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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

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 CAPITOL RECORDS, LLC,

Plaintiff,

- against -

DEFENDANTS COUNTER
 STATEMENT PURSUANT TO
 LOCAL RULE 56.1

Civil Action No: 12 CIV 0095
 (RJS)

REDIGI, INC. ,

Defendant.

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Pursuant to Local Civil Rule 56.1 Defendant, ReDigi, Inc. (“Defendant” or “ReDigi”) by its undersigned counsel, submits this response to plaintiff Capitol Records, LLC’s (“Plaintiff” or “Capitol”) Local Rule 56.1 Statement (the “Capitol’s Rule 56.1 Statement”).¹

I. ADDITIONAL STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL CIVIL RULE 56.1 (b)

¹ The “Adelman Decl.” shall refer to the Declaration of Gary Adelman dated August 14, 2012 together with the exhibits annexed thereto. The “Rogel Decl.” shall refer to the Declaration of Lawrence S. Rudolph (Rogel) dated August 14, 2012. The “Ossenmacher Decl.” shall refer to the Declaration of John Ossenmacher dated August 14, 2012. The “7/20/12 Adelman Decl.” shall refer to the Declaration of Gary Adelman dated July 20, 2012 together with the exhibits annexed thereto (Docket No. 57). The “7/20/12 Rogel Decl.” shall refer to the Declaration of Lawrence S. Rudolph (Rogel) dated July 20, 2012 (Docket No. 58). The “Worth Decl.” shall refer to the Declaration of Colin Worth dated July 20, 2012 (Docket No. 59). The “Lin Decl.” shall refer to the Declaration of Jonathan Lin dated July 20, 2012 (Docket No. 60). “RSUF” shall refer to ReDigi’s Statement of Undisputed Facts Pursuant to Local Civil Rule 56.1 (Docket No. 56).

In accordance with Local Civil Rule 56.1(b) ReDigi sets forth the following additional material facts:

A. The Creation of ReDigi

1. ReDigi was founded to find a way for people to lawfully gift their digital music to people in need who could not afford to buy music, and to provide a donation service so that people would not steal digital music. ReDigi's founders believe that "music is good for the soul and makes people feel better." *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 25:13-25, 26:2-15, 27-28; Adelman Decl., Ex. 1, Rogel Tr. 30:1-19.

2. After some focus groups, the concept evolved into a marketplace because the focus groups revealed that people would not really utilize the service if it could only be used for donation. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 67:8-25, 68:2-4.

3. ReDigi's research found that if individuals could buy or sell music on the site they would be coming more regularly and it would have a more robust user base. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 67:8-25, 68:2-4.

4. As ReDigi developed it quickly grew into a service that would provide a marketplace for individuals to re-sell their legally purchased digital goods. *See* Adelman Decl., Ex. 2, Ossenmacher Tr., 67:2-25-68:2-4.

B. ReDigi's Research

5. As its founders began delving into whether their idea would fit within the confines of copyright law, they discovered the first sale doctrine. *See* Adelman Decl., Ex. 2, Ossenmacher Tr., 29:21-30:20. ReDigi's founders researched copyright law, consulted with attorneys and felt that under the first sale doctrine they could provide a legal market place for digital goods if they had the right technology – the kind of technology that could effectuate

uploads and sales within the confines of copyright law. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 29-32, 38-44, 70-77.

6. Ossenmacher and Rogel also explored existing technologies, but quickly came to the conclusion that the exact technology to make this process work within the confines of the law was not readily available -- so ReDigi set out to develop a technology that would be compliant with copyright law. *See* Adelman Decl., Ex. 2, Ossenmacher Tr., 31:5-14.

7. ReDigi's founders thought extensively about the boundaries of copyright law, looked at other legally existing technologies and transfer methods, researched existing case law and tried to create a legally compliant system, which would also help prevent piracy. *See* Adelman Decl., Ex. 2, Ossenmacher Tr., at 75-78.

8. ReDigi's service is nothing like peer-to-peer file sharing networks. In file sharing networks copies of one file are cut and transferred to millions of people. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 78.

9. The ReDigi system was designed from the ground up to provide a service that was compliant with copyright law. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 31:4-14.

10. ReDigi's purpose was never to help people commit acts of piracy. In fact, appalled by the widespread piracy that has taken place in the music industry, ReDigi's founders actively sought to design a system that would discourage piracy. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 78:3-25, 79:2-17.

11. ReDigi's founders intention by creating a service that functioned as donation service and a secondary marketplace for digital music was to provide incentives for legally purchasing music. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 28:7-19, 78-79.

12. In fact a major benefit of providing a marketplace for the resale of legally verified and purchased digital music is a significant discouragement to piracy. The idea is that if people find that their legally acquired music has real “resale” value they are more often willing to make the purchase knowing that they can resell the music if they don’t like it or grow tired of it. Also, the secondary market attracts the value buyer who may not be interested in purchasing a music track for \$1.29 through iTunes, but would purchase a previously owned track for half that amount. Ossenmacher Decl. ¶3.

13. There are possible differences between new and used digital tracks. ReDigi sells digital tracks on a first in first out basis, meaning that if a person wants to buy a particular song, and they click on the purchase button, they buy whatever quality of the song that another user has offered for sale. Because ReDigi sells the actual music file that was legally purchased, a buyer gets whatever quality, whether lower or higher than the original purchaser bought. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 208-210.

14. Additionally, ReDigi discourages piracy by providing ongoing value to lawfully acquired digitally downloaded music. One of the factors contributing to widespread digital music piracy is that individuals do not view digital music as a type of personal property that has value, the secondary market changes this forever. Ossenmacher Decl. ¶4.

15. Without a secondary marketplace for digital goods a lawful buyer, consumer, has no ability to exercise their right to commerce and to sell their lawfully acquired property, the digital good will take up disk space or be deleted, there was no other alternative until our service was launched. Ossenmacher Decl. ¶5.

16. Like the eBay and Amazon marketplaces for used CD’s, it is proven that when consumers receive value for their personal property, in this case digital property, they are more

likely to protect it, they are less likely to steal it. As a result of this software and marketplace a person who legally purchases digital music can gift, sell or donate that music. Ossenmacher Decl. ¶5.

17. Showing consumers that legally acquired digital personal property has real value just as their other personal property like CD's and vinyl records. Ossenmacher Decl. ¶5.


C. ReDigi's Efforts to Eliminate the Potential for Misuse

18. ReDigi's founders further sought to minimize the incentive individuals would have to try to misuse the system for an illegal purpose by making ReDigi a closed system. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 94:20-25, 96:2-11, 175:3-25, 176:2-21. In a closed system, users can only put money into they system, there is no way to cash money out. *Id.* ReDigi users can buy credits within the ReDigi system that they can utilize to buy digital music. *Id.* Users can also sell their digital music and receive credit. *Id.* However credit received for the sale of music cannot be cashed out of the system for money. Users are only allowed to buy other music with the credit they purchased or earned. *Id.*

19. The closed system was also done at the suggestion of some of the record labels who, during discussions with ReDigi thought it would be a good idea to keep the money "in the music ecosphere." *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 99:16-25, 100:2-8.

20. ReDigi's discussions with the record labels stemmed from their attempt to get input, get marketing support and enter into deals with the labels so that ReDigi could sell new content. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 102-103, 231-233.

21. During ReDigi's discussions with the labels, none of the labels ever raised a concern about the legality of ReDigi's service. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 102-103.



23. In addition, ReDigi's founders took the time to think about the potential ways their service could be abused and have taken active steps to prevent copyright infringement outside of its marketplace and prevent users from committing acts of infringement. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 33-34, 175-176.*

24. Prior to ReDigi's existence, there was already possibility that individuals who legally purchased music, could commit acts of copyright infringement. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 33-34.* By way of example, even when digital music was only distributed physically in CD's, an individual could go to Best Buy, purchase a CD, go home and rip the contents of the CD to their iTunes library and/or make a copy to another CD. Notwithstanding the potential illegality of making reproductions of the CD, that person could then go to a used record store and re-sell the CD. The store would not know or be able to prevent the user from then selling the CD. The possibility that the above type of infringement *could take place is the status quo.* *See Adelman Decl., Ex. 2, Ossenmacher Tr. 33-34.*

25. ReDigi sought to decrease the *status quo* possibility of infringement by building a system that was superior for protecting copyright than what existed in the marketplace at the time. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 34.*

26. ReDigi also utilizes its user agreement to prohibit extraneous acts of copyright infringement. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 36-37.*

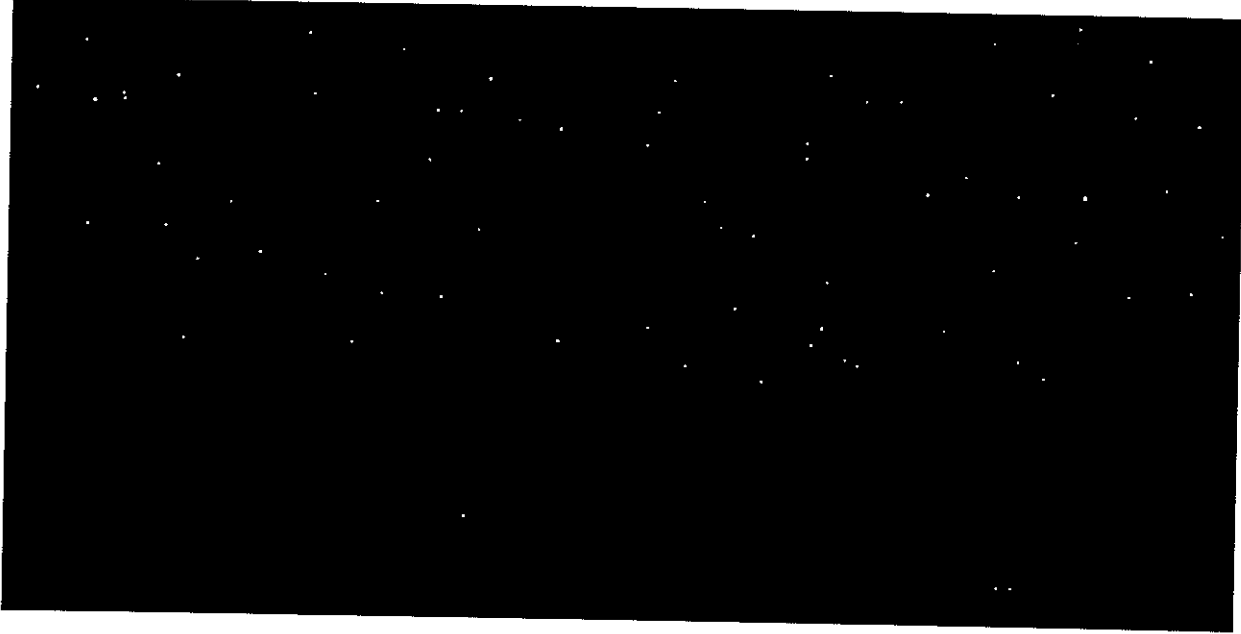
27. Even though individuals are ultimately responsible for their own compliance with copyright law, ReDigi has taken the initiative to not only educate consumers about copyright law, but to use technology to prevent infringement, in an area where there is little enforcement. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 36-37:2-14.*

28. In fact the object of some of ReDigi's marketing materials was to educate consumers as to why ReDigi believed its service was legal. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 151.*

29. To use the ReDigi system for storage or sale, users must download ReDigi's



30. After Media Manager is downloaded



31. Connecting portable media devices is routine and normal use. *See Adelman Decl., Ex. 2, Ossenmacher Tr. 162.*

32.

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33.

If a copy of a song that was uploaded for sale is found by Music Manager, the ReDigi system reminds the user that it is no longer allowed to retain that copy and requests that the copy be deleted. If a user refuses to delete the retained copy and/or after the user has failed to comply that user's account is suspended and their credit is revoked. *See Adelman Decl., Ex. 1, Rogel Tr. 152-155.*

34.

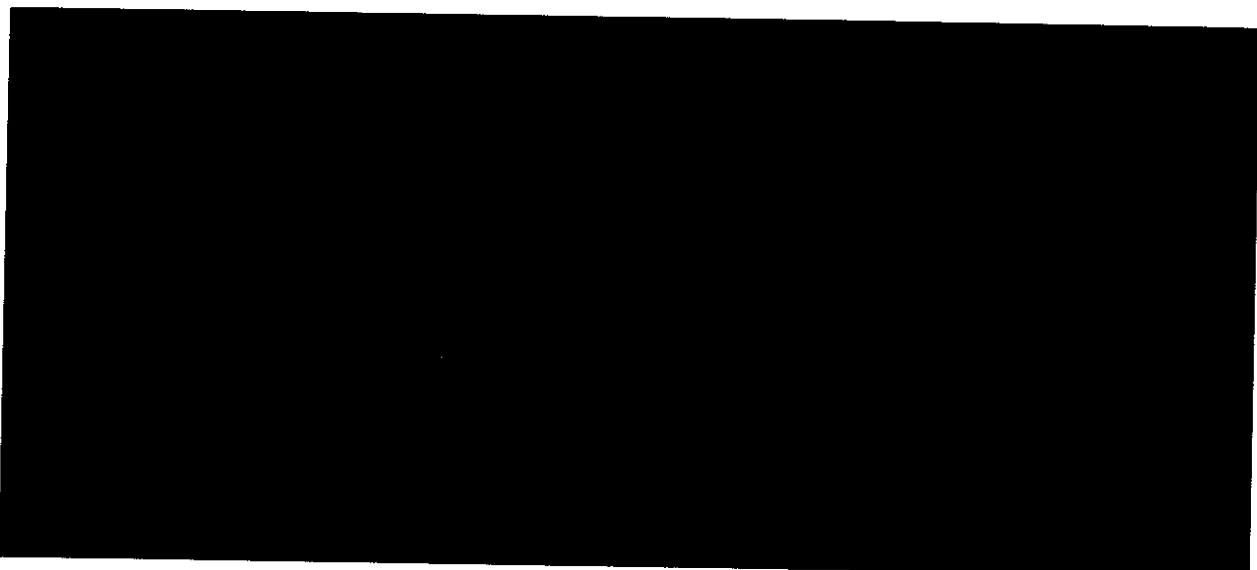
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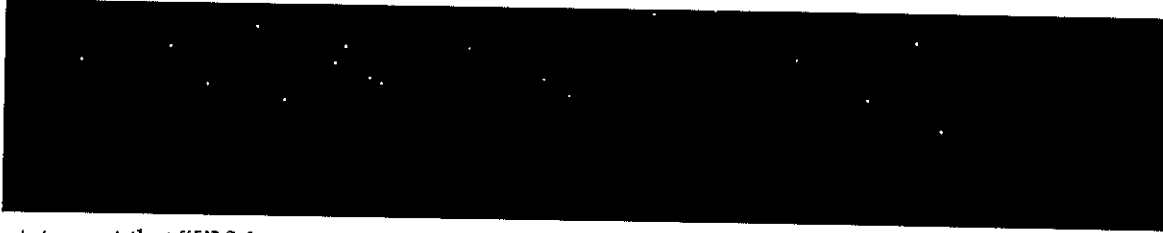

D. Capitol's Has Misinterpreted ReDigi's Previous Statements

37. As explained at length in the deposition of John Ossenmacher, the statement in ReDigi's brief in opposition to Capitol's motion for a preliminary injunction on page 9 (Docket No. 14) has been wholly taken out of context by Capitol.

² ReDigi cannot presently offer the second option as it does not sell new music at this time.




38. Additionally, the word “copies” as used in ReDigi’s materials was not always used to describe ReDigi’s technology. *See* Adelman Decl., Ex. 2, Ossenmacher Tr. 190:22-25-191:2-6. Just as one goes to the record store to get a ‘copy’ of a new or used album, one can go to ReDigi to get a “copy” of a song. *Id.* However in this sense the word copy is not used to describe the technology or indicate that a reproduction or duplication was made or sold, rather it is just a colloquial usage of the word “copy”, which is commonplace in the music industry. *Id.*

39. The phrase “such file” from paragraph 47 of the Answer and Paragraph 6 of the  statement that “[i]f the user were to attempt to upload the file without first accepting the prompt to delete the other copy or copies detected by Music Manager, the upload would be blocked.” 

40. There are many instances in which a pre-existing copy of an Eligible File would exist on a user's hard drive prior to ReDigi's installation. *See* 7/20/12 Rogel Decl. ¶30; RSUF ¶¶29.

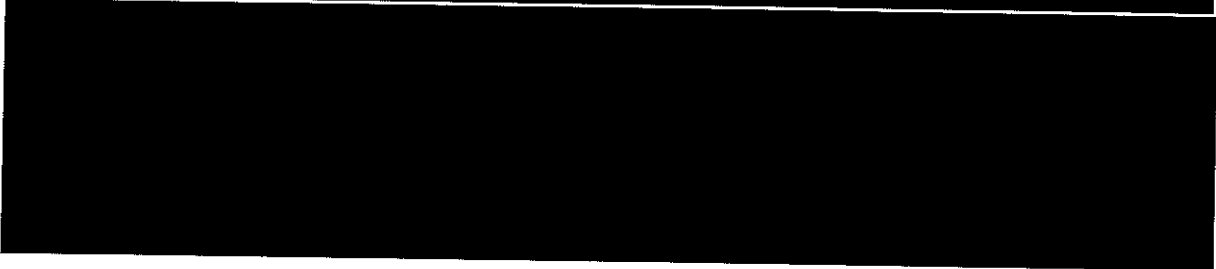
41. ReDigi's system is highly technical and complicated and in opposing the motion for a preliminary injunction, ReDigi sought to explain to the Court in the best way possible how its system worked. However without a protective order in place, ReDigi was also concerned about going into detail as to the details and workings of its technology, as it is highly sensitive, proprietary information. Also sometimes colloquial language is used because highly technical processes are difficult to explain and/or would expose ReDigi's proprietary information. *See* Rogel Decl., ¶6; Adelman Decl., Ex. 2, Ossenmacher Tr. 50-51.

42. To the extent that the patent application uses the word "copied," this was not meant to describe ReDigi's migration process. ReDigi's patent sought protection for its


See Rogel Decl., ¶9.

43. In executing many different user commands, computers move the location of files all the time. For example, computers move the location of electronic files when they go through defragmenting processes or when a person moves their music files from one directory to another because they want to use a new media player. Many editors often make backup copies of files (even editing the MP3 tags, such as changing the ratings or title of the track may cause it to be copied). Installing a new music player on a machine (which changes the default music player) and double clicking on a music file may make a copy of the file. *See* Rogel Decl., ¶7.

44.



II. REDIGI'S RESPONSE TO CAPITOL'S RULE 56.1 STATEMENT

1. ReDigi does not dispute the assertions contained in paragraph 1 of Capitol's Rule 56.1 Statement.
2. ReDigi does not dispute the assertions contained in paragraph 2 of Capitol's Rule 56.1 Statement.
3. ReDigi does not dispute the assertions contained in paragraph 3 of Capitol's Rule 56.1 Statement.
4. ReDigi does not dispute the assertions contained in paragraph 4 of Capitol's Rule 56.1 Statement.
5. ReDigi does not dispute the assertions contained in paragraph 5 of Capitol's Rule 56.1 Statement.
6. ReDigi does not dispute the assertions contained in paragraph 6 of Capitol's Rule 56.1 Statement.
7. ReDigi does not dispute the assertions contained in paragraph 7 of Capitol's Rule 56.1 Statement.
8. ReDigi does not dispute the assertions contained in paragraph 8 of Capitol's Rule 56.1 Statement.

9. ReDigi does not dispute the assertions contained in paragraph 9 of Capitol's Rule 56.1 Statement.

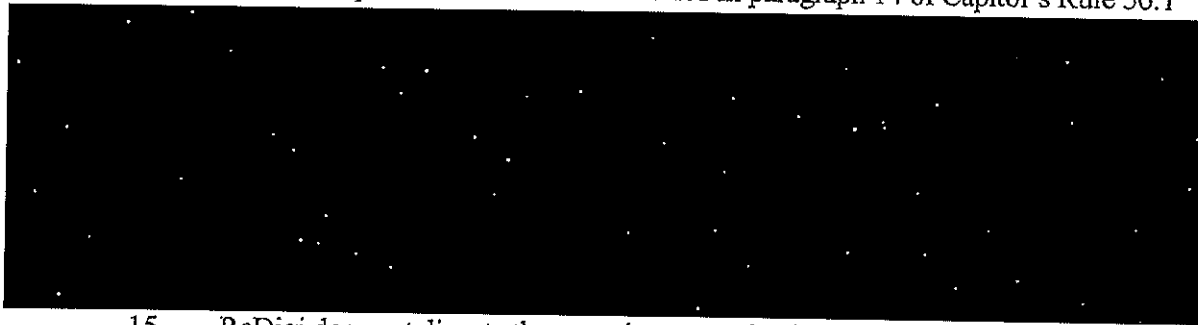
10. ReDigi does not dispute the assertions contained in paragraph 10 of Capitol's Rule 56.1 Statement.

11. ReDigi does not dispute the assertions contained in paragraph 11 of Capitol's Rule 56.1 Statement.

12. ReDigi does not dispute the assertions contained in paragraph 12 of Capitol's Rule 56.1 Statement.

13. ReDigi does not dispute the assertions contained in paragraph 13 of Capitol's Rule 56.1 Statement.

14. ReDigi disputes the assertions contained in paragraph 14 of Capitol's Rule 56.1



15. ReDigi does not dispute the assertions contained in paragraph 15 of Capitol's Rule 56.1 Statement.

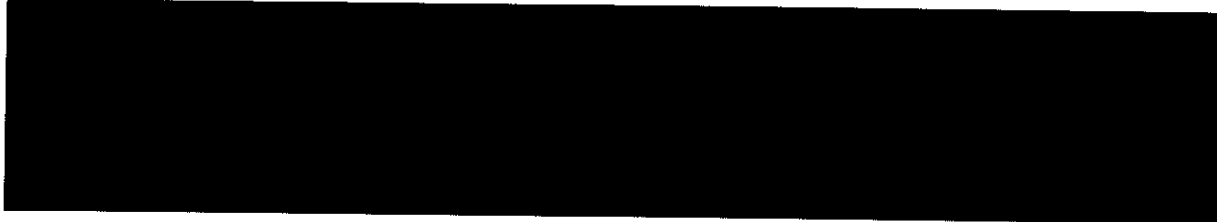
16. ReDigi does not dispute the assertions contained in paragraph 16 of Capitol's Rule 56.1 Statement.

17. ReDigi does not dispute the assertions contained in paragraph 17 of Capitol's Rule 56.1 Statement.

18. ReDigi disputes the assertions contained in paragraph 18 of Capitol's Rule 56.1 Statement. The Eligible File which is uploaded to the Cloud Locker is not deleted from the

user's hard drive after being uploaded because the file has been migrated and is no longer on the user's hard drive. *See* RSUF ¶¶14-22, 31.

19. ReDigi disputes the assertions contained in paragraph 19 of Capitol's Rule 56.1

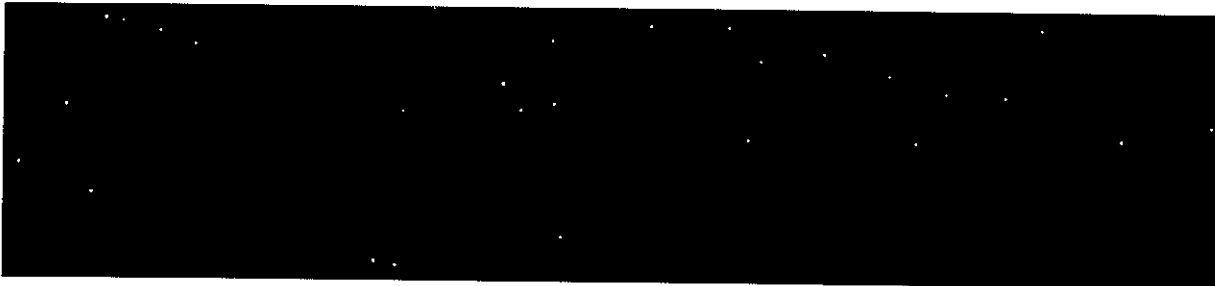


20. ReDigi disputes the assertions contained in paragraph 20 of Capitol's Rule 56.1 Statement as it is ambiguous and not understandable in its current form. ReDigi does not understand what Capitol means by this statement.

21. ReDigi does not dispute the assertions contained in paragraph 21 of Capitol's Rule 56.1 Statement.

22. ReDigi does not dispute the assertions contained in paragraph 22 of Capitol's Rule 56.1 Statement.

23. ReDigi disputes the assertions contained in paragraph 23 of Capitol's Rule 56.1



24. ReDigi disputes the assertions contained in paragraph 24 of Capitol's Rule 56.1 Statement, specifically the assertion that the upload takes several seconds. *See* RSUF ¶22; Adelman Decl., Ex. 1, Rogel Tr. 70:10.

25. ReDigi does not dispute the assertions contained in paragraph 25 of Capitol's Rule 56.1 Statement.

26. ReDigi disputes the assertions contained in paragraph 26 of Capitol's Rule 56.1 Statement. Although the quoted statement was contained in ReDigi's opposition brief to Capitol's motion for a preliminary injunction Capitol has misinterpreted the meaning of this statement. See §I, ¶¶37-41, *supra*.

27. ReDigi disputes the assertions contained in paragraph 27 of Capitol's Rule 56.1 Statement. ReDigi has not applied for patent protection to protect all of its' technology. In fact its original application discussed during the deposition of Rogel, only sought protection for its business process not over the specific method of uploading files to the cloud. See §I, ¶¶42, *supra*.

28. ReDigi does not dispute the assertions contained in paragraph 28 of Capitol's Rule 56.1 Statement.

29. ReDigi does not dispute the assertions contained in paragraph 29 of Capitol's Rule 56.1 Statement.

30. ReDigi disputes the assertions contained in paragraph 30 of Capitol's Rule 56.1 Statement. The patent application referenced does not protect all of ReDigi's technology. In fact its original application discussed during the deposition of Rogel, only sought protection for its business process not over the specific method of uploading files to the cloud. See §I, ¶¶42, *supra*.

31. ReDigi does not dispute the assertions contained in paragraph 31 of Capitol's Rule 56.1 Statement.

32. ReDigi does not dispute the assertions contained in paragraph 32 of Capitol's Rule 56.1 Statement.

33. ReDigi does not dispute the assertions contained in paragraph 33 of Capitol's Rule 56.1 Statement.
34. ReDigi does not dispute the assertions contained in paragraph 34 of Capitol's Rule 56.1 Statement.
35. ReDigi does not dispute the assertions contained in paragraph 35 of Capitol's Rule 56.1 Statement.
36. ReDigi does not dispute the assertions contained in paragraph 36 of Capitol's Rule 56.1 Statement.
37. ReDigi does not dispute the assertions contained in paragraph 37 of Capitol's Rule 56.1 Statement.
38. ReDigi does not dispute the assertions contained in paragraph 38 of Capitol's Rule 56.1 Statement.
39. ReDigi does not dispute the assertions contained in paragraph 39 of Capitol's Rule 56.1 Statement.
40. ReDigi does not dispute the assertions contained in paragraph 40 of Capitol's Rule 56.1 Statement.
41. ReDigi does not dispute the assertions contained in paragraph 41 of Capitol's Rule 56.1 Statement.
42. ReDigi disputes the assertions contained in paragraph 42 of Capitol's Rule 56.1 Statement. The purpose of promotions was to build an inventory by gaining users. *See Adelman Decl., Ex. 2, Ossenmacher Tr., 248:11-21.*
43. ReDigi does not dispute the assertions contained in paragraph 43 of Capitol's Rule 56.1 Statement.

44. ReDigi does not dispute the assertions contained in paragraph 44 of Capitol's Rule 56.1 Statement.

45. ReDigi does not dispute the assertions contained in paragraph 45 of Capitol's Rule 56.1 Statement.

46. ReDigi does not dispute the assertions contained in paragraph 46 of Capitol's Rule 56.1 Statement.

47. ReDigi does not dispute the assertions contained in paragraph 47 of Capitol's Rule 56.1 Statement.

48. ReDigi does not dispute the assertions contained in paragraph 48 of Capitol's Rule 56.1 Statement.

49. ReDigi does not dispute the assertions contained in paragraph 49 of Capitol's Rule 56.1 Statement.

50. ReDigi does not dispute the assertions contained in paragraph 50 of Capitol's Rule 56.1 Statement.

51. ReDigi does not dispute the assertions contained in paragraph 51 of Capitol's Rule 56.1 Statement.

52. ReDigi disputes the assertions contained in paragraph 52 of Capitol's Rule 56.1 Statement. This "guesstimate" was not based upon actual knowledge and therefore cannot be admitted as an undisputed fact. *See Adelman Decl., Ex. 1, Rogel Tr., 82, 83:17-25, 84:2.*

53. ReDigi disputes the assertion contained in paragraph 53 of Capitol's Rule 56.1 Statement. The file that is maintained in the Cloud Locker after purchase is the Eligible File not a copy of the Eligible File. *See RSUF ¶53.* The copy that is downloaded is a Personal Use Copy. *Id.*

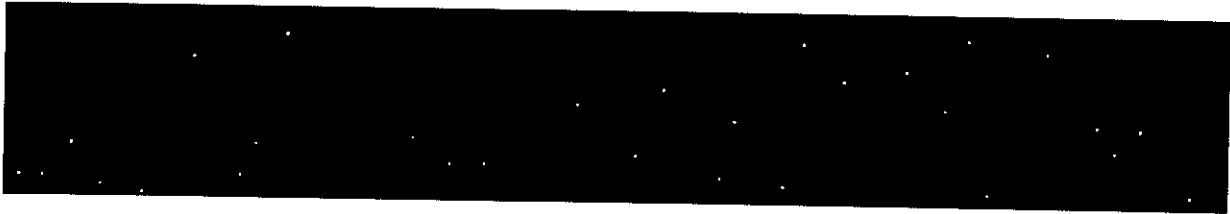
54. ReDigi does not dispute the assertions contained in paragraph 54 of Capitol's Rule 56.1 Statement.

55. ReDigi does not dispute the assertions contained in paragraph 55 of Capitol's Rule 56.1 Statement.

56. ReDigi does not dispute the assertions contained in paragraph 56 of Capitol's Rule 56.1 Statement.

57. ReDigi disputes the assertions contained in paragraph 57 of Capitol's Rule 56.1 Statement. Ossenmacher Tr. 155, 157-159; Rudolph Tr. 102-103.

58. ReDigi disputes the assertions contained in paragraph 58 of Capitol's Rule 56.1 Statement as it has been wholly taken out of context. Mr. Rogel's quoted portion of text was part

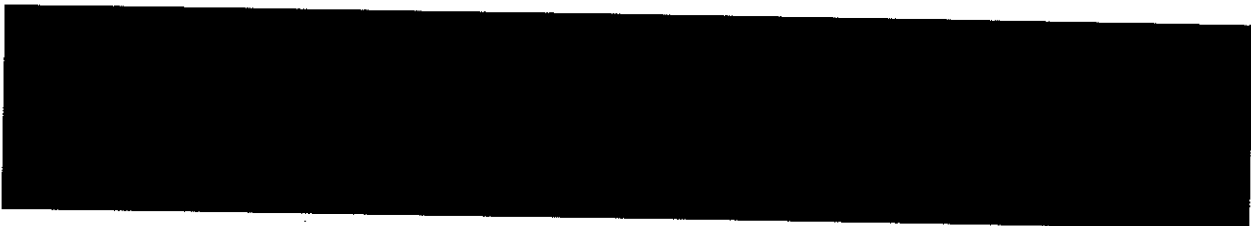


59. ReDigi does not dispute the assertions contained in paragraph 59 of Capitol's Rule 56.1 Statement.

60. ReDigi does not dispute the assertions contained in paragraph 60 of Capitol's Rule 56.1 Statement.

61. ReDigi does not dispute the assertions contained in paragraph 61 of Capitol's Rule 56.1 Statement.

62. ReDigi disputes the assertions contained in paragraph 62 of Capitol's Rule 56.1



63. ReDigi does not dispute the assertions contained in paragraph 63 of Capitol's Rule 56.1 Statement.

64. ReDigi does not dispute the assertions contained in paragraph 64 of Capitol's Rule 56.1 Statement.

65. ReDigi does not dispute the assertions contained in paragraph 65 of Capitol's Rule 56.1 Statement.

66. ReDigi disputes the assertions contained in paragraph 66 of Capitol's Rule 56.1 Statement. In fact the object of some of ReDigi's marketing materials was to educate consumers as to why ReDigi believed its service was legal. *See* §I, ¶¶27-28, *supra*.

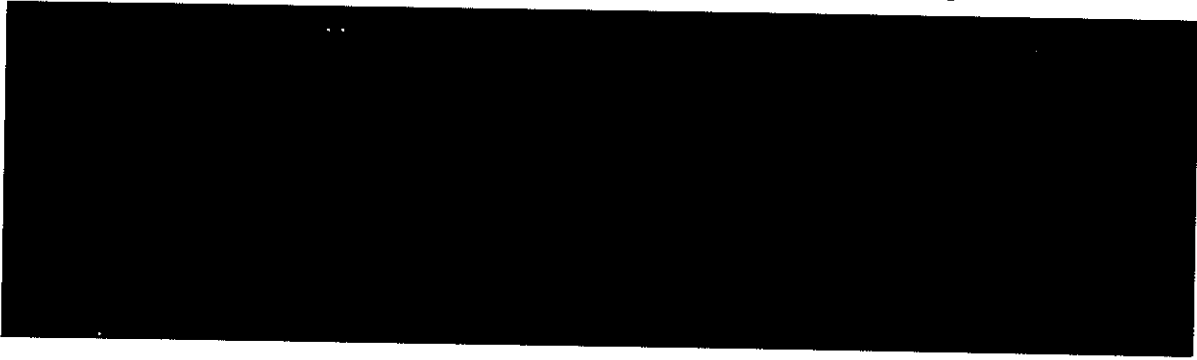
67. ReDigi disputes the assertions contained in paragraph 67 of Capitol's Rule 56.1 Statement. In fact the object of some of ReDigi's marketing materials was to educate consumers as to why ReDigi believed its service was legal. *See* §I, ¶¶27-28, *supra*.

68. ReDigi does not dispute the assertions contained in paragraph 68 of Capitol's Rule 56.1 Statement.

69. ReDigi does not dispute the assertions contained in paragraph 69 of Capitol's Rule 56.1 Statement.

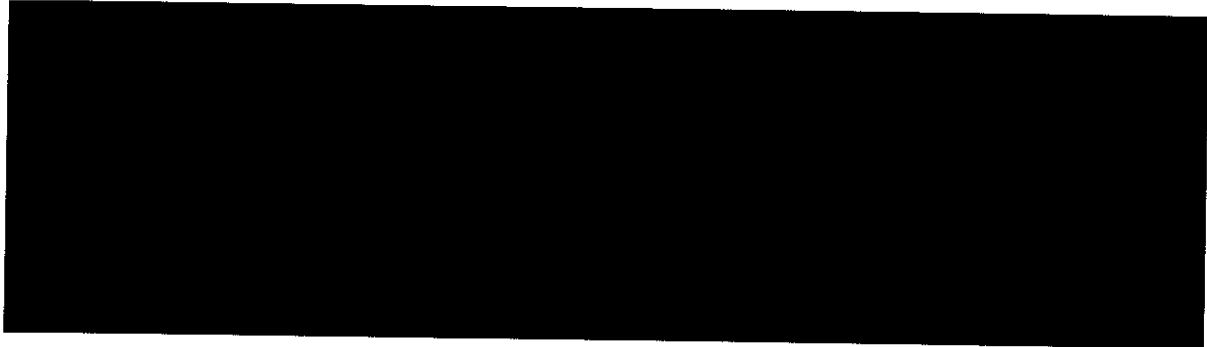
70. ReDigi does not dispute the assertions contained in paragraph 70 of Capitol's Rule 56.1 Statement.

71. ReDigi disputes the assertions contained in paragraph 71 of Capitol's Rule 56.1



information from the ReDigi system when it has all of the information to accurately determine these numbers and is in the best position to do so.

72. ReDigi disputes the assertions contained in paragraph 72 of Capitol's Rule 56.1



73. ReDigi does not dispute the assertions contained in paragraph 73 of Capitol's Rule 56.1 Statement.

Dated: New York, New York
August 14, 2012

Respectfully submitted,

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