. Okay. So there's some period where
20 one piece is uploaded and then another piece,
21 and another piece until the entire file is
22 uploaded?

23 A. Not -- a piece is transmitted, next
24 piece is transmitted, next piece is transmitted.

25 Q. Okay. And in a standard upload, if I

1 L. Rudolph

2 of ReDigi, as a block, as sort of a component
3 block begins the upload process, that component
4 block is deleted from the source computer?

5 MR. ADELMAN: Objection to the form.

6 Asked and answered.

7 But you can answer.

8 A. We're not deleting the file. We're
9 taking a block out of the file and sending it
10 up.

11 Q. And in the case of Google, is it not
12 taking a piece of the block and also sending it
13 up? Uploading to the Google cloud I should say?

14 A. It's not taking it out of the file.

15 Q. Okay. Has ReDigi invented a new way
16 to process an upload of a file?

17 MR. ADELMAN: Asked and answered.

18 But you can answer.

19 A. I think we -- it's not a new way.
20 It's just that we -- in fact it may be a very
21 old way of how things are moved up.

22 Q. Well, how are the component blocks
23 taken off the source computer?

24 I'm not sure I understand the
25 vocabulary.

1 L. Rudolph

2 accurate, correct?

3 A. I believe so.

4 Q. Okay. If you'll refer to the second
5 page, actually to the third page, it's the
6 carryover of paragraph 6, I'll refer you to the
7 first sentence on that page. It says, "Upon the
8 upload of an eligible file to a user's cloud
9 locker, such file and all copies thereof
10 residing on the user's computer, and on attached
11 synchronization and storage devices are
12 deleted."

13 So in that sentence you state that
14 upon the upload of an eligible file, that file
15 itself, put aside the other copies, but that
16 file is deleted, correct?

17 A. Correct.

18 Q. And that statement is accurate,
19 correct?

20 A. Correct.

21 Q. One attribute of the ReDigi upload
22 process you described is that when a song is
23 uploaded, ReDigi doesn't retain a backup of the
24 file during the upload process, correct?

25 A. Correct.

1 L. Rudolph

2 A. No.

3 Q. ReDigi is not an owner of any digital
4 music file.

5 MR. ADELMAN: Objection to the form.

6 Asked and answered.

7 A. So there are -- no.

8 Q. Have you personally, you Larry
9 Rudolph, uploaded any songs to ReDigi?

10 A. Yes, I have.

11 Q. How many?

12 A. Many.

13 Q. Okay. Have you sold any of them?

14 A. A few.

15 Q. Do you know if any of them are in the
16 list of Capitol recordings?

17 A. I believe so.

18 Q. Do you know which ones?

19 A. Offhand no, but I can find out.

20 Q. Okay. Of those, I wouldn't be
21 surprised because Capitol is a big record
22 company, but of the universe you uploaded, have
23 you sold any Capitol recordings?

24 MR. ADELMAN: Isn't that what you...

25 MR. KING: Well, no, let me --

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C E R T I F I C A T E

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

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

That LAWRENCE S. RUDOLPH ROGEL, 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 25th day of June, 2012.



ANNETTE ARLEQUIN, CLR, CSR, RPR

**EXCERPTS FROM THE DEPOSITION TRANSCRIPT OF
JOHN MARK OSSENMACHER**

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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

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June 19, 2012
10:00 a.m.

Deposition of REDIGI, INC., by JOHN
MARK OSSENMACHER, held pursuant to Rule
30(b)(6) of the Federal Rules of Civil
Procedure, at the offices of Cowan,
Liebowitz & Latman, P.C., 1133 Avenue of
the Americas, New York, New York, before
Kristin Koch, a Registered Professional
Reporter, Registered Merit Reporter,
Certified Realtime Reporter, Certified
Livenote Reporter and Notary Public of the
State of New York.

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A P P E A R A N C E S :

COWAN, LIEBOWITZ & LATMAN

Attorneys for Plaintiff

1133 Avenue of the Americas

New York, New York 10036

BY: RICHARD S. MANDEL, ESQ.

JONATHAN Z. KING, ESQ.

MEISTER SEELIG & FEIN

Attorneys for Defendant

140 East 45th Street

New York, New York 10017

BY: GARY P. ADELMAN, ESQ.

ALSO PRESENT:

LARRY RUDOLPH

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IT IS HEREBY STIPULATED AND AGREED
by and between the attorneys for the
respective parties herein, that filing and
sealing be and the same are hereby waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form
of the question, shall be reserved to the
time of the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be sworn to
and signed before any officer authorized
to administer an oath, with the same
force and effect as if signed and sworn
to before the Court.

- oOo -

1 Ossenmacher - Confidential - Attorneys' Eyes Only
2 J O H N M A R K O S S E N M A C H E R,
3 called as a witness, having been duly sworn
4 by a Notary Public, was examined and
5 testified as follows:

6 EXAMINATION BY

7 MR. MANDEL:

8 Q. Please state your name for the
9 record.

10 A. John Ossenmacher.

11 Q. And where do you reside,
12 Mr. Ossenmacher?

13 A. In Boston, Massachusetts.

14 Q. Okay. And you are the CEO of the
15 defendant ReDigi, Inc.; correct?

16 A. Yes.

17 MR. MANDEL: Before we begin, let me
18 just ask you to take a look at what was
19 marked yesterday as Plaintiff's Exhibit 1.

20 As we did yesterday, we can just go
21 over this by counsel.

22 I just want to confirm for the
23 record that Mr. Ossenmacher is being
24 offered as a 30(b)(6) designee on behalf of
25 Defendant ReDigi with respect to topics 1

1 Ossenmacher - Confidential - Attorneys' Eyes Only
2 cloud locker or downloads music files from the
3 user's cloud locker thereby placing copies of
4 the files on his or her computer." You see
5 that language; right?

6 A. Yes.

7 Q. And did you review that language
8 before it was submitted to court?

9 A. Yes.

10 Q. And you don't believe that that
11 language indicates that a copy takes place in
12 connection with the ReDigi service?

13 A. Would you like me to explain?

14 Q. Sure, if you want to.

15 A. So when -- at this point in time
16 part of the ReDigi service did make an archival
17 copy of the source file and so we made an
18 archival copy because, as Larry had talked
19 about yesterday, one of the things computer
20 scientists often worry about was this whole
21 thing of when you are migrating a file or doing
22 something in the computer world, you know, what
23 could go wrong, and so in the early days of
24 this, which was during this period of time, we
25 were making an archival copy so that during the

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2 migration of the source file to the user's
3 cloud, if there was a problem, we could then
4 rely on the archival file to support whatever
5 data might have been lost in translation or
6 whatever. Subsequent to this, after this point
7 in time we no longer use an archival copy and
8 so we are not -- this is no longer completely
9 accurate, because we don't have that archival
10 copy anymore.

11 Q. Okay. But this isn't talking about
12 an archival copy. I mean, this says when a
13 user uploads music files to the -- the only
14 copying which takes place occurs when a user
15 uploads music files to the ReDigi cloud thereby
16 storing copies thereof in the user's personal
17 locker, so it's referring to what's in the
18 user's personal locker as a copy, isn't it?

19 MR. ADELMAN: Objection. You
20 misread what that actually says.

21 A. No.

22 MR. ADELMAN: Hold on. You didn't
23 read it -- was your purpose to characterize
24 it?

25 MR. MANDEL: No, my purpose was to

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2 Where were they physically?

3 A. On the user's device, computer that
4 had the ReDigi service installed.

5 MR. MANDEL: You wanted to take a
6 break anyway, so why don't we take it now.

7 MR. ADELMAN: Thank you. I
8 appreciate it.

9 (Recess was taken from 10:47 to
10 10:56.)

11 BY MR. MANDEL:

12 Q. I want to focus your attention back
13 to Plaintiff's Exhibit 3, page 9.

14 Now, you just testified that the
15 archival copy is actually maintained on the
16 user's hard drive; correct?

17 A. Yes.

18 Q. In this brief what it says is copies
19 are stored in the user's personal cloud locker;
20 correct?

21 A. It does say "thereby storing copies
22 thereof in the user's personal cloud locker,"
23 yes.

24 Q. And what's being referred to in the
25 brief, then, is not the archival copy that's

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2 of this lawsuit?

3 A. When you use the word "subsequent,"
4 you mean just after --

5 Q. After the timing of this lawsuit.

6 A. But not as a result of.

7 Q. I am not saying necessarily as a
8 result of. Just in time.

9 A. I wanted to make sure that was
10 clear. I believe so, yes.

11 Q. Was it as a result of this lawsuit
12 that it came down?

13 A. No.

14 MR. MANDEL: Let's mark as
15 (Exhibit A) Exhibit 25 printouts from the ReDigi
16 website that I believe were submitted by
17 the plaintiff on its preliminary injunction
18 motion in this case.

19 (Plaintiff's Exhibit 25, ReDigi
20 website printout, marked for
21 identification.)

22 Q. Are you able to recognize Exhibit 25
23 as printouts of pages that appeared in the past
24 on the ReDigi website?

25 A. I am.

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2 was drafted?

3 A. I did.

4 Q. Anybody else?

5 A. There may have been others. I don't
6 recall.

7 Q. What was the reason for including a
8 section on the website that indicated that
9 ReDigi was legal?

10 A. After we launched there were --
11 there was definite questioning, you know, in
12 the blogs of, you know, "oh, this is really
13 cool, can I really do this, why can I do this,"
14 and so we thought we would take a proactive
15 measure to explain from our perspective why we
16 thought this was a legal option for people.

17 Q. So this was a response to questions
18 that were raised by others at the time of your
19 launch?

20 A. Not necessarily at the time of
21 launch, but just others as they began to become
22 aware of ReDigi.

23 Q. And who are you referring to when
24 you talk about people who were raising that
25 question?

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2 A. I am just saying generally there are
3 blogs that exist out there, you know, HiBot
4 (phonetic) or others maybe that questioned some
5 of this early on.

6 Q. And if you look at it, the first
7 thing it says after ReDigi, The Legal
8 Alternative, in all caps it says "yes, ReDigi
9 is legal," all caps.

10 Was the point there to make an
11 emphatic statement as to the legality of the
12 service?

13 MR. ADELMAN: Objection. Speaks for
14 itself.

15 You can answer.

16 A. It was to make that statement, yes.

17 Q. But were you also trying to give
18 particular emphasis right up front to the fact
19 that ReDigi was unquestionably legal?

20 MR. ADELMAN: Objection to the
21 characterization of the question.

22 You may answer.

23 A. We believe it to be legal, so yes.

24 Q. And it was put in pretty clear terms
25 in terms of the message that was conveyed here;

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2 right?

3 MR. ADELMAN: Objection to form.
4 You can answer.

5 A. I'm not sure I completely understand
6 the question. We did go through and explain
7 what copyright law meant back in 1908 and First
8 Sale Doctrine and we tried to be educational,
9 so it wasn't just a statement that stood on its
10 own, but it was a statement that added an
11 education to the consumer of copyright law and
12 what we believe our position to be.

13 Q. Did you ever consider including some
14 of the similar language that was in the
15 Subscription Agreement about the copyright law
16 not being well settled in this area?

17 MR. ADELMAN: Objection to form.
18 You can answer.

19 A. I think what we were -- no, not
20 really.

21 Q. Why weren't you concerned with
22 letting people who might use the service and
23 could potentially even be subjecting themselves
24 to potential claims that they were committing
25 copyright infringement, why weren't you

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2 concerned about giving them the same level of
3 disclosure about the uncertain nature of the
4 law that you felt compelled to give to
5 investors in the company?

6 MR. ADELMAN: Object to the form.
7 You may answer.

8 A. You know, basically the items on our
9 website are marketing materials and the
10 objective in the marketing materials was to
11 educate people what we believed to be the
12 legality of our site and so that's what we did.
13 We provided not only the education of legality,
14 but we also made statements in there about how
15 important it is for them to maintain compliance
16 with copyright, and so -- you know, and that
17 there is value in this, and so it was more of
18 an educational part. We -- that's all.

19 Q. From a marketing perspective telling
20 them that the law is unsettled and that
21 copyright owners might bring claims would not
22 have advanced what you were trying to
23 accomplish in this piece; correct?

24 MR. ADELMAN: Objection to form.
25 You could answer.

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2 A. It may have launched and then shut
3 down, but I don't think it ever launched.
4 Again, I'm not completely certain.

5 MR. MANDEL: Let's mark as
6 Exhibit 26 a document bearing production
7 numbers ReDigi 26 through 28.
8 (Plaintiff's Exhibit 26, The New
9 York Times article, Site to Resell Music
10 Files Has Critics, Bates stamped
11 RIDIGI00000026 through RIDIGI00000028,
12 marked for identification.)

13 Q. Are you able to recognize
14 Plaintiff's Exhibit 26 as a copy of a New York
15 Times article that appeared regarding ReDigi in
16 November 2011?

17 A. Yes.

18 Q. And were you interviewed in
19 connection with this piece?

20 A. Yes, I was.

21 Q. Have you been interviewed on a
22 number of occasions by the press?

23 A. On a few.

24 Q. What other publications have
25 interviewed you, if you can recall?

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2 A. Possibly. I don't recall
3 specifically what.

4 Q. If you look on the second page of
5 (Exhibit C) Exhibit 26, the last line, they are talking
6 about what you say, referring to
7 Mr. Ossenmacher, and it says: "But he conceded
8 that the service is not foolproof," and then
9 continuing on the next page it has you quoted
10 as saying "if someone willfully wants to
11 violate copyright law, he said, then there may
12 be ways that they can ultimately beat the
13 system."

14 Do you believe that's an accurate
15 quote that you gave the New York Times?

16 A. It's actually not an accurate quote
17 and our PR person had gotten back to
18 Mr. Sisario and had let him know that that was
19 not an accurate quote.

20 Q. So you believe you were misquoted
21 here?

22 A. Yes.

23 Q. Do you recall what you did say?

24 A. I don't recall exactly what I said,
25 but I was explaining to Mr. Sisario how part of

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2 what ReDigi does is helps a user maintain
3 compliance to copyright law in whenever they
4 connect a device that may have had a copy of
5 something they had listed for sale or sold,
6 that we would communicate to the user that that
7 copy exists, and I think he said, you know,
8 "well, what if they never connect the device,"
9 and then I think I probably said something like
10 "well, unless they connect it, we wouldn't be
11 able to find it. We can't magically find it."

12 Q. So that's what you believe was --

13 A. That was more the conversation. I
14 think he paraphrased that to be this quote.

15 Q. Separate and apart from whether the
16 quote is exactly accurate, do you agree that
17 the ReDigi service is not foolproof?

18 A. It depends how you define the ReDigi
19 service. I think the way we built the ReDigi
20 service for the purpose it serves, which is to
21 identify lawfully-obtained tracks, to help
22 identify tracks that are unlawfully obtained,
23 to allow users to migrate those to their cloud
24 and then store, stream, sell, do what they --
25 you know, those lawful activities with them, I

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2 think our service is foolproof. In terms of if
3 someone want to come with, I don't know, other
4 things, I --

5 Q. Well, do you agree that if a user is
6 determined to keep a copy of the file that they
7 are supposedly selling and getting rid of,
8 there are ways they can accomplish that while
9 still using the ReDigi system?

10 MR. ADELMAN: Objection to form.

11 A. So if a user wants to willfully --
12 but if a user wants to willfully violate
13 copyright law and go to what I will call
14 extreme measures to do that by doing things as
15 we just discussed, yes, that's possible.
16 However, the only other thing I want to add,
17 and I think this is really important, this is
18 important to EMI as well, ReDigi caters to the
19 lawful user. The people who are stealing music
20 from file sharing networks, they can steal it
21 and get it for free. They don't need to try to
22 figure out how to make a few cents on ReDigi.
23 Our objective was to help lawful users be
24 lawful, and we really believe that the lawful
25 users, the people who lawfully are downloading

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2 anymore.

3 Q. Now, suppose I sign up for a ReDigi
4 account and offer to sell a thousand songs that
5 I have previously purchased from iTunes.

6 A. Okay.

7 Q. Is there anything to prevent me from
8 after I made those sales deleting ReDigi from
9 my computer?

10 A. No.

11 Q. And is there anything to prevent me
12 from then going back to iCloud and downloading
13 every one of those thousand songs I have just
14 sold on ReDigi without paying for them again?

15 A. Yes.

16 Q. What?

17 A. The law.

18 Q. Other than the law, is there
19 anything that will actually prevent me from a
20 technological point of view from just clicking
21 the button and doing it?

22 A. Not to my knowledge, but I think the
23 law is important here. I mean, that's what
24 this case is all about, the law.

25 Q. Sure. But what I am just trying

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14 MR. MANDEL: Let's mark as
15 Exhibit 28 a document bearing production
16 numbers ReDigi 578 to 585. *(Exhibit H)*
17 (Plaintiff's Exhibit 28, e-mail
18 dated March 28, 2012, Bates stamped
19 REDIGI00000578 through REDIGI00000585,
20 marked for identification.) *(Exhibit H)*

21 Q. Do you recognize Exhibit 28 as
22 containing a ReDigi newsletter?

23 A. It is labeled ReDigi Newsletter,
24 yes.

25 Q. Are you familiar with what the

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2 ReDigi Newsletter is?

3 A. I am, yes.

4 Q. Can you explain what it is?

5 A. It's an occasional item we put out
6 to keep contact with our users or people who
7 have an interest in having the newsletter.

8 Q. And do you use it as a promotional
9 item?

10 A. In terms of --

11 Q. Promoting services that are
12 available through ReDigi or --

13 A. Typically the newsletter is designed
14 to communicate news, information, something
15 that's happening at ReDigi. (EXHIBIT H)

16 Q. This one, Exhibit 28, says: "We're
17 excited to send you our inaugural weekly
18 newsletter."

19 Is it correct that the first
20 newsletter went out on or around March 28th of
21 2012?

22 A. The date of this is March 28th. I
23 don't know if this -- let's see. It looks --
24 it appears to be, yes.

25 Q. Is that consistent with your

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2 understanding that ReDigi began its newsletter
3 sometime in late March of 2012?

4 A. It seems about right, yes.

5 Q. And has it, in fact, been a weekly
6 newsletter that's been sent?

7 A. No, it has not.

8 Q. Has ReDigi sent any subsequent
9 newsletters after this first one?

10 A. Yes, we have.

11 Q. Do you know approximately how many?

12 A. I think, two. I'm not sure.

13 Q. How frequently have they gone out?

14 A. I guess if this is March and we sent
15 two more -- there is no schedule anymore. Our
16 intent was originally to do it on a weekly
17 basis, but I think we are doing it more now
18 probably on a monthly basis.

19 Q. Are you involved in the preparation
20 of the newsletter?

21 A. In a minor way.

22 Q. Who actually prepares the copy for
23 all the newsletters?

24 A. Jaclyn.

25 Q. If you look on Plaintiff's

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2 (Exhibit H)
3 Exhibit 28, the inaugural newsletter, on the
4 first page it says: "Enclosed you will find
5 things like ReDigi News" and it goes on also to
6 then talk about "In Demand Songs so that you
7 know which songs you can sell now to earn some
8 quick credits for new music."

9 Do you have any understanding of
10 what the In Demand Songs feature is that's
11 referred to here?

12 A. It is. It's songs that have order
13 demand or people have been ordering, one or the
14 other, within ReDigi, so if the songs had been
15 a high-demand song on ReDigi, we put them on
16 that list, or if there is open orders for the
17 song we put them on that list.

18 Q. And is part of the purpose of doing
19 that so users know that they have a ready buyer
20 if they want to sell that song?

21 A. I would think that would be one of
22 the purposes, but I think the other purpose too
23 is people like to know what other people like,
24 so often times people look at the In Demand
25 Songs as something that they might find an
interest in wanting to buy as well or listen

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2 to.

3 Q. And if you look on page 581 of
4 Plaintiff's Exhibit 28 ^(Exhibit H) under In Demand Songs,
5 it says that: "In demand songs are songs that
6 have been ordered by other users on ReDigi. If
7 you act fast you can make an instant sale on
8 any of the tracks below."

9 What was the purpose of including
10 that copy about acting fast to make an instant
11 sale?

12 A. I believe the purpose of that copy
13 was on ReDigi unlike new we have a limited
14 demand and when someone buys a song, that song
15 may be gone, we may only have one copy, which
16 is likely in many cases, and, you know, there
17 may only be one order for the song.
18 Conversely, and so when someone fulfills that
19 order, our inventory comes into the system to
20 fulfill that order, the order will be gone.

21 Q. And is this also notifying potential
22 sellers that they have the opportunity to
23 quickly make a sale of that particular song?

24 A. I guess, yeah.

25 Q. I want to focus you on what's

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2 violation of any other legal principle or law
3 because he decided to keep a copy I think is a
4 separate matter. I think First Sale protected
5 him in the sale of that file.

6 Q. Could he be in violation of
7 copyright law?

8 MR. ADELMAN: Objection to form.

9 Calls for a legal conclusion.

10 You can answer.

11 A. Possibly. I don't know.

12 Q. Turning to page 664 of Exhibit 20,
13 it says "how much does a user get per recycled
14 song" at the bottom of 664. Do you see that?

15 A. Yes.

16 Q. And then the answer is: "We think
17 users should be rewarded for contributing to
18 the ReDigi library, so we have set up a system
19 of coupons and credits that encourage them to
20 both buy and sell."

21 Do you think that's an accurate
22 statement on the part of ReDigi?

23 A. Yes.

24 Q. Now, if you look further down in
25 this copy, there is a note underneath the

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15 (Exhibit G) MR. MANDEL: Let's mark as
16 Exhibit 31 a document bearing production
17 numbers ReDigi 43 through 44.

18 (Plaintiff's Exhibit 31, press
19 release, ReDigi Fiat 500 Giveaway Drives
20 Music Fans To Sell or Store Their Unwanted
21 MP3s, Bates stamped REDIGI00000043 and
22 REDIGI00000044, marked for identification.)

23 Q. Do you recognize Plaintiff's
24 (ExL, 6, 7, G) Exhibit 31 as a press release that was issued
25 by ReDigi in December 2011?

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2 A. Yes.

3 Q. And this was prepared by Jaclyn
4 Ingles?

5 A. Yes, it was.

6 Q. And you reviewed it?

7 A. Yes, I did.

8 Q. Is Jaclyn actually an employee of
9 ReDigi?

10 A. She is one of our consultants.

11 Q. Now, the press release talks about
12 ReDigi kicking off Phase 2 of inventory
13 building. Can you explain what is meant by
14 phase 2 inventory building?

15 A. Yes. Phase 2 was to start to build
16 inventory in the marketplace, there would be
17 things for people to buy and sell.

18 Q. And how did ReDigi want to go about
19 building up inventory for people to buy and
20 sell?

21 A. To gain users.

22 Q. And what was phase 2 or how was
23 phase 2 envisioned to actually accomplish that?

24 MR. ADELMAN: Objection to form.

25 You can answer.

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2 A. I don't think phase 2 was
3 envisioned -- I'm not sure I understand the
4 question. Phase 2 was simply meant to get
5 people to join the system and hopefully upload
6 music to sell.

7 Q. And part of the way that ReDigi
8 hoped to increase inventory was by doing
9 promotions that would offer incentives; is that
10 fair to say?

11 A. Right. I mean, as it says, it was
12 mainly to get people to use the system. It
13 wasn't necessarily to sell. We felt if people
14 came to the system and used it, whether it was
15 storing so that they could stream it or just
16 save disk space, that they would eventually use
17 it, so as in this case this promotion has to do
18 with people storing things and/or selling them.

19 Q. So the hope was that by building up
20 the user base, eventually that would translate
21 into increased inventory available for purchase
22 and sale; correct?

23 A. Yes.

24 Q. And under the promotion anyone who
25 uploaded ten or more songs to sell or store on

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2 ReDigi.com was entered in a contest; is that
3 correct?

4 A. Yes.

5 Q. Can you describe what contests were
6 actually implemented as part of these
7 promotions?

8 A. So this promotion is specific to the
9 giveaway of a grand prize of a Fiat 500, Solo
10 Beats headphones by Dr. Dre.

11 Q. And has there actually or were there
12 weekly lottery drawings for headphones?

13 A. I believe during the initial launch
14 there was. We then modified the program at a
15 later date.

16 Q. For how long a period were there
17 actually weekly lottery drawings?

18 A. Not long. I don't recall.

19 Q. Is it a month, less than a month?

20 A. I think it was less than a month.

21 Q. Did you give away any headphones?

22 A. I believe we did, yes.

23 Q. And how was it modified, the
24 program?

25 A. The program was modified to remove

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