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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,

Plaintiff,

Civil Action No: 12 CIV 0095
(RJS)

- against -

REDIGI, INC. ,

Defendant.

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**DECLARATION OF GARY ADELMAN IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

GARY ADELMAN, pursuant to 28 U.S.C. § 1746, declares under the penalty of perjury, as follows:

1. I am a partner at the law firm of Meister, Seelig & Fein LLP, attorneys for Defendant Redigi, Inc. ("Defendant"). As such, I am fully familiar with the facts and circumstances herein based upon my personal handling of the file.

2. I make this declaration in support of Defendant's opposition to plaintiff Capitol Records LLC's motion for partial summary judgment.

3. A true and correct copy of relevant pages from the deposition transcript of Lawrence S. Rudolph (Rogel) as taken on June 18, 2012 is annexed hereto as Exhibit "1."

4. A true and correct copy of relevant pages from the deposition transcript of John Mark Ossenmacher as taken on June 19, 2012 is annexed hereto as Exhibit "2."

5. A true and correct copy of the relevant portions of the transcript of the preliminary injunction hearing, in this matter, before the Hon. Richard J. Sullivan on February 6, 2012 are annexed hereto as Exhibit "3."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2012 in New York, New York.



GARY ADELMAN ESQ.

Exhibit 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC

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

Page 30

1 L. Rudolph
 2 MR. KING: You can just object.
 3 MR. ADELMAN: Okay. I think -- you
 4 know, if you could just rephrase.
 5 BY MR. KING:
 6 Q. Was it either your idea or
 7 Mr. Ossenmacher's idea to develop ReDigi into a
 8 for profit company?
 9 A. It was a joint idea between the two
 10 of us. I've been in the area of writing
 11 patents, writing papers and there's -- I think
 12 as you say, that by -- when two people work
 13 together and think about alternatives and
 14 discuss those, it's a joint idea.
 15 Q. Okay. Who came up with the name
 16 ReDigi?
 17 A. I do not recall.
 18 Q. And what does ReDigi stand for?
 19 A. Recycled digital goods.
 20 Q. Okay. And that name is meant to
 21 capture the fact that ReDigi involves the sale
 22 and purchase of what ReDigi calls used or
 23 recycled digital media?
 24 MR. ADELMAN: Objection to form.
 25 But you can answer.

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1 L. Rudolph
 2 A. I'm the computer architect that
 3 pretty much decided how we would be doing that.
 4 Q. And once you developed technology to
 5 achieve that first goal of identifying whether a
 6 digital file was legally acquired, what's the
 7 next technological step in implementing this
 8 idea of a used digital marketplace?
 9 A. The next step was to figure out how
 10 one can transfer ownership of a digital file
 11 from one user to another without actually --
 12 without ever having the point of time when two
 13 people, the buyer and seller, both own the song
 14 at the same time, they own both the digital good
 15 at the same time.
 16 Q. Okay. So did you write software code
 17 that you believe achieves that goal?
 18 A. Correct.
 19 Q. And did you seek patent protection
 20 for these technologies?
 21 A. Yes.
 22 Q. Okay. Because I know your
 23 declaration that you submitted in your
 24 summary -- not summary judgment, the preliminary
 25 junction motion made reference to a patent

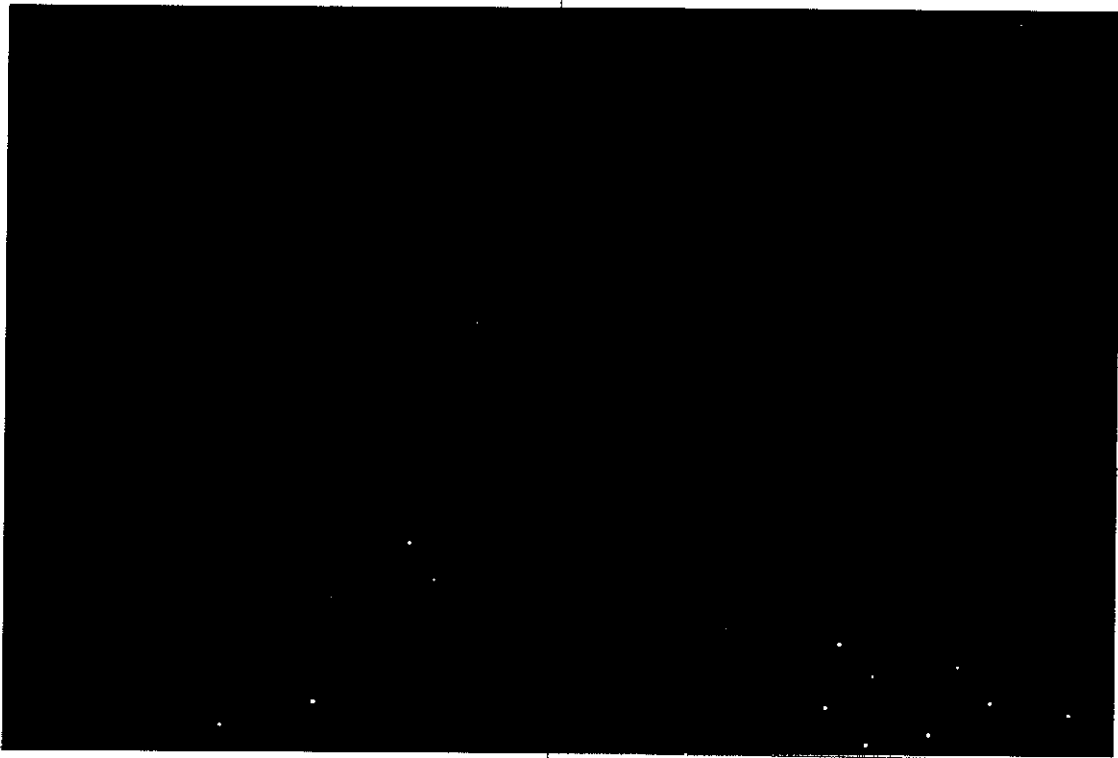
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1 L. Rudolph
 2 A. It's to capture the idea of recycled,
 3 pre-owned digital goods.
 4 Q. So when you and Mr. Ossenmacher had
 5 this idea of a marketplace for buying and
 6 selling used or recycled digital goods, what
 7 were your first steps in implementing that idea?
 8 A. The first step, the basic step was to
 9 figure out how we can identify the difference
 10 between a legally acquired digital good versus
 11 illegally acquired digital good.
 12 It was our belief from the outset
 13 that a marketplace would only work where the
 14 goods would be legally acquired. We wanted to
 15 make sure that we could distinguish between the
 16 two.
 17 Q. So then did you seek to develop a
 18 technology that permitted you to achieve the
 19 goal that you just described?
 20 A. I developed the technology that
 21 attempts to -- that looks at a digital file and
 22 defines whether it's legally acquired or not.
 23 Q. And you're the computer programmer
 24 who wrote the software code that achieves that
 25 goal?

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1 L. Rudolph
 2 application, correct?
 3 A. Correct. It's -- I was extremely
 4 excited about this notion that we can do a
 5 transaction in the cloud to be able to transfer
 6 ownership from one user to another.
 7 I'm going to be -- I'm answering the
 8 minimum information, but I don't know, I had 10
 9 or 15 good ideas in my life and this is one of
 10 them.
 11 Q. And the patent that you filed, and we
 12 can take a look at it, the patent that you filed
 13 is your wish that it covered both the
 14 verification that the legal -- that the file was
 15 legally acquired and covered your technology for
 16 the transfer as you described it just a moment
 17 ago?
 18 A. Yes.
 19 Q. Okay. Let me take a look at the
 20 patent.
 21 MR. ADELMAN: Before we go on, I just
 22 wanted -- we forgot at the beginning, I
 23 wanted to just verify the last depositions
 24 were designated attorneys' eyes only for
 25 the review period, for our review period

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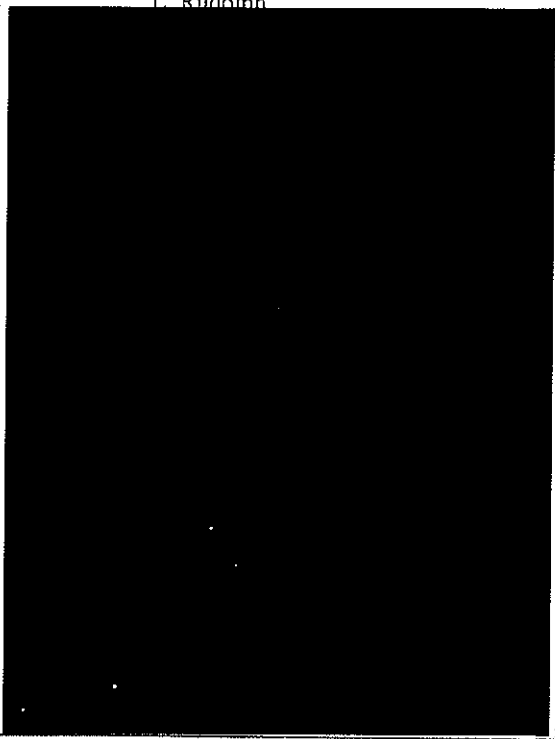


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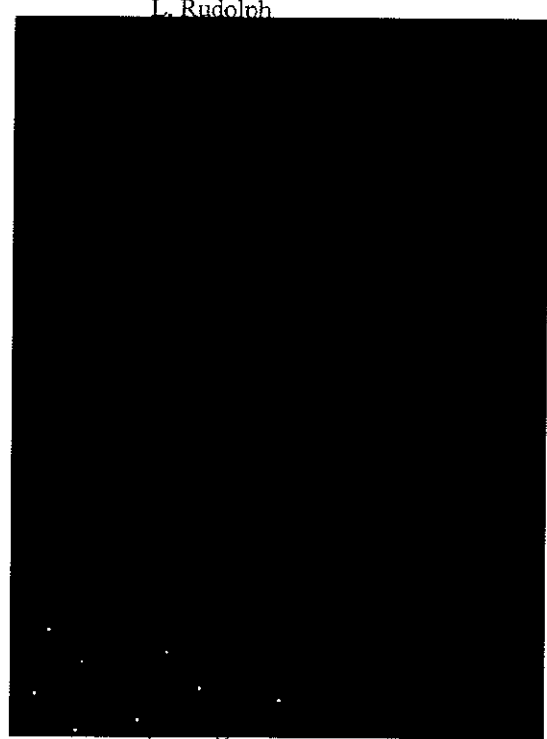
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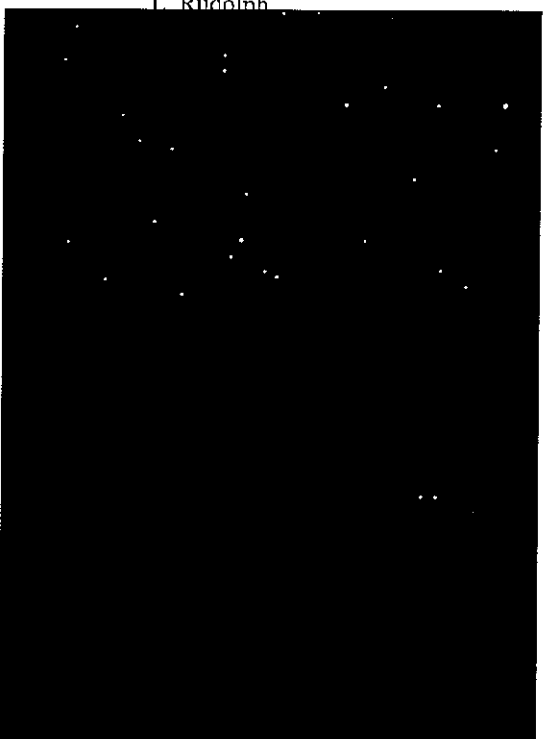
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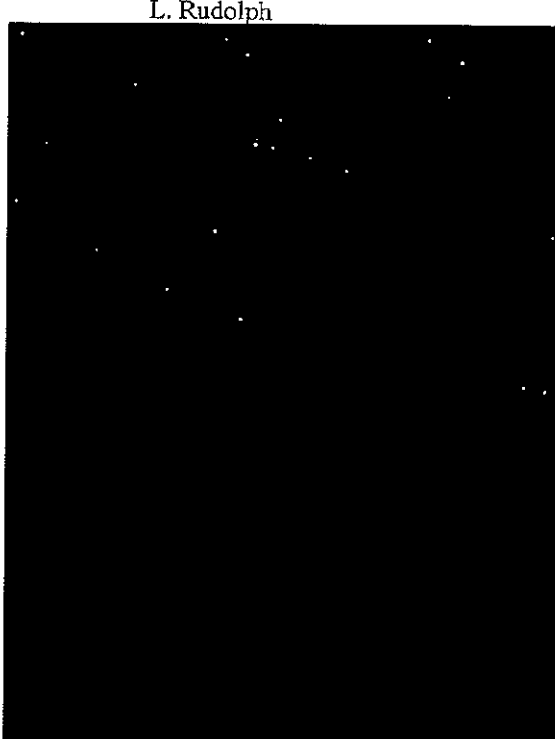
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L. Rudolph

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1 L. Rudolph
 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

1 L. Rudolph
 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?

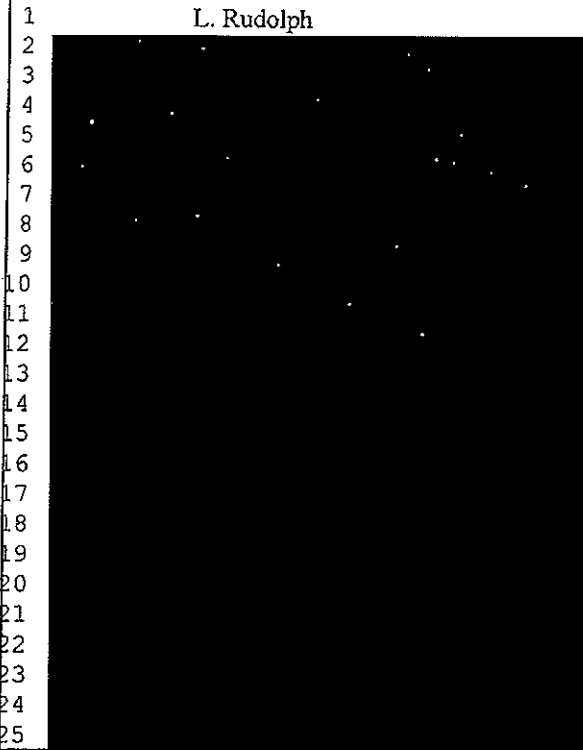
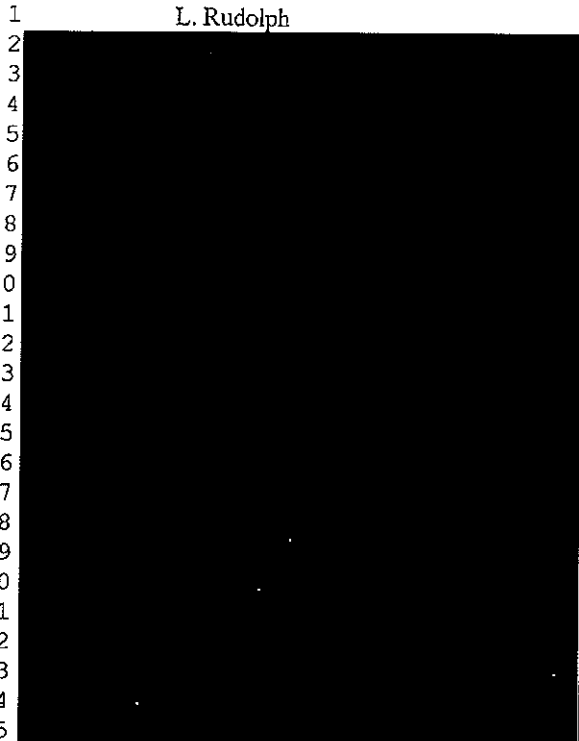
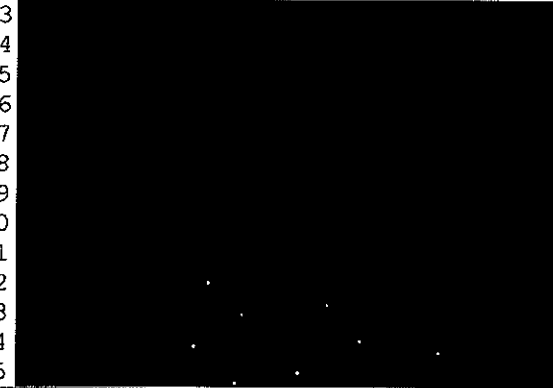
8 A. That is a possibility.

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?

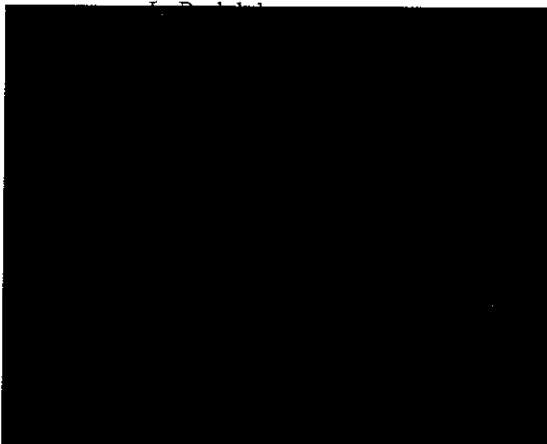
15 A. As we discussed before, the fact that
 16 the Media Manager continues to run and scan,
 17 any time in the future if the user reconnects an
 18 iPod to ReDigi, that will delete it from their
 19 file, from their iPod even without the Media
 20 Manager being part of it, but if they don't
 21 reconnect 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

1 L. Rudolph
 2 storage services that are offered, right?
 3 A. The --
 4 Q. I'm talking not ReDigi cloud services
 5 needless to say.
 6 A. You said prior to ReDigi? What was
 7 the question. You said prior to ReDigi?
 8 Q. Strike the question.
 9 A person who owns iTunes songs can
 10 store some of those songs in various cloud
 11 storage services, correct?
 12 A. That is correct.



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

A. No, we do not.

Q. Okay.

MR. ADELMAN: Objection to form.

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

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

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L. Rudolph
think I have yours. You gave me two copies.

(Handing.)

BY MR. KING:

Q. If you'll turn to the second page of this document, you'll see it says, "Buy here, automatically get it everywhere"?

A. Yes.

Q. It says, "With iTunes in the cloud, the music you download to one device automatically appears on all your devices. So the song you buy from your Mac at work is ready and waiting for you on your iPod when it's time to drive home. iTunes will automatically download your new songs, apps, books to your other devices over Wi-Fi or a cellular network."

And then I'll refer you to the first page of this document.

A. Um-hmm.

Q. "What's new in iTunes." It states, "As part of iCloud, iTunes in the cloud takes what you buy on iTunes on one device and pushes it to all your other devices wirelessly and without syncing."

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L. Rudolph
automatically -- it can be set to automatically download it to all of your devices, correct?

A. I don't know if that's -- it's all your devices. I don't know exactly. It's pretty complicated.

MR. ADELMAN: Can we take a two-minute break?

MR. KING: Sure.

(Recess is taken.)

(Plaintiff's Exhibit 4, Printout from iTunes website describing iCloud service, marked for identification, as of this date.)

BY MR. KING:

Q. Okay. We were discussing Apple's iCloud service, and if you turn to the second page of what we -- well, first of all, I'll represent to you that what I've placed in front of you is Plaintiff's Exhibit 4. It's just a printout from the iTunes website describing its iCloud service.

And if you'll turn to the second page of this document --

MR. ADELMAN: You know what, Jon, I

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L. Rudolph
Are you familiar with that service that iTunes provides of automatically wirelessly downloading all your iTunes purchases to all your devices?

A. I can't answer that question because you're asking me to draw a conclusion which I don't agree with. I mean this is marketing bullshit.

I'm sorry. I'm sorry. I didn't mean to say that. This is marketing. It does not push it to all your devices. I can't agree with that. It doesn't push it to your iTune, to your iPad for example.

Q. Right.

So it pushes it to your devices that are wireless enabled, correct?

A. That's right and the statements like "to all your devices" is not correct.

Q. Okay. Do you agree, though, that as currently constituted, the iCloud service pushes an iTune purchase to all your devices that are wireless enabled, like an iPod touch, for example?

A. I am saying I read those words and I

1 L. Rudolph
 2 can agree that those are what those words say.
 3 Beyond that I can't say any more.
 4 Q. Is that because you just don't know
 5 how the service works?
 6 A. A, that's correct, and B, it did not
 7 download to all my devices.
 8 Q. So you mean in your personal
 9 experience it didn't download to all your
 10 devices.
 11 A. Yes.
 12 Q. Did you go in and click all the boxes
 13 to configure it to provide this auto download
 14 service?
 15 A. Yes.
 16 Q. Okay. So it just didn't work for
 17 you.
 18 A. Yes.
 19 Q. You understand that iTunes advertises
 20 that it can provide this service.
 21 A. Yes.
 22 Q. Okay. Well, let me ask you this: If
 23 I'm a ReDigi user and I have this service, and I
 24 upload a song to the ReDigi service let's say
 25 from my home computer, from my Mac, and sell it,

1 L. Rudolph
 2 A. Correct.
 3 Q. But this service is automatically
 4 given to every single iTunes user, the iCloud.
 5 MR. ADELMAN: Objection.
 6 Q. It's not optional.
 7 MR. ADELMAN: Objection to form.
 8 Are you telling him or asking him?
 9 BY MR. KING:
 10 Q. Are you aware that the iCloud service
 11 is not only made available, but in a sense
 12 automatically provided to every iTunes user
 13 without payment?
 14 A. So maybe there's some confusion
 15 between iMatch and iCloud.
 16 Q. Yes, there is.
 17 A. Okay. I was assuming it's iMatch.
 18 Q. No.
 19 A. I don't know how iCloud works.
 20 Q. Okay. There is -- how do we do this.
 21 By iMatch are you referring to the
 22 service for which users pay \$25 a year?
 23 A. That is correct.
 24 Q. Okay. And you understand that
 25 there's a difference between iMatch and iCloud?

1 L. Rudolph
 2 will ReDigi be able to determine if I have
 3 copies on my other devices that are never
 4 physically connected to that Mac?
 5 MR. ADELMAN: Objection to form.
 6 A. If what iTunes says is correct, then
 7 the answer is yes.
 8 Q. And how would it be able to make that
 9 determination?
 10 A. Because when you offer something for
 11 sale on ReDigi, we delete it, we make sure that
 12 the user deletes it from their iCloud, removes
 13 it from their iCloud and not deletes it from
 14 their device, and then Apple is supposed to
 15 remove it from all connected devices.
 16 Q. So ReDigi purports actually to remove
 17 the copy of the music file that's residing in
 18 Apple's cloud server?
 19 A. No. ReDigi says that if we see that
 20 it's in Apple's iCloud server, we do not allow
 21 ReDigi to offer it for sale until it's removed
 22 from the iCloud service.
 23 Q. Okay. So I cannot sell something on
 24 ReDigi if ReDigi determines that my song is
 25 available from the iCloud?

1 L. Rudolph
 2 A. I understand there's a difference,
 3 but I'm not familiar with how iCloud works
 4 without iMatch.
 5 Q. Okay. Is it your understanding that
 6 iMatch will take everything that's in your
 7 iTunes library regardless of whether you
 8 purchased it from iTunes or not and find a match
 9 for it in the iCloud?
 10 A. I'm familiar that it tries to do
 11 that, yes.
 12 Q. Okay. And is that, to your
 13 understanding, part of what you pay -- what a
 14 user pays \$25 a year for?
 15 A. I do not know -- that's part of what
 16 the iMatch service is is what the user pays \$25
 17 a year for, correct.
 18 Q. Separate and apart from the iMatch
 19 service, are you also aware that all iTunes
 20 users also have their files available to them
 21 from the iCloud?
 22 MR. ADELMAN: Objection to form.
 23 A. I'm going to ask you to repeat the
 24 question.
 25 MR. KING: Would you repeat it,

1 L. Rudolph
 2 please?
 3 BY MR. KING:
 4 Q. Actually, let me ask the question
 5 again because I misstated it.
 6 Are you aware that all people who use
 7 the iTunes service have access to files they
 8 purchased from iTunes from the iCloud service?
 9 MR. ADELMAN: Objection to form.
 10 A. Well, from reading, yes.
 11 Q. And do you understand that that free
 12 service provided to all iTunes users means that
 13 for any song that you purchased from iTunes,
 14 that song can be set to be automatically
 15 downloaded to all your wireless devices?
 16 MR. ADELMAN: Objection to form.
 17 A. I think we talked about that just
 18 before.
 19 Q. So the answer to that question is
 20 yes?
 21 A. It's what the literature says.
 22 Q. Okay. So then my question is this:
 23 If I'm a ReDigi user who has this free iCloud
 24 service available to me and I upload a song that
 25 I purchased from iTunes to ReDigi and sell that

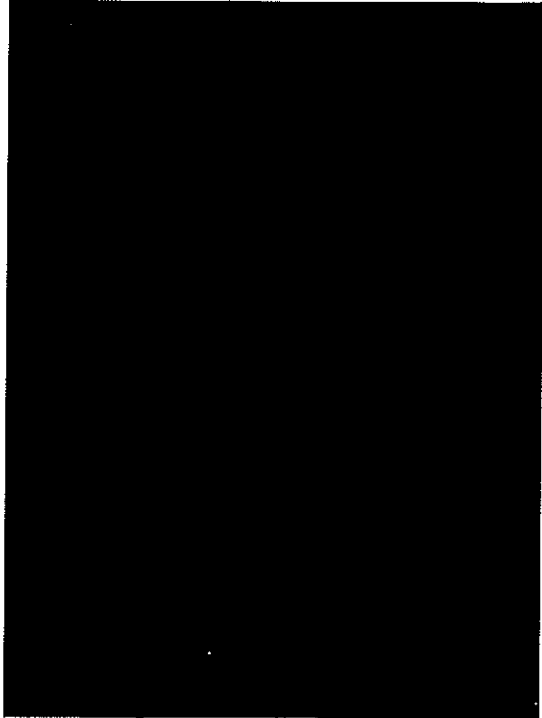
1 L. Rudolph
 2 also have an iPad and an iPod Touch, both of
 3 which are wireless enabled devices, and I buy a
 4 Katy Perry song, it's on my Mac, it's also been
 5 automatically downloaded from the iCloud to my
 6 iPod Touch and my iPad, if I sell that song from
 7 my Mac on ReDigi, ReDigi will not be able to
 8 determine, will it, that I've also retained
 9 copies of that song on my iPad or my iPod Touch?
 10 MR. ADELMAN: Objection to form.
 11 You can answer.
 12 A. So what I said in the previous answer
 13 is that we remove it from your library. I don't
 14 know what happens to your iCloud, on your
 15 iCloud.
 16 If there is a way for ReDigi to
 17 determine that even if you removed it from your
 18 local library, it's still in your iCloud, then
 19 we will not allow you to offer the song for
 20 sale.
 21 Q. But you don't know whether --
 22 A. At the moment I do not know how
 23 iCloud works.
 24 Q. And do you know when an iTunes user
 25 has access to a popular song in the iCloud, do

1 L. Rudolph
 2 song, can I still have access to that song from
 3 the iCloud?
 4 A. What ReDigi does is when you offer a
 5 song for sale, it removes it from your local
 6 iTunes library using your Apple API, a call
 7 which says remove this song from my library.
 8 With iMatch service, the song is not
 9 removed from your iCloud. You have to
 10 explicitly remove it from the iCloud and we can
 11 detect that.
 12 I do not know what happens when you
 13 remove a song from your local library on the
 14 iCloud service.
 15 When you remove a song from your
 16 local library and you attach a device to your
 17 PC, it gets removed from the device.
 18 I do not know what happens if you
 19 have iCloud and not iMatch to other devices and
 20 you remove it from your local library.
 21 Q. Okay. And I think you've identified
 22 the scenario that, it's a mouthful, but the
 23 scenario that I'm questioning you about.
 24 So if I don't have iMatch, I'm just
 25 an iTunes user and let's say I have a Mac but I

1 L. Rudolph
 2 you know whether that user has a unique copy of
 3 that file in the iCloud or just has copy to a --
 4 has access to a master copy that iTunes keeps?
 5 Do you know?
 6 MR. ADELMAN: Objection to form.
 7 A. I don't understand the question.
 8 MR. ADELMAN: Either of the defined
 9 terms.
 10 A. I don't understand what you're asking
 11 me.
 12 And if you're asking me what Apple
 13 does on their site, I have absolutely no idea.
 14 I never worked for Apple so I don't know what
 15 they do.
 16 Q. The scenario you described before
 17 where you said you won't, ReDigi won't let
 18 people upload files if it's stored in -- if they
 19 have those files stored in the iCloud, you were
 20 talking about ReDigi users who are subscribers
 21 to the iMatch service?
 22 A. That is correct.
 23 Q. Now earlier you testified that in
 24 vetting a song file before it gets uploaded to
 25 the ReDigi cloud, ReDigi determines, among other

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L. Rudolph

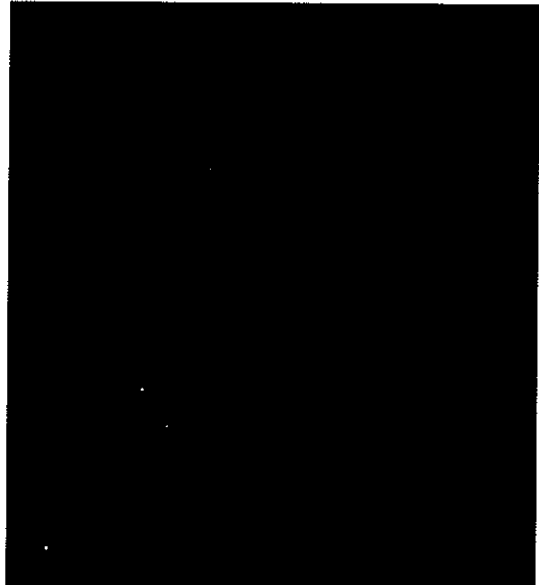


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L. Rudolph

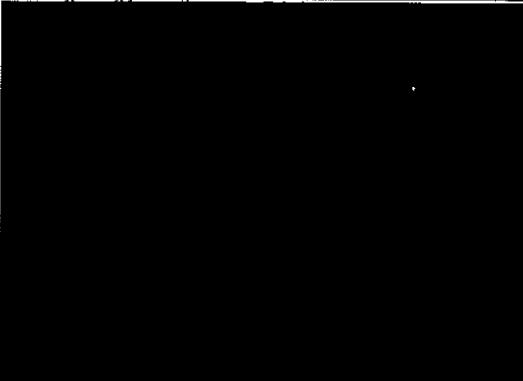
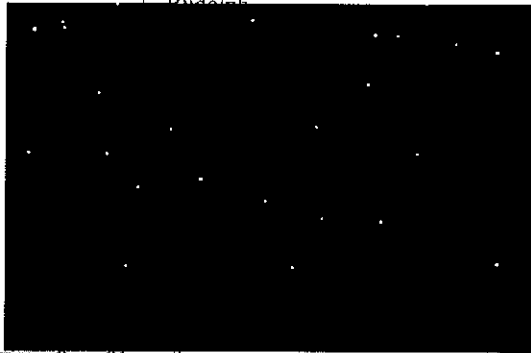
A. Before ReDigi Media Manager was installed, we cannot detect activity. We do not collect any activity.

Q. Right.



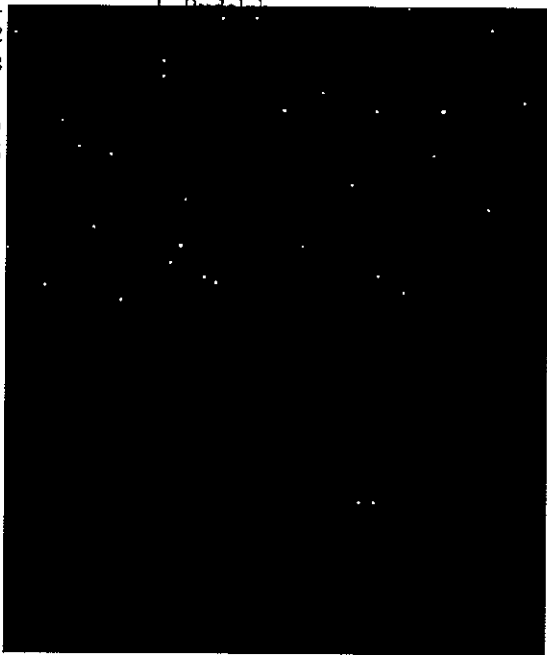
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L. Rudolph



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L. Rudolph



MR. KING: You know what, it's almost 1:00, why don't we do our lunch break now.

MR. ADELMAN: Okay.

1 L. Rudolph
 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 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

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.

1 L. Rudolph
 2 notifies that user about that copy and asks that
 3 user to delete it?
 4 Let me ask the question again.
 5 When ReDigi detects that a song that
 6 has been offered for sale or sold, a copy of
 7 that song still resides on the user's machine,
 8 how does ReDigi notify the user of that
 9 violation?
 10 A. There are two ways.
 11 One is the user is locked so -- I'm
 12 going to ask you, probably ask you to rephrase
 13 your question because there are no files on the
 14 machine when it's offered for sale and their
 15 file appears. So the way you asked the
 16 question, I can't answer that question because
 17 it doesn't happen.
 18 Q. Okay. So then how do you notify a
 19 user of a violation?
 20 A. There's a pop-up window that happens.
 21 Q. What does that pop-up window say?
 22 A. Please -- this file has been offered
 23 for sale or has been sold. We've discovered a
 24 copy on your machine. Please delete it.
 25 Q. So the circumstance is that a user is

1 L. Rudolph
 2 offering a file for sale, and then sometime
 3 after having uploaded an offer for sale, ReDigi
 4 detects that that file has reappeared somehow on
 5 that user's machine or a connected device?
 6 A. Somehow that file, that's right, the
 7 same file is found.
 8 Q. Okay. We have one document that
 9 seems to relate to this and maybe this will
 10 help.
 11 MR. KING: I think we're up to
 12 Plaintiff's Exhibit 12.
 13 (Plaintiff's Exhibit 12, Form
 14 suspension notice, marked for
 15 identification, as of this date.)
 16 BY MR. KING:
 17 Q. Do you recognize Plaintiff's
 18 Exhibit 12, which bears ReDigi Bates number 374?
 19 A. Yes.
 20 Q. Okay. And is this an actual
 21 suspension notice or a form suspension notice?
 22 A. This is a form suspension notice.
 23 Q. Okay. But if I were to, if I were to
 24 commit a violation and refuse to delete a copy
 25 that appeared after I offered a song for sale,

1 L. Rudolph
 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 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
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1 L. Rudolph
 2 [REDACTED]
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 4 [REDACTED]
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 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 Q. Have you had other instances where
 12 users have committed violations but then have
 13 corrected the problem by deleting the file?
 14 A. That was the previous question and
 15 the answer is we don't know.
 16 Q. Oh, you don't -- but don't you have a
 17 record of when someone has committed a
 18 violation?
 19 A. So let's -- let me not -- let me
 20 answer this differently then.
 21 So a violation happens when we tell
 22 them to delete a file and they don't. That
 23 happened once.
 24 If on the machine the ReDigi Media
 25 Manager detects a violation which is a different

1 L. Rudolph
 2 violation than the one that causes -- it's a
 3 previolation, right? We've noticed that that
 4 song appears there. We ask the user to delete
 5 and when he deletes, everything is fine and we
 6 don't know that.
 7 Q. You don't know that.
 8 That process happens --
 9 A. The user did the right thing.
 10 Q. Okay. And you don't keep a report of
 11 record of the fact that that user deleted an
 12 extra copy or complied with the previolation
 13 request?
 14 A. That is correct. The user does the
 15 right thing, we don't assume he's guilty.
 16 Q. Okay. And with respect to the one
 17 user who committed the, I guess the pre -- more
 18 than a previolation, was suspended, do you have
 19 any communication with that user apart from
 20 saying you've been suspended?
 21 A. No, we do not.
 22 Q. Now at various times the ReDigi
 23 website has offered audio streams of recordings,
 24 correct?
 25 MR. ADELMAN: Object to the form.

1 L. Rudolph
 2 Q. Tried to do what? I'm sorry.
 3 A. Upload everything they can and see
 4 what gets verified.
 5 Q. And a track or two slipped through
 6 the system even though it wasn't an iTunes file?
 7 A. Correct.
 8 Q. Okay. How recently have you done
 9 that?
 10 A. We do that frequently. We found one
 11 months ago. We haven't found it recently.
 12 Q. Before one of the breaks we had asked
 13 you to consider what would be involved in
 14 determining basically an aggregate information
 15 regarding users who have uploaded tracks and
 16 only stored them in the cloud as against users
 17 who have uploaded tracks and offered some or all
 18 of them for sale.
 19 Did you ponder that issue further?
 20 A. Yes.
 21 Q. Okay.
 22 A. It would take weeks, but we can do
 23 it.
 24 Q. Okay.
 25 MR. KING: I think we're going to

1 L. Rudolph
 2 that information as well.
 3 MR. ADELMAN: Take it under
 4 advisement.
 5 MR. KING: And I think we're done.
 6 MR. ADELMAN: Thank you.
 7
 8 (Time noted: 4:51 p.m.)
 9
 10
 11 LAWRENCE S. RUDOLPH ROGEL
 12
 13
 14 Subscribed and sworn to before me
 15 this day of 2012.
 16
 17 _____
 18
 19
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 25

1 L. Rudolph
 2 request that information, Gary.
 3 MR. ADELMAN: Put it in --
 4 THE WITNESS: A request?
 5 MR. ADELMAN: Yeah, put it in a
 6 request.
 7 MR. KING: Okay.
 8 MR. ADELMAN: I mean I don't even
 9 understand what you're asking for. I don't
 10 know if he understands what you're asking
 11 for but I'd rather have it -- I'd rather do
 12 it once and do it --
 13 MR. KING: All right. I'll put it --
 14 MR. ADELMAN: But take it under
 15 advisement as well.
 16 MR. KING: We'll reiterate it.
 17 BY MR. KING:
 18 Q. Also I think you said it would be
 19 fairly easy to determine of the 430 or so tracks
 20 that have been purchased, how many of them have
 21 actually been downloaded to users' computers; am
 22 I correct?
 23 A. Yes.
 24 Q. Okay.
 25 MR. KING: I think we'll call for

1 L. Rudolph
 2 CERTIFICATE
 3
 4 STATE OF NEW YORK)
 5) ss.:
 6 COUNTY OF WESTCHESTER)
 7
 8 I, ANNETTE ARLEQUIN, a Notary Public
 9 within and for the State of New York, do
 10 hereby certify:
 11 That LAWRENCE S. RUDOLPH ROGEL, the
 12 witness whose deposition is hereinbefore
 13 set forth, was duly sworn by me and that
 14 such deposition is a true record of the
 15 testimony given by such witness.
 16 I further certify that I am not
 17 related to any of the parties to this
 18 action by blood or marriage; and that I am
 19 in no way interested in the outcome of this
 20 matter.
 21 IN WITNESS WHEREOF, I have hereunto
 22 set my hand this 25th day of June, 2012.
 23
 24
 25 ANNETTE ARLEQUIN, CLR, CSR, RPR

Exhibit 2

Page 22	Page 23
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 into the plans that were under discussion with 3 respect to the lacrosse league? 4 A. Sure. The idea was to attract a 5 certain demographic, a youthful demographic, 6 you know, that likes music and to do these 7 events on Friday or Saturday evenings when the 8 arenas weren't having another use and so there 9 was going to be an idea to use up-and-coming 10 bands to showcase their abilities and have kids 11 come and listen and enjoy. 12 Q. So that was separate and apart from 13 the lacrosse league or was it going to be in 14 connection with the lacrosse -- 15 A. It was connected. It was meant to 16 it be all together, yeah. 17 Q. And would those concerts promote the 18 lacrosse league, was that part of the idea? 19 A. Yes. 20 Q. Now, up until that point it doesn't 21 sound like any of your background was in the 22 music industry. Is that fair to say? 23 A. Yes. 24 Q. Did you have any prior involvement 25 at all with projects in the music industry?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. The only reason I am hesitating 3 slightly is we had done some charity things 4 with some bands, but other than that, no. 5 There was -- no. 6 Q. And in terms of the lacrosse project 7 and the intersection with musical content, did 8 you actually go down the road of exploring how 9 that would be done from a legal perspective? 10 A. I'm not sure I understand the 11 question. 12 Q. Let me rephrase it. Did you have 13 occasion to have to consider any copyright law 14 implications in connection with plans that were 15 under discussion for the lacrosse league? 16 A. Yes. I think the discussion there 17 was in the bands that were being considered 18 they had to own the copyright to the material 19 they used, that they were going to use, and 20 that they had to have the rights to whatever 21 performance they were going to do, but, again, 22 that was something the lawyers were working on 23 and I wasn't. 24 Q. So you weren't personally involved 25 in studying the copyright law aspects of that</p>
Page 24	Page 25
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 situation? 3 A. Not at that time, no. 4 Q. Okay. What happened next after you 5 decided that AWE Mobile wasn't really going to 6 go anywhere? What did you do next? 7 A. That's when I, you know, just in 8 things we were doing started looking at -- I 9 had learned lots of things about the arena and 10 learned many things about how their systems 11 work and problems they have, and part of my 12 nature is a problem solver, and so one of the 13 things I learned during that process was they 14 had significant problems with ticketing and how 15 ticketing was handled, the cost of ticketing, 16 and so I started working on a solution with one 17 of the arenas to come up with a new type of 18 digital ticketing technology that would be 19 significant. 20 Q. And did you actually form any 21 business in connection with that? 22 A. That was the start of Intellisys 23 Group. 24 Q. So tell me what Intellisys Group is 25 or was.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. So Intellisys was set up and we 3 started working on the ticketing project and 4 then there were a couple of other projects that 5 ended up in Intellisys as well. One was 6 another arena owner I knew hosts a major -- the 7 world's largest skateboarding event, and so we 8 started working on some skateboarding 9 technology, basically apps and some other 10 things for them, which we delivered and are 11 being used today, in a project we called Skate 12 Hub. And -- there was something else. I don't 13 know why I am drawing a blank on it. There 14 were a few little projects that we had going 15 there and that was kind of, I guess, the time 16 also when towards the end of that when, you 17 know, we started contemplating this idea of 18 donating initially music and using music to 19 help, you know, as Larry said yesterday, the 20 kids with cancer, but it was meant to go to the 21 troops and other people who -- you know, we 22 thought music -- I guess the bottom line was we 23 feel music is good for the soul and makes 24 people feel better and so we thought -- and 25 actually the idea came from my daughter</p>

Page 26	Page 27
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 initially, because she is heavily involved in 3 charitable things, saying "dad, can we help 4 these kids out," she was doing things for the 5 troops at the time, packing up all the gift 6 boxes and all that stuff, and "is there a way 7 we can give them music to make them feel 8 better," and so that was kind of the start of 9 thinking about what are all the reasons why we 10 can or can't gift music, and we originally 11 started -- the project was originally called 12 Gift Music, actually. I think if you go to 13 Gift Music dot-com today it probably takes you 14 to ReDigi, but, I mean, that was the start of 15 it. So that was Intellisys. 16 Q. Okay. Was Intellisys Group actually 17 formed as a corporate entity? 18 A. It was formed as an LLC. 19 Q. And when was that formed? 20 A. Oh, man. You know, actually, I am 21 trying to think. I will have to go back to our 22 attorneys on that. We were going to set it up 23 as an LLC, but I'm actually not sure if we ever 24 ended up doing it. I think we did. And I 25 would say probably maybe 2008, 2009, somewhere</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 in that range. 3 Q. And when you formed Intellisys 4 Group, what was the idea? Did it have a 5 specific business purpose? 6 A. It was to try to use technology to, 7 you know, do things, and, you know, some of 8 those things were the ones that we kind of 9 mentioned. You know, we had this immediate 10 need with arenas that was on the ticketing 11 side. One of my friends who I got to know 12 pretty well who owns an NBA team and also an 13 arena wanted us to help him with a 14 skateboarding thing. So it was just meant to 15 be kind of a little bit of a catch-all. 16 Q. A catch-all for the various projects 17 you -- 18 A. Just the projects we were working 19 on, yeah. 20 Q. And did you have any investors in 21 that entity? 22 A. No. 23 Q. Did you envision it as a for-profit 24 entity when you formed it? 25 A. Parts of it. You know, Gift Music</p>
Page 28	Page 29
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 at the original time was meant to be a 3 charitable, but the other ones were definitely 4 for profit, yes. 5 Q. So what was the concept of Gift 6 Music when it first came up? 7 A. The concept was is there a way where 8 other kids or other people can lawfully gift 9 their music to people in need, people that 10 can't afford to buy the music, and do it in a 11 way where they don't steal music, so it was 12 kind of meant to be a way to provide this nice 13 service to people that maybe would make them 14 feel better because they can now listen to 15 music and escape maybe the feeling of 16 chemotherapy that they are in or troops sitting 17 there in the middle of the desert. You know, 18 that was the whole concept. So the original 19 concept was to do it as a donation-type system. 20 Q. And whose idea was that? 21 A. Well, that was my daughter's idea. 22 Q. In its original form were you 23 thinking about it in terms of gifting digital 24 music as opposed to other forms? 25 A. It was meant specifically for</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 digital music, yes. 3 Q. And you said your daughter raised it 4 with you and I take it you became interested in 5 that? 6 A. Yes. 7 Q. So what did you do next in terms of 8 exploring the possibilities of bringing that to 9 fruition? 10 A. So that's where we started to do 11 research, you know, which is also part of my 12 nature, you know, to try to understand things. 13 You know, a lot of it was Internet research and 14 then subsequently discussion with law firms, 15 some of the people that I had known at the 16 time, but it was how do we go about doing this, 17 is there a way to do it. 18 Q. When you say "Internet research," 19 did you, yourself, actually do research on the 20 Internet? 21 A. Yes. 22 Q. And is that when you first started 23 having occasion to look into copyright law? 24 A. Yes. 25 Q. And were you actually trying to</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 learn the copyright law by doing research? 3 A. I don't know if I was trying to 4 learn the copyright law. I was trying to 5 understand the copyright law and how that 6 applied to -- at the time I didn't understand 7 what the -- you know, what the bounds of it 8 were, so I was trying to understand how does 9 that apply to people donating things, for 10 example, like can you donate something that is, 11 you know, copyright protected, and that was 12 part of the original desire to learn more, and 13 then I, of course, learned a lot more. 14 Q. And in terms of your research, is 15 that when you had first occasion to hear of 16 something called the First Sale Doctrine? 17 A. I think I had heard of it 18 previously, but it was certainly my first 19 occasion to really delve into it more and seek 20 a greater understanding of it. 21 Q. And separate and apart from any 22 consultation that you may have had with counsel 23 at the time, did you, yourself, based on your 24 Internet research form any conclusions as to 25 how any aspect of the copyright law impacted on</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 your potential plans? 3 A. Yes. 4 Q. What conclusion did you reach? 5 A. I reached the conclusion that it was 6 exciting to me, because I found it to be 7 fertile ground on the digital side because 8 technology didn't seem to have been readily 9 available that would allow transfers between 10 users in certain types of parameters, and I 11 thought -- you know, part of what I think got 12 me excited and Larry excited then was the idea 13 of being able to use technology to be able to 14 be compliant with copyright law. 15 Q. What were the copyright law 16 implications that you based on your research -- 17 let me strike that. Let me rephrase the 18 question. 19 What barriers, if any, did you feel 20 copyright law imposed to the potential plans 21 that you wanted to implement? 22 MR. ADELMAN: Objection to form. 23 You can answer. 24 A. Okay. I thought a couple of things. 25 So one was I -- on the barrier side it seemed</p>
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 that the challenge, and this is part of the 3 technical part that was exciting to me, was how 4 do you have -- how do you transfer a digital 5 good where two people are owning the same good 6 at the same time, and with technologies that 7 had been previously available obviously it was 8 not possible to do, and so that obstacle, I 9 think, had kind of left the market open because 10 nobody had really understood how do you 11 transfer without having simultaneous ownership 12 by two parties, and then the other thing that 13 as I learned more about copyright law, going 14 back to your question about First Sale 15 Doctrine, was that there are also limitations 16 to copyright law, and so that I did a fair 17 amount of research on, you know, the fact that 18 once something is acquired and purchased and 19 royalties have been paid, that the owner of 20 that is entitled to do certain things with 21 them. They can gift them, they can sell them. 22 And so I think that education -- you know, 23 those things were important to me. Those were 24 two big things that came up as I did my 25 research.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. And those are things that you 3 discovered on your own before you even 4 consulted with any attorneys? 5 A. Correct. 6 Q. So you identified at least the 7 issues that existed? 8 A. To me. 9 Q. Okay. And based on your 10 evaluation -- let's talk about the first of 11 those things. You talked about the transfer of 12 digital goods. 13 Was it your conclusion that there 14 would be a copyright law issue if at the end of 15 a so-called transfer the original party still 16 retained a copy of the digital good that was 17 supposedly being transferred? 18 MR. ADELMAN: Objection to form, but 19 you can answer. 20 A. No, I didn't think there would be a 21 copyright issue. Part of what I had learned 22 during copyright was, again, just studying, and 23 one of the things we tried to do is understand 24 how is the law currently implemented and how is 25 the law currently enforced, and so, you know,</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 one of the things that we tried to seek a deep 3 understanding of is how do we do better than 4 that. So we wanted to see what existed. For 5 example, in a CD sale, you know, someone goes 6 to Best Buy, they buy a CD for \$15, they listen 7 to it by ripping it to their iTunes library, 8 put it on their iPod, their MP3, and then they 9 sell it on eBay, and, you know, one of the 10 things we realized is with digital we could 11 actually help the industry significantly, 12 because with digital we can make sure that 13 people couldn't do that readily, that that 14 wouldn't be easily able to be done. And so, 15 you know, as we trapped, you know, the digital 16 file we felt we could actually build a system 17 far superior for protecting copyright than what 18 existed in the marketplace, so we thought we 19 were okay. 20 Q. But what I am trying to understand 21 is you seem to indicate that an obstacle was 22 with the transfer of digital goods making sure 23 that it's not owned by more than one person. 24 Is that fair to say, you had concern about 25 that?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. The transfer. The actual point of 3 sale. So in eBay -- so the way I would clarify 4 that question is it was in moment of 5 transaction, the exchange of cash or a 6 donorship for that actual good. In the 7 physical world it happens where I hand you \$5, 8 you hand me the CD. So when I hand you the \$5 9 and you hand me the CD, I am the one with the 10 CD. And so the obstacle we were trying to 11 overcome in a digital age is how do I hand you 12 \$5 and then have you transfer that digital good 13 to me without you owning it at the same time as 14 transferring to me. 15 Q. So you are focusing very literally 16 on the time when the transfer actually takes 17 place when you talk about that? 18 A. Well, the change of title. 19 MR. ADELMAN: Objection to form. 20 A. What we were focused on is what we 21 thought to be the point in time when title 22 changes. 23 Q. Now, why was simultaneous ownership 24 a problem, if you viewed it as a problem, in 25 that context?</p>
Page 36	Page 37
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 MR. ADELMAN: Objection to form. 3 You can answer. 4 A. It wasn't simultaneous ownership. 5 What we were worried about was we were trying 6 to give physicality to a digital transaction, 7 and so in giving that image of physicality, 8 again, as I explained earlier, it's the 9 transaction of we wanted title to change 10 instantaneously with either money or a 11 donation, or whatever it happened to be, so 12 that the actual good transacted at the same 13 time, because that's how physical good 14 transacts, so that we wanted it to be the same. 15 Q. But did you also have concerns that 16 when that happened that the person who was 17 selling the goods would no longer retain what 18 they were selling? 19 MR. ADELMAN: Objection to form. 20 You can answer. 21 A. Where we were on that is, again, 22 through just studying, it's -- the person who 23 is selling it, in our -- I think one of the 24 things that's in our user agreement is we felt 25 it very important that our job was to help the</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 seller maintain compliance with the copyright 3 law. We were purely -- we weren't the seller. 4 So as the person in the middle one of the 5 things we wanted to do is say to the seller and 6 provide them the tools to be able to do a 7 better job than they did with their CD, so we 8 took the position and we believe this position 9 to be that anybody who sells their good, be it 10 physical or digital, is responsible for 11 maintaining compliance to copyright law. Most 12 consumers have very little understanding at all 13 of copyright law. So one of the things we felt 14 with ReDigi is ReDigi would be a great system 15 to actually help educate consumers that they 16 have this obligation that when they sell or 17 transact a good, in our case a digital good, 18 that they should be -- they should care about 19 copyright, so whenever -- that's why we built 20 the system. Whenever we find one, we tell them 21 "please delete it," you know, all that type of 22 thing, so that they would have that education 23 in compliance. 24 Q. Now, you made reference to the First 25 Sale Doctrine, that that factored into also</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 your thinking about what you could or couldn't 3 do. Is that fair to say? 4 A. Yes. 5 Q. And you indicated that there are 6 certain limitations on copyright law. One of 7 those limitations I assume you are referring to 8 is the First Sale Doctrine? 9 A. Yes. 10 Q. Did you also have occasion in your 11 research to the read any articles about how, if 12 at all, the First Sale Doctrine applied in a 13 digital context? 14 A. What we found there is that there 15 hadn't been much -- it was very difficult to 16 find things about digital and how that applies 17 to First Sale Doctrine, because it didn't 18 appear that the technology had existed to allow 19 it to happen lawfully, so when we built the 20 technology that allowed that -- what we thought 21 was critical that transaction to happen 22 autonomically, instantaneously, we are not 23 owning the same copy at the same time, we 24 thought we had a pretty novel idea there, and 25 so -- but there wasn't much to actually read</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 about digital for sale. 3 Q. Was there a report that the 4 copyright office had commissioned that actually 5 looked at the question of First Sale Doctrine 6 in the digital context? 7 A. I do recall reading some 8 documentation in that area and I recall reading 9 some things about finding robust forward and 10 delete systems and, you know, recommendations 11 of such which, again, we believe we comply 12 with. 13 Q. Do you recall that the copyright 14 office actually in the early 2000s studied the 15 question of how, if at all, the First Sale 16 Doctrine applied in a digital context? 17 MR. ADELMAN: Objection to form. 18 You can answer. 19 A. I may have read it, but technology 20 changed significantly from 2000 forward, and so 21 the information they had when they did their 22 studies in 2000 certainly wasn't anywhere near 23 what was happening in -- 24 Q. Okay, but I am going to ask you, if 25 you can, I appreciate the narrative and I</p>
Page 40	Page 41
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 really do want to get your understanding, but I 3 am also asking you -- separate and apart from I 4 understand there may be reasons why what they 5 concluded you think doesn't apply, there may be 6 a lot of things you have to say about it and we 7 can talk about that, but I just want to first 8 understand very specifically did you actually 9 have occasion to look at that document and read 10 it? 11 A. I don't recall the specific 12 document, but I recall reading so many 13 documents and my thoughts are what I had said 14 there. 15 Q. But I assume you understand that the 16 copyright office has a particular role with 17 respect to the administration of the copyright 18 statute; right? 19 MR. ADELMAN: Objection to the form. 20 You can answer. 21 A. I understand that the copyright 22 office obviously has a lot to do with copyright 23 law. 24 Q. And I would assume that if the 25 copyright office is studying the very question</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 that you are trying to answer, that would be 3 something that might be of particular interest; 4 correct? 5 A. Definitely, absolutely of interest, 6 and that's part of the reason for the reading 7 of those documents, but, again, when we read 8 what people write and what their thoughts are 9 at the time, those thoughts actually helped 10 guide us to build the system we built. 11 Q. Okay. That's fair. We will get to 12 that. 13 Let me ask you first did you 14 understand that the copyright office's 15 conclusion when it looked at the question was 16 that the statute as it existed did not provide 17 a First Sale defense in a digital context? 18 MR. ADELMAN: Objection to form. 19 A. Absolutely not. 20 Q. That wasn't your reading of it? 21 A. Absolutely not. 22 Q. Did you have any understanding of 23 whether the copyright office evaluated whether 24 making a copy had any impact on whether the 25 First Sale Doctrine would apply?</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. I'm not sure I understand the 3 question. 4 Q. Let me try and rephrase it. 5 Is it correct that based on what you 6 reviewed, that the First Sale Doctrine doesn't 7 apply if you sell something that you copied? 8 A. So there is language in the 9 copyright law that I recall that has to do with 10 copying things, you know, and I think it was 11 probably meant for books and other types of 12 devices, but yes, I understand there is 13 language in there that talks about that. 14 Q. Did you understand that in the 15 copyright office report it talked about how if 16 you actually have to make a copy in order to 17 affect the transaction, that it's no longer 18 covered by the First Sale Doctrine? 19 MR. ADELMAN: Objection to form. 20 You can answer. 21 A. I'm not sure I understand that. 22 Q. You are not sure you understand my 23 question or you are not sure that's your 24 understanding of what the copyright office 25 said?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. Probably both. 3 Q. Did you understand part of the 4 reason the copyright office -- strike that. 5 Did you understand the copyright 6 office to say that under traditional First Sale 7 Doctrine that if you made a copy of a work and 8 then distributed that copy, that the First Sale 9 Doctrine did not apply? 10 MR. ADELMAN: I am going to object, 11 calls for a legal conclusion, but allow you 12 to answer. 13 A. I understand in a physical goods 14 world that taking a copy of a hard cover book 15 or something, making a copy of that book and 16 trying to sell that book was the intent of 17 that, and yes, I understand that that's not 18 allowable. 19 Q. Okay. In a digital context, if I 20 make a copy of my music file and then 21 distribute that copy, is it your understanding 22 that the First Sale Doctrine does or does not 23 apply to that transaction? 24 MR. ADELMAN: Objection. Calls for 25 a legal conclusion, but I'll allow you to</p>
Page 44	Page 45
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 answer if you know. 3 A. I'm not sure, but we don't make 4 copies, so we are not worried about that. 5 Q. Okay. You say you don't make 6 copies, but you understand that when this issue 7 came up for the first time for resolution 8 before the court in this case that isn't the 9 position that you took in the court; right? 10 MR. ADELMAN: Objection to form. 11 A. I'm -- I don't agree with that. 12 Q. Okay. Well, let me ask you to take 13 a look at, if you can, at Plaintiff's 14 Exhibit 3. 15 You recognize Exhibit 3 as the brief 16 that was submitted by ReDigi in opposition to 17 Capitol's motion for preliminary injunction in 18 this case? 19 A. Yes, I do. 20 Q. And if you look at page 9 under the 21 part that begins under Section B(i) the first 22 sentence says: "The only copying which takes 23 place in the ReDigi service occurs when a user 24 uploads music files to the ReDigi cloud thereby 25 storing copies thereof in the user's personal</p>	<p>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</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 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</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 shorten it, but I am happy to read the 3 whole thing, if you would like. 4 MR. ADELMAN: Yes, I think it's 5 important. 6 MR. MANDEL: Okay. 7 MR. ADELMAN: I appreciate that. 8 Q. It says: "The only copying which 9 takes place in the ReDigi service occurs when a 10 user uploads music files to the ReDigi cloud 11 thereby storing copies thereof in the user's 12 personal cloud locker." 13 So it does refer to what's in the 14 user's personal locker as a copy; correct? 15 A. Would you like me to explain that? 16 Q. Sure. 17 A. Okay. So, again, the only copying 18 that takes place in ReDigi is a creating of 19 that archival copy when a user goes to push 20 upload. When they decide they want to migrate 21 their file from their computer to their cloud, 22 that was the point in time where we were 23 actually on their computer keeping an archival 24 copy on their computer, and when the process 25 was completed, that was treated as any other</p>
Page 48	Page 49
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 copy and was removed. 3 Q. During what period of time did 4 ReDigi actually make archival copies during the 5 process of upload? 6 A. I would say it did it from the point 7 of time of launch, which was October, until -- 8 I can't remember the exact date, but it was one 9 of our upgrades. I feel it was sometime in 10 March. 11 Q. March of 2012? 12 A. Yes. 13 Q. And you understand that the defense 14 that was raised to the copying in this brief 15 was that it was a fair use because the user had 16 the right to space-shift their files; correct? 17 MR. ADELMAN: Objection to form. 18 Calls for a legal conclusion, but you are 19 free to answer. 20 A. I'm not sure and -- you know, I'm 21 not sure what... 22 MR. ADELMAN: When you get to a 23 point that makes sense, I just have to take 24 a break. 25 MR. MANDEL: Sure.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 MR. ADELMAN: It doesn't have to be 3 now. Whenever it makes sense. 4 MR. MANDEL: I'll do it shortly. 5 Q. Was the archival copy that you are 6 talking about actually retained or destroyed 7 once the upload was complete? 8 A. It was removed once the upload was 9 complete. 10 Q. So it existed only during the period 11 of the uploading process? 12 A. Yes. 13 Q. And then it was deleted? 14 A. It was removed. 15 Q. Is there a difference between 16 removing it and deleting it? 17 A. I like to go with what our CTO 18 directs us. He uses lots of different 19 processes. There are lots of different 20 processes that are part of the ReDigi system, 21 and so I know that we remove those copies. 22 Q. Well, I am just wondering, 23 because -- if there is a difference between 24 removal and delete, as far as you understand. 25 A. I think Larry explained yesterday</p>

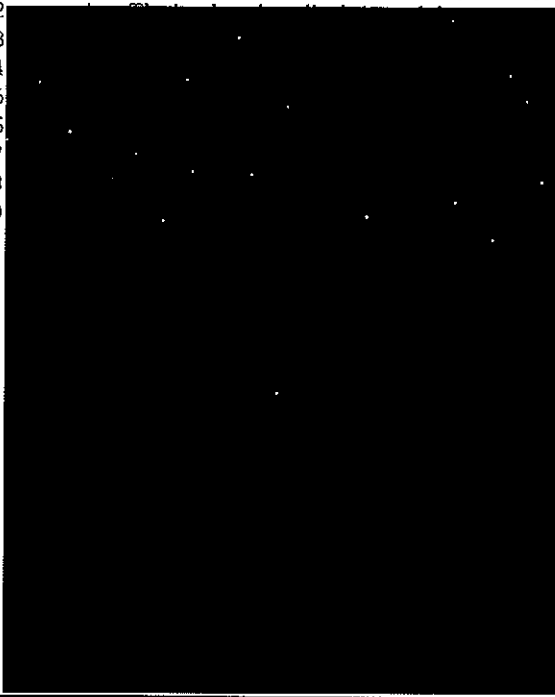

Page 50	Page 51
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 what he has educated all of us on, that there 3 are different ways to remove files and some are 4 more permanent than others, et cetera, so, 5 again, I'm not sure, but I know we removed 6 those files when that was complete. 7 Q. Are they permanently removed? 8 A. My understand is yes. 9 Q. Is that different than a deletion, 10 to your lay understanding? 11 A. It may or may not be. Again, there 12 are different forms of that word, so... 13 Q. But you have certainly used that 14 word in terms of -- 15 A. Sure. 16 Q. -- describing what ReDigi does? 17 A. We use lots of colloquial language 18 for multiple reasons, you know, in ReDigi, and 19 I think part of the reason was in the early 20 days when we tried to use more sophisticated 21 words, people didn't understand what we were 22 doing, so 1, we use more colloquial terms, and 23 2, our technical, I think, understanding has 24 always been to protect our trade secrets and so 25 sometimes, you know, absent patents granted and</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 just things that aren't covered by patents we 3 wanted to protect our trade secret methods. 4 Q. Now, it's correct that ReDigi never 5 uses the word "archival copy" anywhere in the 6 preliminary injunction opposition papers; 7 correct? 8 MR. ADELMAN: Objection to form, but 9 you may answer. 10 A. I don't know. I don't recall if 11 it's in there or not. 12 Q. And do you recall it being used in 13 any declaration that was submitted to the court 14 explaining what's going on factually? 15 A. I don't recall. Again, it was only 16 used as a measure to -- as a quality control 17 measure. It wasn't required as part of how our 18 system -- service works, so whether the 19 attorney at this time decided to disclose it or 20 use it or thought it was important, I don't 21 know, but that was why we used that term and 22 that's why he was aware of that term and used, 23 I think, this in here. 24 Q. Okay. And where were the archival 25 copies actually maintained when they existed?</p>
Page 52	Page 53
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 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</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 being stored in the user's personal cloud 3 locker; correct? 4 MR. ADELMAN: Calls for a legal 5 conclusion. 6 You can answer. 7 A. That was not my understanding when 8 we reviewed this when Ray Beckerman originally 9 wrote it. That was the only copy that we were 10 doing. So I am not, again, sure of his 11 terminology. I am not a lawyer and there were 12 lots of things in here that we didn't 13 completely understand why an attorney writes 14 them the way they do, but... 15 Q. When it's talking about where the 16 copy is, that's talking about an issue of 17 technology; correct? 18 MR. ADELMAN: Objection to form. 19 You can answer. 20 A. I'm not sure it's talking about an 21 issue of technology. I know one of the things 22 Ray believed, which isn't necessarily how the 23 technology worked, is that users should be able 24 to for certain legal reasons be able to make 25 copies for their own personal use in the cloud.</p>

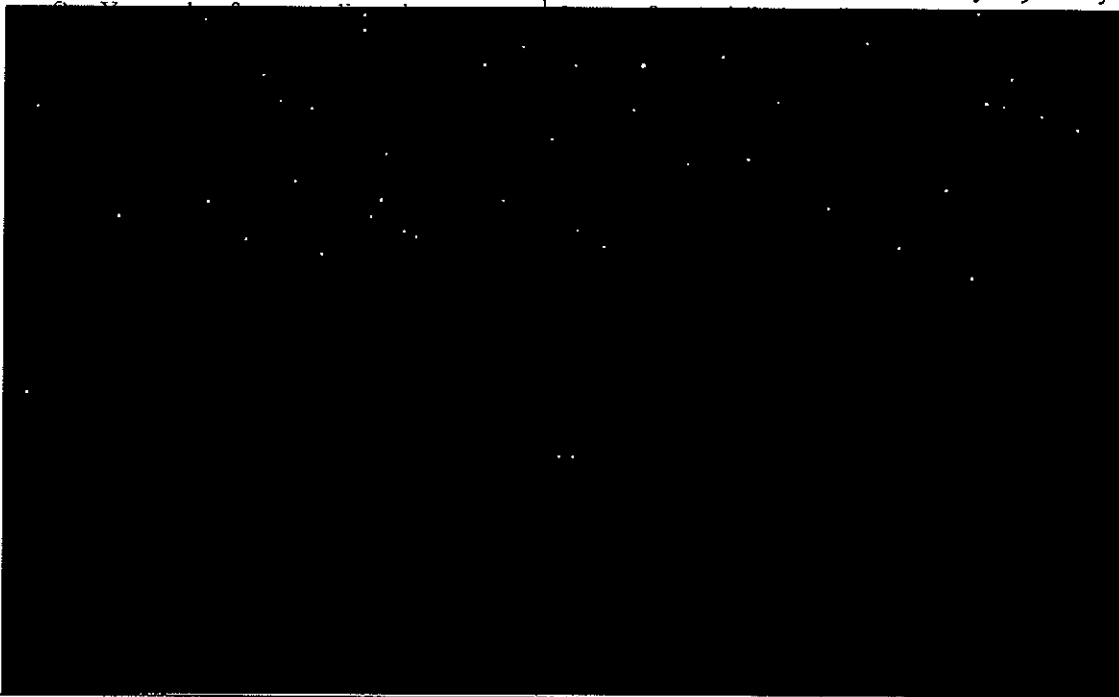
Page 54	Page 55
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 I don't know if that was something he thought 3 was part of this or he wanted to incorporate in 4 this, but it wasn't how our technology worked. 5 Q. So your understanding is it's not a 6 copy that's stored in the user's personal cloud 7 locker? 8 A. It is not. 9 Q. But when you read this, you didn't 10 feel that there was any ambiguity about that, 11 what was being said? 12 A. I remember reviewing this with Ray, 13 discussing the archival copy, and this is how 14 he determined he wanted to write this. I'm not 15 sure why. 16 Q. Okay. Now, you said that archival 17 copies were made for a certain period of time 18 between October 2011 and March 2012? 19 A. I think that's approximately 20 correct. I'm not sure of the exact dates. 21 Q. And the reason to make an archival 22 copy is to protect against the possibility of 23 some kind of crash in the uploading process? 24 A. Yes. 25 Q. So it's a good thing to have that</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 safety precaution; correct? 3 A. Well, I said -- 4 MR. ADELMAN: Objection to form, but 5 you can answer. 6 A. I said yes, but yes in that it would 7 help -- it wouldn't prevent a crash, but in the 8 case of a crash it would help us provide good 9 customer service by making sure the user's 10 track was completely delivered. 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED]</p>
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 [REDACTED] 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED]</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 correct? 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED]</p>


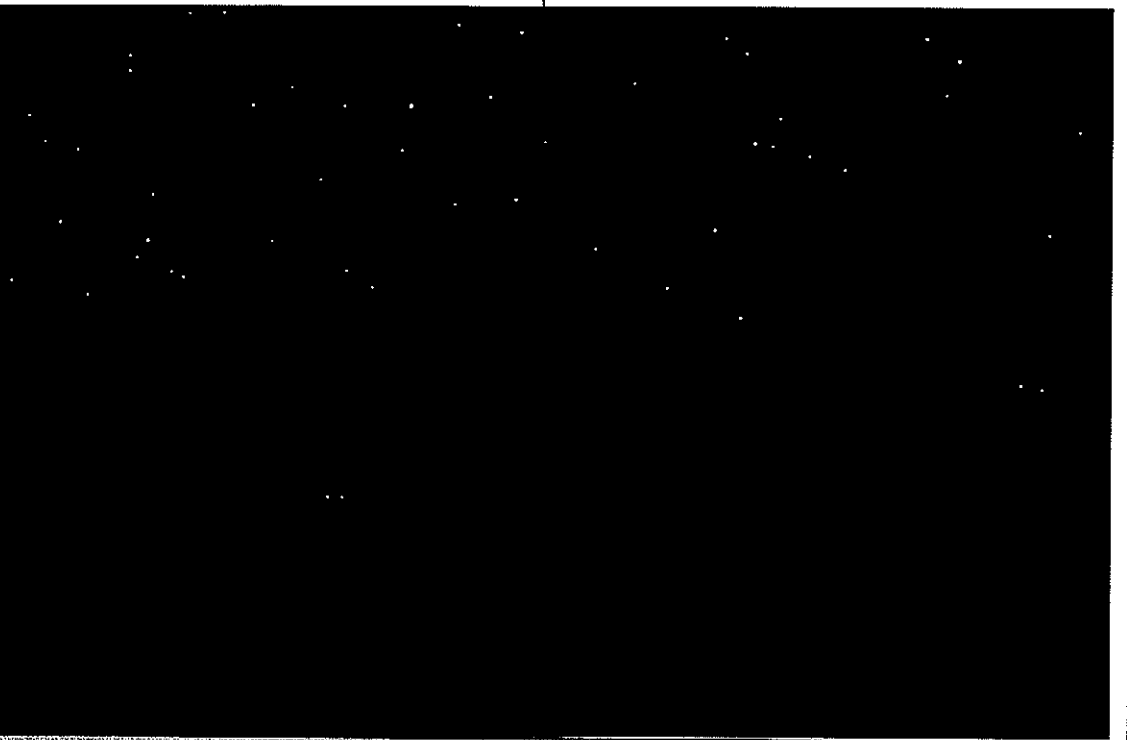
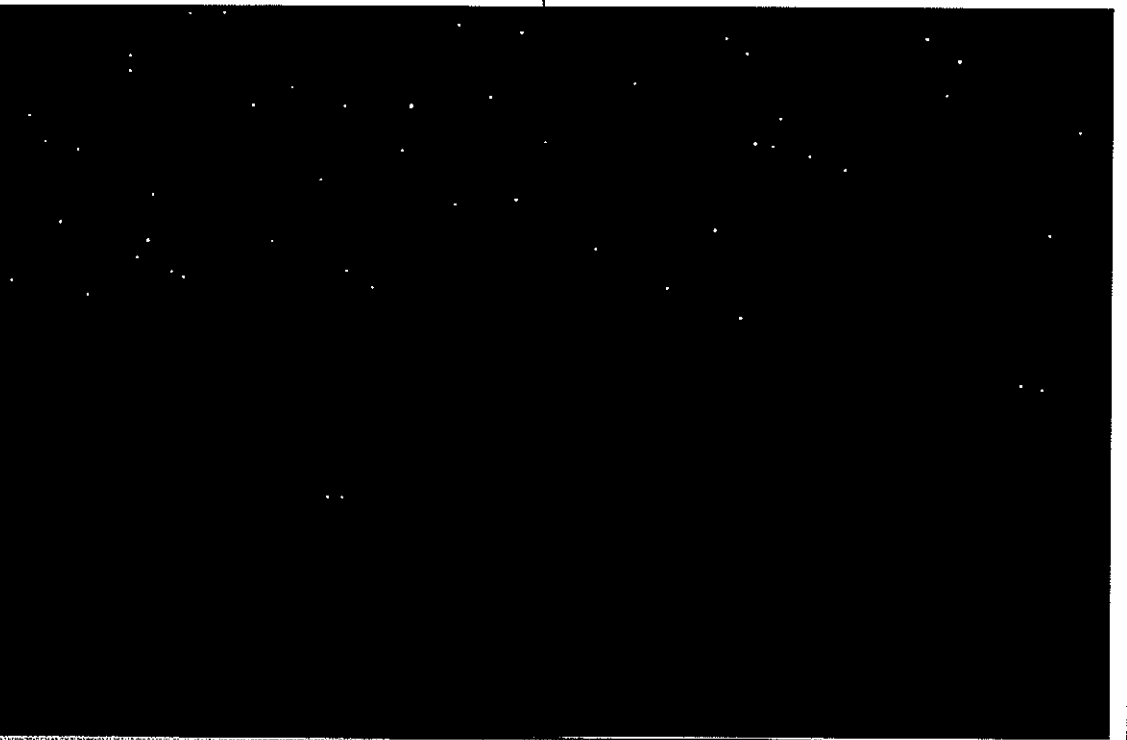
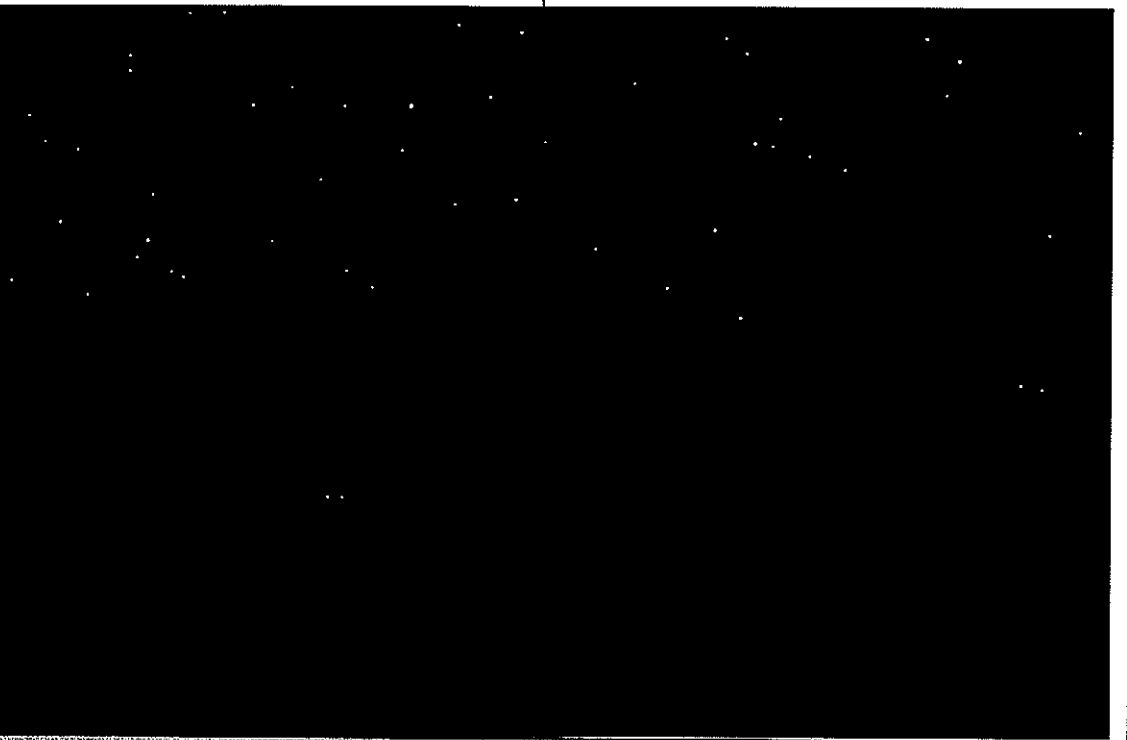
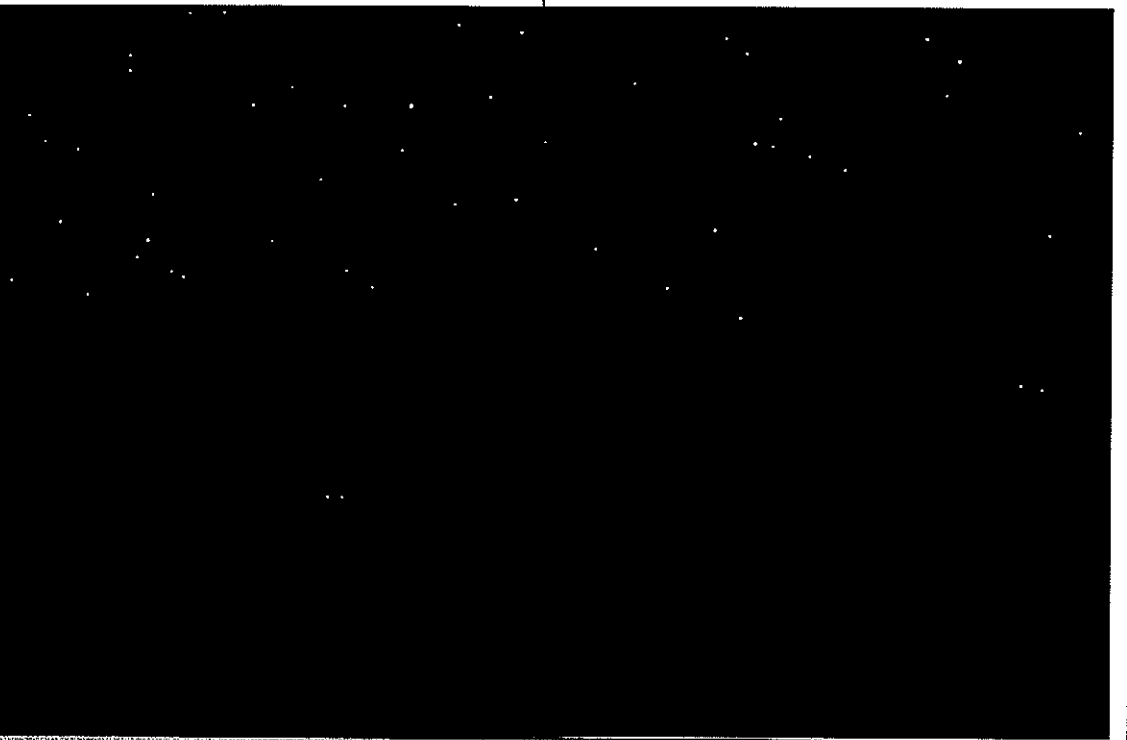
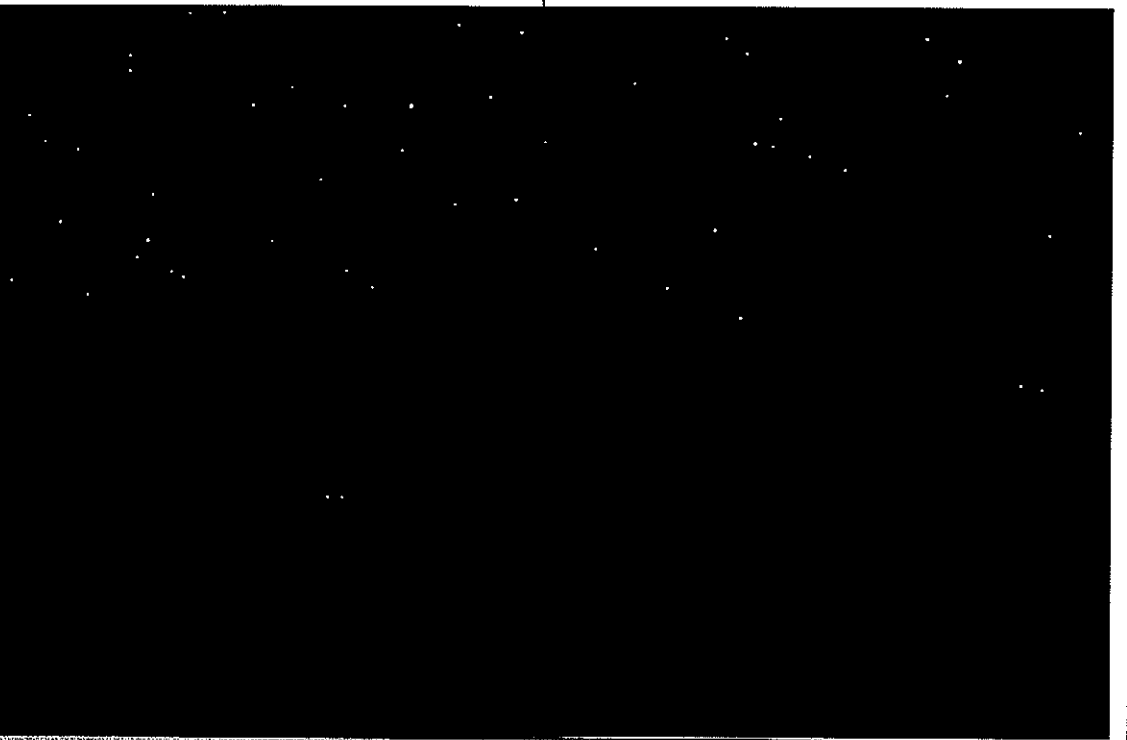
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 [REDACTED] 3 [REDACTED] 4 [REDACTED] 5 [REDACTED] 6 [REDACTED] 7 [REDACTED] 8 [REDACTED] 9 [REDACTED] 10 [REDACTED] 11 [REDACTED] 12 [REDACTED] 13 [REDACTED] 14 [REDACTED] 15 [REDACTED] 16 [REDACTED] 17 [REDACTED] 18 [REDACTED] 19 [REDACTED] 20 [REDACTED] 21 [REDACTED] 22 [REDACTED] 23 [REDACTED] 24 [REDACTED] 25 [REDACTED]</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. And you described the evolution of 3 your idea with the gift of music. How did that 4 evolve into the ReDigi concept? Can you 5 describe how that transformation took place? 6 A. So I would say in early 2011 we 7 started to do a little bit more work with -- 8 once we felt we had a technological solution we 9 wanted to look at how would we bring gift music 10 to market and what we realized through user 11 groups -- we did some student user groups when 12 we had students. What we learned through those 13 was people thought it was a cool idea, but they 14 probably wouldn't use it that regularly to 15 donate music, and so then the idea came 16 basically from that was, you know, if you guys 17 would allow us to be able to resell our music, 18 then we would be coming to your site regularly 19 and we would probably donate more, because it 20 would be something we would feel more 21 comfortable doing, so the whole concept then of 22 making the business a marketplace where people 23 could buy and sell used digital music and 24 donate used digital music, that's where that 25 really evolved, is that became more of an ideal</p>
Page 68	Page 69
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 for how we could actually launch a successful 3 business rather than have something that nobody 4 would use. 5 Q. You made reference to a 6 technological solution. How did -- describe 7 for me the process of how that came to be 8 formed. 9 A. Again, with Larry, you know, we 10 spent a lot of time trying to figure out that 11 issue we talked about, many issues, but the key 12 issue that we wanted a solution to was how do 13 we exchange title of a good autonomically or 14 simultaneously with the exchange of cash or 15 ownership and so the whole idea of the 16 in-the-cloud transaction was what we solved and 17 that was some of the patent matter that 18 Jonathan went over with Larry yesterday. 19 Q. How did you meet Larry Rudolph? 20 A. I met Larry in an airport and, you 21 know, we started talking about various things. 22 It's just a matter of how small the world is. 23 I had read his book on bluetooth, because in 24 the arena business bluetooth communications was 25 key to some of the app development we were</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 doing, because there is very poor Wi-Fi signal 3 in arenas, and so we felt if we could use a 4 bluetooth solution to allow people to continue 5 to these apps internally, which is actually 6 very novel technology, we could provide a good 7 solution there, so we just kind of hit it off 8 and, you know, that's... 9 Q. When was that? 10 A. That was probably -- I think 2008. 11 Q. And during that first conversation 12 in the airport did you actually discuss with 13 him your gift music idea? 14 A. No. 15 Q. So there was no discussion of that 16 at that point? 17 A. That idea didn't exist at that 18 point. 19 Q. And after you met Mr. Rudolph at the 20 airport, you kept in touch with him? 21 A. Yes. 22 Q. And did you -- were you actually 23 discussing with him at that point the 24 possibility of working together on projects? 25 A. We did.</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. And were there other projects that 3 you were working on at that point in time 4 separate from what eventually became ReDigi? 5 A. Yes. 6 Q. What kind of projects were you 7 working with him on? 8 A. Those are the ones I described 9 earlier where we were working on the ticketing 10 program, the skateboarding program, you know, 11 those projects. 12 Q. And at some point in time I take it 13 then you started discussing with him your gift 14 music idea? 15 A. Yes. 16 Q. When do you recall those discussions 17 first taking place? 18 A. I don't have a clear recollection of 19 the date, but probably sometime in 2009. 20 Q. And did you describe to him what you 21 felt was needed from a technological viewpoint 22 to implement the concept that you had? 23 A. We talked about it, yes. 24 Q. And what do you recall discussing in 25 that regard?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. We discussed the idea of is there a 3 way to do a transaction with a digital good 4 that does not require copying and does not 5 require, you know, the simultaneous ownership 6 of a product between a buyer and a seller. 7 Q. So in your initial discussions with 8 Mr. Rudolph, did you actually talk about the 9 fact that you wanted to do this without making 10 copies? 11 A. I don't know if it was in the 12 initial discussion or not. It's hard to -- you 13 know, I mean, that's a hard one to pull back, 14 but certainly during that we talked about it, 15 yes. 16 Q. But at some point in the process 17 relatively early were you talking about the 18 fact that you wanted to implement this 19 technology without making copies? 20 A. Yes. 21 Q. And did you talk about what that 22 meant? 23 MR. ADELMAN: Objection to form. 24 A. Yes, I believe we did. 25 Q. And did you actually talk about</p>
Page 72	Page 73
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 whether a copy would be made in the process of 3 uploading a file to the cloud? 4 A. Initially we hadn't conceived of how 5 we were going to do this, you know, what 6 technologies would be most likely used, so I 7 don't recall in those initial conversations 8 what -- 9 Q. So was the first thing that you kind 10 of settled on the idea that you would do this 11 transaction in the cloud? 12 A. Yes. 13 Q. And you decided that -- did you 14 discuss whether the technology existed to 15 change who would have access to a file in the 16 cloud? 17 A. We did. 18 Q. And whose idea was that, that you 19 could do it that way? 20 A. I think we came up with that 21 together just after, you know, lots of 22 brainstorming and discussion. 23 Q. And was that technologically 24 difficult to implement, that part of the 25 process?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. Larry can better answer that than I. 3 Q. To your understanding in terms of 4 how long it took. 5 A. I think it was reasonably complex, 6 yes. 7 Q. Now, once you had settled on the 8 idea that this transaction was going to take 9 place in the cloud, I take it you also had to 10 discuss how is the digital file going to get to 11 the cloud to be transferred; correct? 12 A. Correct. 13 Q. And did you then at that point when 14 you realized that you would need to get 15 something to the cloud to transfer, did you 16 discuss with Mr. Rudolph how to implement that? 17 A. Yes. 18 Q. Tell me everything you can remember 19 about that discussion. 20 A. It was more than one discussion. We 21 had numerous discussions on all of these 22 topics. I mean, discussion ranged anywhere 23 from how are people getting things to the 24 cloud. At that point in time there were other 25 cloud services that existed. How do people get</p>





Page 74	Page 75
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 them to the cloud. Is it lawful how they have 3 gotten them to the cloud. Why is it lawful in 4 the way they have gotten them to the cloud. Is 5 there a better way to do it. Is there a novel 6 way to do it. Is there a way -- you know, how 7 do you do it better and novel and still provide 8 outstanding, you know, robust quality, and so, 9 I mean, there was -- you are asking me to talk 10 about all the things, but there were so many 11 things that we talked about. 12 Q. That's okay. That's helpful in 13 terms of framing the general questions. 14 In terms of how to get it to the 15 cloud, what was your understanding of how that 16 generally was taking place at that point in 17 time? 18 A. I think at that point in time 19 people -- the cloud service that existed 20 employed, you know, standard copying 21 methodology. 22 Q. When you say "standard copying 23 methodology," is that language that Mr. Rudolph 24 used at the time? 25 A. I don't recall his exact language.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. What do you mean by "standard 3 copying methodology"? 4 A. A copy with standard computer and 5 then you would copy a copy to the cloud. You 6 would have a copy of the instance on your 7 computer and a copy of the instance at the 8 cloud simultaneously. So there would be a copy 9 in the cloud of what you have on your computer. 10 Q. So that's what you understand 11 standard to mean, the end result of there being 12 two copies, one on the user's computer and one 13 in the cloud? 14 A. I guess that would be part of it, 15 sure. 16 Q. Is there anything else you 17 understand to be standard copying methodology? 18 A. I'm sure there is lots of them, you 19 know, but I -- again, in this context that's 20 what it meant. 21 Q. And did you discuss with Mr. Rudolph 22 that if you employed standard copying 23 methodology, that wouldn't work, to your 24 understanding, in terms of affecting the 25 transaction?</p>
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 MR. ADELMAN: Objection to form. 3 You can answer. 4 A. No, at the time we actually 5 considered doing that because existing services 6 were doing that. It seemed allowable. It 7 seemed the labels were allowing it. It seemed 8 other copyright holders were allowing it. It 9 seemed standard practice that people could 10 actually do that and that users could actually 11 use clouds to copy things to lawfully, so we 12 did consider it but we felt we wanted to be 13 better than that and we wanted to do something 14 different than that, so we did. 15 Q. When you say "better than that," I 16 mean, was it your understanding based on the 17 research you had done that if all that happened 18 was the user just copied it to the cloud and 19 then gave that copy to somebody else while 20 retaining what they started with, that you 21 would have a problem from a First Sale Doctrine 22 perspective? 23 MR. ADELMAN: Objection to form. 24 A. Well, that's not how our service 25 worked. We don't give anything to anybody, nor</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 do we keep multiple copies, so if you want me 3 to speak to someone else who is doing 4 something, I'm not sure I can do that. We were 5 not doing that. 6 Q. I understand, but you were talking 7 about what you were going to implement and how 8 you were going to implement it and that's what 9 we are talking about at this -- 10 A. You asked me the things we 11 considered and talked about. We talked about 12 what other people were doing, which was that. 13 That's what other people were doing. We didn't 14 want to do that, so -- but we didn't not do 15 that because we didn't think it unlawful. We 16 actually thought it must be lawful because 17 people are doing it. 18 Q. And did you have any familiarity 19 with the concept of file sharing at this point 20 in time? 21 A. In what term? 22 Q. Had you read about the idea of file 23 sharing services? 24 A. Like the Limewires and the Napsters? 25 Q. Yes.</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. Yes. 3 Q. Did you have any occasion to learn 4 about any lawsuits that existed as a result of 5 that? 6 A. Yes. 7 Q. And so you were aware that in the 8 file sharing context there had been decisions 9 that had been rendered that would certainly 10 question the legality of that kind of conduct; 11 correct? 12 A. Actually, no. The readings I did on 13 those areas were not about the illegality of 14 moving a file to the cloud, but were more the 15 illegality of actually taking that file and 16 then parsing it and copying it millions of 17 times and allowing people access to it that 18 didn't have a right to it. The copyright 19 holder was not protecting their obligation 20 under copyright law to protect their copyright 21 material, and so -- but I didn't find any 22 readings where they said the actual movement of 23 a file from someone's computer to the cloud was 24 unlawful, but what was done after it got there 25 was unlawful.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. But you understood that a process by 3 which multiple people ended up with the same 4 music was found to involve unlawful copying; 5 correct? 6 MR. ADELMAN: Objection to form. 7 Calls for a legal conclusion. 8 A. All I will say is we thought that 9 was terrible. I mean, part of ReDigi was how 10 to help prevent file sharing, how to prevent 11 piracy. We built the system with many controls 12 so that when we uploaded a copy there is a 13 single instance of that copy and that instance 14 is controlled. So we looked at that and said 15 how do we make sure that we build a system that 16 helps get rid of that type of terrible 17 behavior. I mean, that was horrible. 18 Q. When you talked with Mr. Rudolph, 19 did you discuss whether you could develop 20 something to get files to the cloud without 21 using standard copying methodology? 22 A. Yes, we did. 23 Q. And what do you recall him advising 24 you about in that respect? 25 MR. ADELMAN: Objection to form.</p>
Page 80	Page 81
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> 	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> 

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. And who did you discuss that with at 3 that point? 4 A. Larry and I discussed it. 5 Q. And describe to me what conclusions 6 you reached at that point in time about the 7 viability of turning the basic concept into 8 some sort of for-profit business. 9 A. We liked it. We thought it had 10 merit and we thought it would -- you know, as 11 we started to just talk more about it, we 12 thought it would be a good way to go. 13 Q. And what was your initial concept of 14 how to do this from a business perspective? 15 A. In terms of? 16 Q. How to make it -- did you think 17 about what kind of business model might work 18 based on the technology you were discussing? 19 A. We did. 20 Q. And what discussion did you have in 21 that regard? 22 A. You know, we talked about lots of 23 different things. You know, how do people get 24 compensated, should it be an auction model, 25 should it be a not auction model, should it be,</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 you know, where people can input cash in, can 3 they get cash out. We talked about lots of 4 different things and, you know, we also talked 5 with a couple of the record labels about the 6 business model as well and got feedback from 7 them as to what they thought and what would be 8 a good idea, and we actually modified -- what 9 is ReDigi today is different than we originally 10 conceived of it as because of input also from 11 people in the industry at record labels. 12 Q. What did you originally conceive of 13 it as? 14 A. We originally conceived of it more 15 as an eBay-esque type model where people could 16 just basically load their music in and have an 17 auction-type price where they could sell it for 18 what they wanted to sell it for or donate it, 19 you know, that they could either denote it or 20 sell it, and the buyer could, you know, bid on 21 it or whatever they wanted to do. 22 Q. And in that form was the concept 23 that ReDigi would take some kind of commission 24 on the sale? 25 A. It was, yeah.</p>
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 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</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 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.</p>
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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. I actually don't believe the law to 3 be unsettled. I believe what we said to the 4 investors was more of a forward-looking 5 potential issue. I think as a business person 6 I believed that what we built we built to be 7 compliant with what we knew existing copyright 8 law to be and that's what we did. 9 Q. But you did tell investors the law 10 cannot be said to be well settled in the area 11 of copyright and contract law relating to the 12 sale or license of digital media content for 13 consumer use? I mean, that is what you said; 14 right? 15 A. Yes, purely because it hadn't been 16 done before. There hadn't been a used digital 17 site that we could rely on to say that this had 18 happened before. So it was a different 19 requirement. 20 Q. So it was just the absence of any 21 precedent that made it not well settled, in 22 your opinion? 23 MR. ADELMAN: No objection. 24 Go ahead. You can answer. 25 A. I would say primarily, yes.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 Q. And in terms of prior attempts, 3 there was a company that had previously 4 expressed an interest in doing used digital 5 media; correct? 6 A. Yes. 7 Q. What entity was that? 8 A. The only entity I know of is a 9 company called Bopaboo. 10 Q. And did you do any research in the 11 course of developing your business as to what 12 had taken place with Bopaboo? 13 A. Yes. 14 Q. What did you find out? 15 A. We found out that Bopaboo -- there 16 was, one, no legal precedence, so if this 17 question is tying back to legal precedence, 18 there certainly wasn't an understanding they 19 had any type of litigation that would set 20 precedence for us, but what we found out in our 21 course of doing it is they had built a system 22 whereby it was a gentleman's agreement that 23 once the transaction happened, the seller would 24 delete his copy and any other copies and the 25 buyer would then keep a copy, which is very</p>

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<p>1 Ossebmacher - Confidential - Attorneys' Eyes Only 2 different than our system where there is not 3 copying, nor is there a gentleman's agreement. 4 Q. And how did you determine what had 5 happened with Bopaboo? 6 A. A couple of record labels had 7 informed us what their process was. 8 Q. And had Bopaboo actually sought 9 contractual relationships with the record 10 companies? 11 A. Now you are asking me to speak third 12 party, but -- 13 Q. Based on what you know or what you 14 were told. 15 A. What I heard? So hearsay-wise my 16 understanding was yes, that they had worked 17 with the record labels and the record labels we 18 were actually told were working with them, had 19 liked aspects of it. 20 Q. But ultimately they didn't enter 21 into a contract with the record labels? 22 A. They are not going to share that 23 with us. I don't think so. I don't know. 24 Q. And what happened with the business, 25 did it ever launch, to your knowledge?</p>	<p>1 Ossebmacher - Confidential - Attorneys' Eyes Only 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?</p>
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<p>1 Ossebmacher - Confidential - Attorneys' Eyes Only 2 A. I think some of the Boston local 3 newspapers. Inc. Magazine. I don't know. 4 There have been a few. I don't recall. 5 Q. If you look on the first page in the 6 third paragraph it says: "The service has 7 already drawn concern from music executives and 8 legal scholars, who say it is operating in a 9 gray area of the law." Do you recall that 10 being reported? 11 A. Well, I'm reading it that it is 12 being reported here. 13 Q. I know. My question was do you 14 recall that that was actually reported by the 15 New York Times that legal scholars were saying 16 that you -- the company was operating in a gray 17 area of the law? 18 A. Is your question do I recall that 19 the New York Times reported that? 20 Q. Yes. 21 A. Reading that, yes, I do now recall 22 that. 23 Q. And have you seen statements like 24 that contained in other publications or blogs 25 talking about ReDigi?</p>	<p>1 Ossebmacher - Confidential - Attorneys' Eyes Only 2 A. Possibly. I don't recall 3 specifically what. 4 Q. If you look on the second page of 5 Exhibit 26, the last line, they are talking 6 about what you say, referring to 7 Mr. Ossebmacher, 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</p>

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<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 readers, and, you know, part of iTunes' whole 3 motivation, and I think this was used by 4 Jonathan yesterday, was we connect to all 5 devices, we always keep you up to date, and so 6 that's what music listeners. That's what they 7 want. They connect to their devices. So we 8 know that to be a routine normal use. 9 Q. But isn't one of the trends today to 10 actually eliminate the need for synching? 11 A. For people who want to buy music, 12 not to my knowledge. 13 Q. Well, are you familiar with Apple's 14 iCloud service? 15 A. I am. 16 Q. Do you actually have an iTunes 17 account on your computer? 18 A. I do. 19 Q. Have you ever used the Apple iCloud? 20 A. I don't think so. 21 Q. Do you have multiple devices, like 22 an iPod, an iPad, anything like that? 23 A. Yes. 24 Q. What do you actually own? Do you 25 own an iPad?</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. I own an iPhone. 3 Q. Do you have an iPad? 4 A. No. 5 Q. Do you have an iPod Touch? 6 A. No. 7 Q. Let me just show you what I believe 8 was marked yesterday as Plaintiff's Exhibit 4, 9 if you can pull it from your pile. 10 A. Sure. "What is new in iTunes." 11 Q. If you look at Plaintiff's 12 Exhibit 4, according to this piece, it's saying 13 as part of iCloud, iTunes in the cloud takes 14 what you buy on iTunes on one device and pushes 15 it to all your other devices wirelessly and 16 without synching. 17 Do you have any familiarity with the 18 ability for that to take place via the iCloud? 19 A. Yes. 20 Q. And have you actually attempted to 21 use that service? 22 A. I have not personally, no. 23 Q. Is part of what iTunes seems to be 24 promoting here the ability to have what you buy 25 pushed into your device without the need to</p>
Page 164	Page 165
<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 synch it? 3 A. So, again, very interesting 4 question, but I think this is marketing 5 terminology to me. When they say they push it 6 to all of your devices wirelessly without 7 synching, I'm not sure what you think that 8 means, but that means something else to me. I 9 mean, that is wirelessly synching. They are 10 wirelessly synching your device. 11 Q. Do you understand it to mean you 12 don't actually have to attach the device to the 13 computer? 14 A. You don't with ReDigi. If you synch 15 or connect to a ReDigi enabled account, whether 16 it's wirelessly or via, we do the same thing. 17 Q. So would ReDigi's technology -- if 18 somebody doesn't attach the computer, but 19 downloads a song from the iTunes cloud 20 wirelessly to a device and they don't actually 21 attach that device at any point to the computer 22 to synch it, would ReDigi know that? 23 A. Repeat that again. 24 Q. Suppose I have a device like you 25 said you have an iPhone.</p>	<p>1 Ossenmacher - Confidential - Attorneys' Eyes Only 2 A. Yes. 3 Q. Let's say I purchase songs on my 4 main computer from iTunes. 5 A. Yes. 6 Q. Let's say my desktop that I have at 7 home. 8 A. Yes. 9 Q. If I set my iCloud so that any time 10 I make a purchase it automatically gets pushed 11 into all my devices and one of them is my 12 iPhone, would ReDigi know that if the iPhone is 13 not subsequently actually physically attached 14 to the computer? 15 A. If it performed this function of 16 synching or pushing to all my devices would we 17 know that it has been pushed? 18 Q. Yes. 19 A. Yes. 20 Q. And so you are saying separate and 21 apart from whether the iPhone has actually ever 22 been physically attached to the computer, 23 ReDigi's technology can tell that that song has 24 been copied onto the iPhone? 25 A. We will know that it's been pushed</p>

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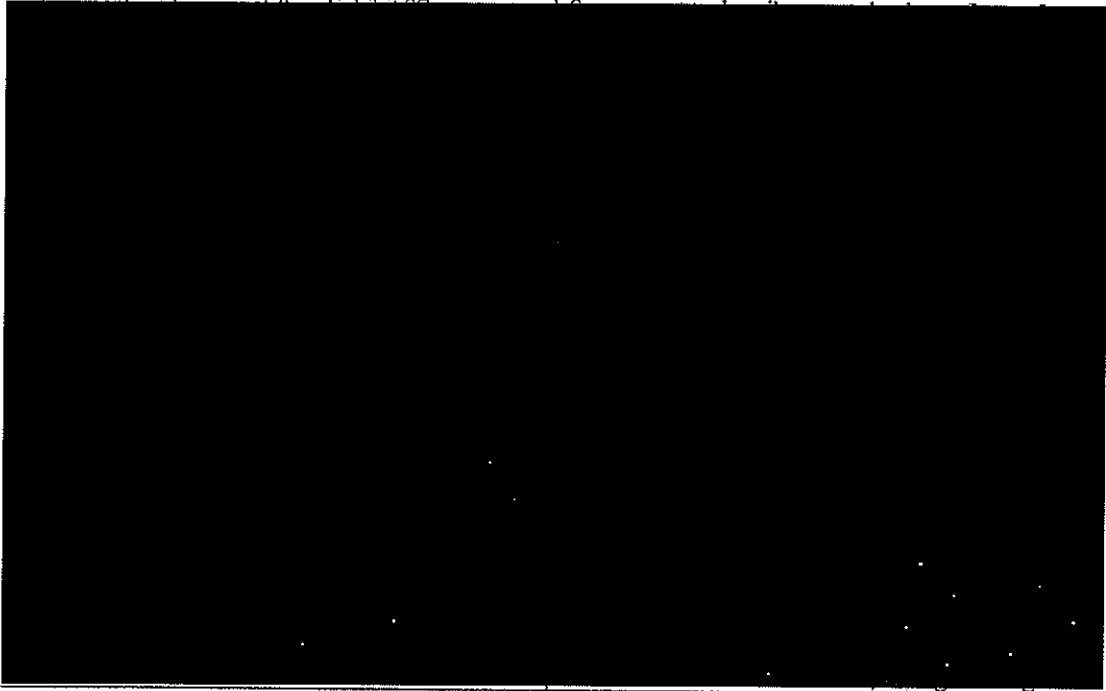

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2 get for it, I mean, Mr. Mandel, the only thing
3 they are going to get for that is the ability
4 to use that credit to buy new music. We kept
5 the money in the system so that we would help
6 prevent things like that. We didn't want
7 people to try to do things unlawfully. Even
8 though they are lawful users, they are iTunes
9 users, they are buying legal songs, we wanted
10 to just take away the incentive for anybody to
11 even do that. So we said you can't take that
12 money out of the system. So you are going to
13 now do that and you could maybe -- if you
14 figured out how to do it, you might be able to
15 do that for one song, because once we
16 fingerprint it and you have sold that song, you
17 can't resell it again. So maybe if they went
18 to great lengths to do that that would be
19 possible, but then all they are going to do is
20 get a few cents to discount or spend on their
21 next used or new song.
22 Q. You are saying all this difficulty
23 of keeping track. I mean, isn't it really just
24 as simple as having one device that you don't
25 sync?



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3 Q. Now, if somebody is nonetheless
4 determined that they want to make some extra
5 money by selling some tracks through ReDigi and
6 just concealing the fact that they have
7 retained copies, are you saying it would be a
8 difficult thing for them to do that?
9 A. So the way I would respond to that
10 is this: One, it would be much more difficult
11 than anything they have to do in the world of
12 physicality. Today with a CD it's very easy to
13 buy a CD, rip it to as many devices as you
14 want, give it to your friends and then go off
15 and sell that CD. On ReDigi it is far more
16 complicated to do that, because someone would
17 have to actually remember to make these
18 songs -- "I've sold these songs, now I don't
19 want to sync this thing that I sold on this
20 day and I don't want to sync this thing that I
21 sold on that day," now you have to try to keep
22 track of all of these songs they might have
23 sold at some point in time to keep them from
24 syncing to their library, which is not a
25 normal practice, and then all they are going to

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2 A. Okay. So let's just explore that.
3 I buy a song on my iTunes library and I am
4 going to put them on a remote hard drive. I am
5 going to hide them on a remote hard drive. Can
6 we pick that? Is that an okay example?
7 Q. I guess that's one example.
8 A. It's a common one. So I am going to
9 now buy the song on my iTunes library. I am
10 going to now hide some songs over on my remote
11 drive. Okay. So I do that. Then I go put
12 them up on ReDigi. I'm not sure what sold,
13 what didn't sell. I'm not sure what I really
14 moved up there and what I liked and I didn't
15 like. A month from now I am going to go, "oh,
16 I bought all these other songs, I bought
17 another hundred songs this past month, let me
18 go hide those." So I am going to connect to my
19 drive and hide them again. The minute they
20 connect it, we find all the ones that they put
21 up last time, so they would have to get another
22 hard drive.
23 Q. Well, can't you just have one device
24 that you repeatedly put things on and just
25 don't connect to a computer?

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2 file; correct?
3 A. Yes.
4 Q. If I buy a used, what you are
5 calling a used file through ReDigi, would I
6 also have access to the same artwork?
7 MR. ADELMAN: Objection to form.
8 You can answer.
9 A. What the user purchased from iTunes,
10 which includes the artwork associated with it,
11 is what's delivered to the new buyer, so if the
12 user had the artwork associated with it when
13 they go to sell it, yes, the artwork is still
14 with the file.
15 Q. So they get exactly what it was that
16 the original purchaser had bought?
17 A. Yes.
18 Q. And in the context you talked about,
19 if I have a CD that I burn to five different
20 files and then sell the CD, I no longer have
21 some of those physical attributes like the
22 cover art and the liner notes and all of that
23 stuff that comes with the product; right?
24 MR. ADELMAN: Objection to form.
25 You can answer.

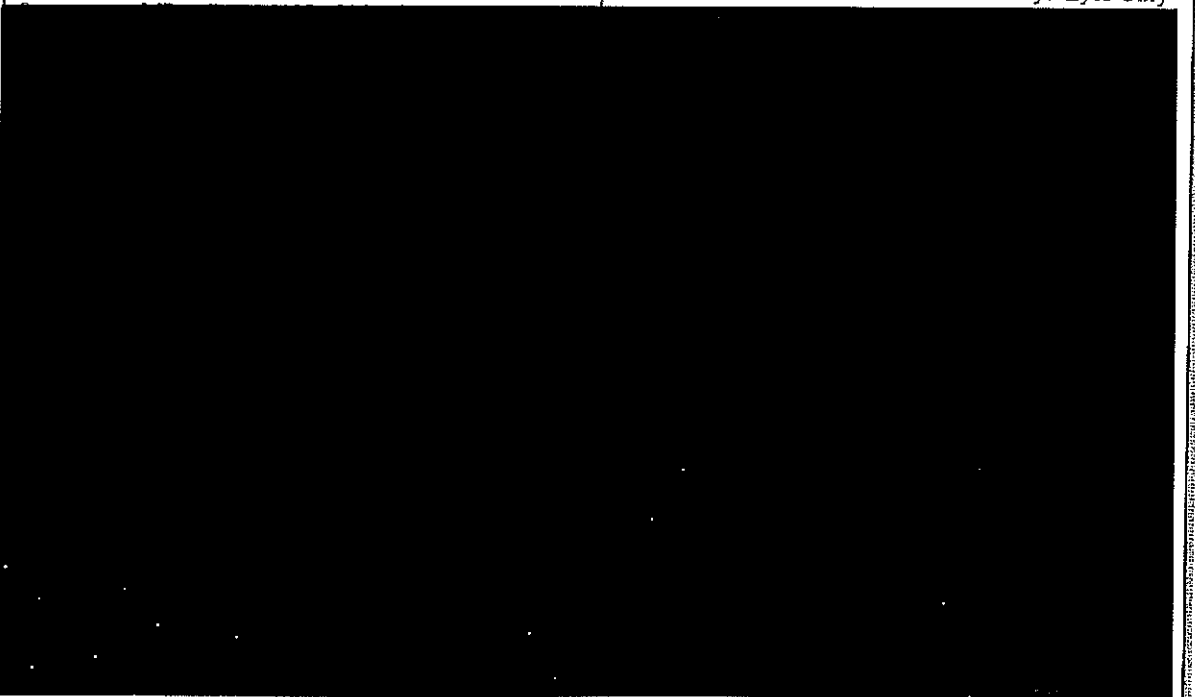
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1 Ossenmacher - Confidential - Attorneys' Eyes Only
2 A. I kind of lost that question.
3 Q. If I have a CD, you talked about it
4 earlier --
5 A. A physical CD.
6 Q. A physical CD. Thank you. And I
7 make copies of it, digital copies, that I am
8 storing in the cloud or putting on my devices
9 and then I sell that physical CD, I no longer
10 have access to the physical product that came
11 with it in terms of the liner notes or the art
12 that was part of it; correct?
13 A. I would think not, however, on the
14 digital file when it's delivered to iTunes into
15 your multiple devices, on your iPad or iPhone,
16 it also delivers the artwork to those as well,
17 but on a physical CD, no, it doesn't.
18 Q. Have you in any research seen
19 whether consumers who purchase physical CDs
20 consider it a desirable attribute to have those
21 liner notes and all of that that accompanies
22 the physical product?
23 A. I don't know.
24 Q. Have you ever looked at any research
25 that's discussed that?

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1 Ossenmacher - Confidential - Attorneys' Eyes Only
2 A. No, I have not.
3 MR. MANDEL: Why don't we take like
4 a five-minute break.
5 (Recess was taken from 2:48 to
6 2:57.)
7 BY MR. MANDEL:
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
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18 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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1
2 **CERTIFICATE**
3
4 STATE OF NEW YORK)
5) ss.:
6 COUNTY OF NASSAU)
7
8 I, KRISTIN KOCH, a Notary Public
9 within and for the State of New York, do
10 hereby certify:
11 That JOHN MARK OSSENMACHER, the
12 witness whose deposition is hereinbefore
13 set forth, was duly sworn by me and that
14 such deposition is a true record of the
15 testimony given by such witness.
16 I further certify that I am not
17 related to any of the parties to this
18 action by blood or marriage; and that I am
19 in no way interested in the outcome of this
20 matter.
21 IN WITNESS WHEREOF, I have hereunto
22 set my hand this 29th day of June, 2012.
23
24 -----
25 KRISTIN KOCH, RPR, RMR, CRR, CLR

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Exhibit 3

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C26TCAPA
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

CAPITOL RECORDS, LLC,

Plaintiff,

v.

12 CV 95 (RJS)

REDIGI INC.,

Defendant.

-----x

New York, N.Y.
February 6, 2012
3:30 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN
Attorneys for Plaintiff
BY: RICHARD MANDEL
JONATHAN KING

RAY BECKERMAN, PC
Attorneys for Defendant
BY: RAY BECKERMAN
M. TY ROGERS

C26TCAPA

1 you wanted to move into the modern age, you put them there, you
2 were thinking you don't want these cluttering up your computer
3 any more, you played a few just for the heck of it to see if it
4 works and say, you know, you maybe I acted too hasty, and you
5 store them there for a year and then you decided to take them
6 back. Mr. Mandel is trying to ask you to disregard what
7 actually happens. The actual physical event that is occurring,
8 he's asking you to avoid -- to pay no attention to that
9 technology, disregard that.

10 THE COURT: I think there may be a dispute to what the
11 technology is, which I think is foreshadowing what we're going
12 to be talking about with your contemplated motion for summary
13 judgment, because maybe there's some factual disputes that have
14 to be resolved first.

15 MR. BECKERMAN: There has to be some evidence on this
16 side and some evidence on that side. There can't be some
17 evidence on this side and some lawyer speculating as to what he
18 thinks may be going on.

19 THE COURT: We haven't had any discovery, so there's
20 no evidence on any side at this point.

21 MR. BECKERMAN: He should not have brought a lawsuit
22 without evidence of a copyright infringement. If there were a
23 copyright infringement, it would have been a small matter for
24 an investigator to open up an account -- and this is what they
25 do all the time, in fact they probably did. I think it is

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