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By E-mail (sullivannysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan, U.S.D.J. United States Courthouse Southern District of New York 500 Pearl Street New York, NY 10007

Re: Capitol Records, LLC v. ReDigi Inc., 12 cv. 0095 (RJS)

Dear Judge Sullivan:

We represent plaintiff Capitol Records, LLC ("Capitol"), which charges defendant ReDigi, Inc. ("ReDigi") with widespread copyright infringement by operation of an online "marketplace" that purports to sell "used" digital copies of Capitol's sound recordings. We write in response to ReDigi's January 19, 2012 pre-motion letter ("ReDigi's Letter").

ReDigi's Letter is based on the false premise that ReDigi is merely a "cloud storage service" that provides users with a "locker" akin "to any other cloud storage system of which we are aware." See ReDigi Letter at 1, 3. ReDigi's homepage, located at www.redigi.com, makes scant reference to "storage" and tells a very different story: "Welcome to the Online Marketplace for Pre-Owned Digital Music ... Sell Songs You Don't Listen To. Buy Previously Listened to Songs at Used Prices ... ReDigi is the world's first and only online marketplace for pre-owned digital music" (emphasis added). "Locker storage," where individuals retain files for their own use, is of course a far cry from a "marketplace" that makes unlawful copies of sound recordings, offers them for sale, and distributes them to any willing buyer. And ReDigi is no passive participant, but rather the active consignment retailer, earning fees for each "sale" consummated. See ReDigi Answer \$\frac{1}{2}\$ (admitting that ReDigi "earns a transaction fee from the sale of music by one user to another through the ReDigi website").

As set forth in Capitol's complaint and preliminary injunction papers, ReDigi's conduct violates numerous of Capitol's exclusive rights. As ReDigi obliquely admits, uploading and downloading music files to and from its "cloud" for resale can only be accomplished by the unauthorized reproduction of Capitol's sound recordings. See ReDigi's Letter at 3 (copying "arguably takes place" in the upload and download of files from the ReDigi cloud). ReDigi's repeated reference to "deleting" source files from individual computers or the "Cloud Locker" after uploading and downloading underscores the act of copying; if an actual tangible copy had

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been transferred to its destination, no original copy would remain to delete. All such copies are made without Capitol's authorization and violate Capitol's exclusive right of reproduction under 17 U.S.C. §106(1). See Warner Bros. Records, Inc. v. Walker, 704 F. Supp. 2d 460, 465 (W.D. Pa. 2010) ("Courts have uniformly held that downloading sound recordings . . . without the authorization of the copyright holder constitutes an unlawful reproduction"); Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 931-32 (N.D. Cal. 1996) (copies made when protected works were "uploaded to or downloaded from" defendant's electronic bulletin board).

ReDigi's suggestion these reproductions are excused by the fair use or essential steps doctrines is not even colorable. ReDigi cannot satisfy a single one of the four statutory factors considered in assessing fair use under 17 U.S.C. §107: the purpose and character of the copying are purely commercial, with ReDigi earning fees for each transaction; sound recordings are the kinds of creative works less susceptible to fair use; the entire copyrighted recordings are taken wholesale; and ReDigi's euphemistically described "used" files, which suffer no degradation in sound quality but are offered at discount prices, directly supplant the market for legitimate digital distribution channels like iTunes and Amazon. See A&M Records v. Napster, 239 F.3d 1004, 1014-19 (9th Cir. 2005) (music file sharing network not entitled to fair use defense where use was commercial and non-transformative, sound recordings were creative, entire tracks were shared, and network interfered with market for legitimate downloads).

The essential step doctrine, codified at 17 U.S.C. 117(a), permits the "owner" of a "computer program" to make a copy of that program only if that new copy is "an essential step in the utilization of the computer program" and "is used in no other manner." Music files, however, are not computer programs (a "set of instructions" used in a computer "to bring about a certain result," see §17 U.S.C. 101); ReDigi is not an "owner" of anything other than an infringing service; and the copies are not made solely to "utilize" the music files and "in no other manner," but for the specific purpose of resale for a profit. Section 117 only exempts copies made for internal use, and not those made to be sold to third parties. See Expediters Int'l of Wash., Inc. v. Direct Line Cargo Mgt. Svcs., Inc., 995 F.Supp. 468, 478 (D.N.J. 1998)(§117 exemption only applies to copies made for internal use); Apple Computer, Inc. v. Formula Int'l, Inc., 594 F.Supp. 617, 622 (C.D. Cal. 1984)(§117 exemption only applies to copy made for owner's internal use and "cannot be made accessible to others").

By selling files to third party "purchasers," and assisting its users in doing the same, ReDigi also violates Capitol's exclusive right to distribute its recordings to the public pursuant to 17 U.S.C. §106(3). ReDigi's wordplay that digital "files" are not "copies" and are thus exempt from the distribution right has already been rejected by the Supreme Court. See New York Times Co., Inc. v. Tasini, 533 U.S. 483, 498 (database from which users downloaded digital copies of newspaper articles infringed distribution right); Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 146-47 (S.D.N.Y. 2009) ("Defendants' delivery of copies of their copyrighted works by transmitting copies in response to subscribers' requests to download a digital music file constitutes a 'distribution' under the Copyright Act").

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Nor does the first sale doctrine exonerate ReDigi's infringing distributions. Section 109(a) of the Copyright act permits the "owner" of a lawfully made "copy" – defined in §101 as the "material object" in which a copyrighted work is "fixed" – to part with "that particular copy." But ReDigi and its users do no such thing. One user uploads a copy of a music file to the ReDigi storage medium and the purchasing user downloads a different copy to his or her own hard drive, or iPod. No "material object" – essential to the definition of a copy – passes through the Internet, and the purchaser ends up with a different copy than that which resided on the seller's computer. It is for this reason that the Copyright Office has already determined that the first sale doctrine does not apply to digital transmissions. See U.S. Copyright Office, August 2001DMCA Section 104 Report at 79-80 (cited in Capitol's preliminary injunction brief).

ReDigi also violates Capitol's performance and display rights by streaming audio clips of the recordings and displaying album artwork Capitol owns, in violation of 17 U.S.C. §106(5) and (6). ReDigi nowhere explains how these acts are licensed or from whom, so its defense is impossible to evaluate. Capitol certainly has not authorized them, and is unaware of any of its legitimate affiliates having done so. Moreover, these displays and performances are incidental to the infringing copying and sale of the recordings themselves.

Finally, ReDigi's unexplained refrain that Capitol has "violated" the DMCA distorts the law. The DMCA, 17 U.S.C. §512, provides defenses to "internet service providers" ("ISPs") from secondary liability if they meet certain criteria. It imposes no affirmative obligations on copyright owners, who may choose to use its "notice and takedown" procedures, but are under no requirement to do so. In any event, to the extent ReDigi seeks to cast itself as an ISP storing information "at the direction of users" pursuant to §512(c), ReDigi does much more than "store information" – it distributes copies. Moreover, it surely does not meet the requirements that it "not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. §512(c)(1)(B). ReDigi earns money for each sale, vets each file for "eligibility" and suspends users who violate its rules. This level of involvement far exceeds what Courts deem sufficient to constitute the "right and ability to control" the infringing activity. See Napster, 239 F.3d at 1023.

Inasmuch as Capitol's preliminary injunction papers establish a likelihood of success on the merits of its infringement claim, ReDigi's proposed summary judgment motion is destined to fail and redundant of issues that will be addressed by the preliminary injunction motion.

Respectfully,

Richard S. Mandel

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cc: Morlan Ty Rogers, Esq.. (via email) Ray Beckerman, Esq. (via email)