



Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036

(212) 790-9200 Tel
(212) 575-0671 Fax
www.cll.com

Richard S. Mandel
(212) 790-9291
rsm@cll.com

February 1, 2012

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”) and write in response to the February 1, 2012 pre-motion letter submitted by Google Inc. (“Google”) seeking leave to file a brief amicus curiae on Capitol’s pending preliminary injunction motion. Google’s letter is addressed largely to issues that are not the subject of the pending motion or even this lawsuit. It comments needlessly on the merits of the parties’ positions and equities, and seeks to influence the procedures and schedules of this case, but makes no showing why Google has any specific interest justifying its participation. We accordingly oppose Google’s request.

District Courts have “broad discretion in deciding whether to accept amicus briefs,” which are “normally” allowed only:

when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case ... or when the amicus has unique information or perspective that can help the court beyond the help that lawyers for the parties are able to provide. Otherwise, leave to file an amicus brief should be denied.

Jamaica Hospital Medical Center, Inc. v. United Health Group, Inc., 584 F. Supp. 2d 489, 497 (E.D.N.Y. 2008) (citations omitted). We do not understand Google to be questioning the competency of counsel, and it identifies no “other case that may be affected” by decision in the instant matter, so Google presumably believes it offers unique “information or perspective” which current counsel lack or has some unspecified interest requiring protection. It has shown neither.

First, the legal questions about which Google appears most concerned are not even at issue in this case, rendering Google's participation here improper. See Citizens Against Casino Gambling in Erie County v. Kempthorne, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) (amicus participation "goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties"). After echoing ReDigi's admiration for "cloud computing," Google worries that Capitol's motion will (1) "blur" the legal rules regarding "publicly performing copyrighted sound recordings by streaming songs to a single user from her own private 'locker,'" and (2) "challenge[] the scope of fair use as it relates to space shifting in cloud storage services." More generally, Google suggests that a preliminary injunction "could create unintended uncertainties for the cloud computing industry." None of these concerns are remotely justified. As is abundantly clear from Capitol's complaint and moving brief, and as stated explicitly in its reply brief filed today, this case is not about cloud storage, whereby a user stores his or her own files remotely. Capitol does not challenge in this case a user's streaming of a song she owns, to herself, from her own "private locker" or any acts of "space shifting," whereby a user makes "personal, non-commercial" copies of a file to listen to it on different devices. Rather, this case is clearly and specifically about ReDigi and its users copying files for purposes of transfer and sale, for profit, to other users. The only streaming challenged in the complaint is the streaming of 30 second audio clips of Capitol's recordings to any interested shoppers, not to the actual owners of the files, for purposes of encouraging those shoppers to make an unlawful purchase and perhaps make their own files available unlawfully for sale. ReDigi and now Google seem stubbornly unwilling to accept the actual focus of Capitol's claims, but Capitol has been very clear on this point.

Second, to the extent the other legal principles raised in Google's letter are in fact at issue in this case, they apply only to the very unique fact pattern of ReDigi's conduct and implicate no particular interest of Google. Capitol's argument that ReDigi's "level of intervention, oversight and encouragement plainly constitutes volitional conduct under the governing case law" (see Plaintiff's Memorandum of Law In Support of Motion For Preliminary Injunction at 9) is an application of existing precedent to ReDigi's allegedly "unique" verification engine. A challenge to the lawfulness of ReDigi's service poses no threat of "blurring" any legal standard, much less any as to which Google can claim a unique interest or perspective, but simply does what any case does – applies existing laws to a particular fact pattern. Likewise, Google's nearly verbatim rehash of ReDigi's argument that ReDigi either distributes no copies or is entitled to a first sale defense adds nothing to what the parties have already briefed. Google identifies no interest or additional "perspective" that entitles it to invade what is a private dispute between Capitol and ReDigi. Capitol notes that, while ReDigi and Google cite only their own views and speculation on this point, Capitol cites ample authority contrary to ReDigi's and Google's identical positions.

Oddly, while Google insists that it "takes no position on the merits of this case," it has already done so quite clearly, and in a way that seeks to manage the procedures and operations of this litigation even though "an amicus curiae is not a party and has no control over the litigation." Citizens Against Casino Gambling, 471 F. Supp. 2d at 311. Google's purportedly disinterested stance includes ensuring that ReDigi is not held liable for direct copyright infringement, that

Cowan, Liebowitz & Latman, P.C.

Hon. Richard J. Sullivan, U.S.D.J.

February 1, 2012

Page 3

ReDigi is held either to have distributed no “copies” or to be entitled to a first sale defense, and that Capitol’s motion for a preliminary injunction is denied. Google even goes so far as to offer its view, from a distance, that any “harm to Capitol can be compensated by money damages in an easily calculated amount, whereas an injunction threatens to put ReDigi out of business.” Finally, Google offers its perspective that this case should proceed at a slower pace, to give full consideration to its concerns – never mind the daily infringement of Capitol’s intellectual property.

Needless to say, Google is in no position to comment on the equities governing the injunction, on ReDigi’s ability to answer for damages, or on the immediate threat Capitol faces when users upload infringing copies of its recordings for resale at deflated prices. This case is neither difficult, complicated, nor laden with the broad policy issues Google suggests. ReDigi is a profiteer, trying to earn money by processing sales of infringing copies of Capitol’s sound recordings. Accordingly, Google’s motion to participate as amicus curiae should be denied.

Respectfully,

A handwritten signature in black ink, appearing to read "Richard S. Mandel". The signature is fluid and cursive, with a large initial "R" and "M".

Richard S. Mandel

cc: Morlan Ty Rogers, Esq.. (via email)
Ray Beckerman, Esq. (via email)
Kathryn J. Fritz, Esq. (via email)
Andrew P. Bridges, Esq. (via email)