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Hon. Richard J. Sullivan
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street, Room 615
New York, NY 10007

Re: Capitol Records, LLC v. ReDigi Inc., Case No. 12-cv-0095 (RJS) (AJP)

Dear Judge Sullivan:

We write on behalf of interested non-party Google Inc., which seeks leave to file a brief as *amicus curiae* in support of neither party in this case, in order to highlight the importance of the copyright law questions Plaintiff's pending preliminary injunction motion raises. In accordance with section 2(A) of Your Honor's Individual Practices, we request a pre-motion conference regarding a motion by Google for leave to submit the *amicus curiae* brief, or, in the alternative, and in light of the time restraints on the present pending preliminary injunction motion, permission to file it. We are prepared to file the motion and the brief today with the Court's permission; we omit them as attachments to this letter because of Your Honor's instructions to avoid attachments to letters such as this.

While Google takes no position on the ultimate merits of this case, it has a specific and vital interest in the legal doctrines underpinning the "cloud computing" industry. Cloud computing enables users to store and process data remotely, in the "cloud" of networked computer servers connected through the internet to the user's computer, thus freeing users from the need to keep physical files and process data locally with their own hard drives and powerful computers. The continued vitality of the cloud computing industry—which constituted an estimated $41 billion dollar global market in 2010—depends in large part on a few key legal principles that the preliminary injunction motion implicates.

The Second Circuit confirmed two of these principles in the seminal decision *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) ("*Cablevision*"), which applied core doctrines of copyright law to the remote storage of television recordings by customers on a cable service provider's central servers. First, it established that a service provider does not directly infringe copyright by operating a service that permits users to make copies, even if some of those copies may be infringing; the direct infringer (if any) is the user who supplies the

"necessary element of volition" to cause the copy to be made. *Id.* at 131 Second, *Cablevision* confirmed that a performance is not "public"—and therefore does not invade the copyright owner's exclusive right under 17 U.S.C. § 106(4)—if it is transmitted from a copy of the work that is uniquely identified to a particular user, even if other users receive transmissions of the same work from different copies. The present motion seeks a decision potentially blurring these clear rules prescribing liability, to the extent it seeks to hold ReDigi directly liable for copying that users may initiate and for publicly performing copyrighted sound recordings by streaming songs to a single user from her own private "locker."

The third principle is fair use, which Section 107 of the Copyright Act, 17 U.S.C. § 107, codifies as a limitation on a copyright owner's exclusive rights. More than a quarter century ago, the Supreme Court held that "time shifting," the recording of television broadcasts for later viewing, was a fair use of copyrighted television broadcasts, thus affording consumers the benefits of the VCR, followed by the DVD player, TiVo, and remote recording services like Cablevision's. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). With the rise of digital technologies, the corollary "space shifting"—copying purchased files onto computer hard drives, backup drives, or music players like iPods—has been widely accepted as a fair use as well. *See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (space shifting is "paradigmatic personal noncommercial use," citing *Sony*). The present motion, however, challenges the scope of fair use as it relates to space shifting in cloud storage services.

The final principle concerns the interplay between two provisions of the Copyright Act which, by their plain language, are limited to material objects: the distribution right, Section 106(3), and the first sale doctrine, Section 109. Both provisions deal with copies and phonorecords, which are material objects in which copyrighted works are fixed. The present motion argues that the first sale doctrine—which permits the owner of a lawfully-made copy or phonorecord to sell it without needing the copyright owner's permission—cannot apply to this case because no material objects change hands. But it also argues that ReDigi infringes Capitol's exclusive right to "distribute copies or phonorecords," despite its admission that no material objects are distributed. Either both provisions apply, and ReDigi's service may be protected by the first sale doctrine, or neither applies, and ReDigi's service does not infringe the distribution right. Google takes no position on which outcome is correct but urges the Court to reject an internally inconsistent argument that would weaken the statutory restrictions on the distribution right.

The Court can and should deny the motion for preliminary injunction without reaching the complex and profound legal issues outlined above because any decision should be informed by the fullest presentation of the relevant facts and law rather than at a preliminary injunction stage. A premature decision on incomplete facts could create unintended uncertainties for the cloud computing industry. The Court need not address these issues, however, because, at minimum, Capitol has not shown three of the four elements necessary to a preliminary injunction. 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. If so, a preliminary decision on the present motion would stand as the only evaluation of these weighty issues,

without affording the parties and the Court the opportunity to consider them in the unhurried posture and full record of summary judgment or appeal. Google urges the Court to proceed to a full consideration on the merits, applying a steady and unhurried hand to the legal principles that have been the foundation of an unprecedented groundswell of productive economic activity.

For these reasons, Google respectfully seeks either a pre-motion conference regarding a motion for leave to submit the *amicus curiae* brief, or, in light of the expedited nature of the preliminary injunction motion, permission to file the brief.

Respectfully submitted,

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Enclosures