



# Selling Used Digital Music: It's Now or Never?

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## Seller of “Used” MP3’s Avoids Preliminary Injunction.

Controversial purveyor of “used” digital music files ReDigi escaped a crushing blow to its business in early February when a Southern District of New York judge declined to issue a preliminary injunction ordering it to cease doing business. The injunction was sought by Capitol Records, which has sued ReDigi for direct and secondary copyright infringement. The judge declined to speculate as to the eventual victor, but did find that Capitol Records had shown a likelihood of success on the merits by having a compelling argument on its face. The preliminary injunction denial was largely based on a lack of irreparable harm, since money damages were an adequate remedy for any harm that may have been caused by ReDigi’s business model and ReDigi kept careful records from which any eventual damages could easily be calculated.

The way that ReDigi’s used MP3 service works is carefully constructed to give it the best legal defense possible to a copyright infringement claim. All ReDigi users are required to download its “Music Manager” program in order to resell their music files. The user may then upload eligible files into the user’s Cloud Locker. The only eligible music files for resale are iTunes files, since unlike digital music purchased from Amazon, iTunes music files are actually purchased and not licensed. This also avoids users profiting off of illegally downloaded files or music they still own because it was ripped from a CD. Once the eligible files the user has selected for sale are uploaded, the copies on the user’s computer and synced devices are automatically wiped, although the user may still stream the music files from his or her Cloud Locker through ReDigi while they remain unsold. When another user buys a song, the “owner” of the file in ReDigi’s cloud database is changed from the seller to the purchaser. No copy is made immediately upon sale, only a change in which user has permission to stream or download the file. The owner of a digital file stored in a Cloud Locker may download it to his or her computer at any time, and the copy on the Cloud Locker server will immediately be wiped. ReDigi earns up to a 15% commission on the music files sold through its service.

Capitol Records claims that the copies made during the uploading and downloading of files to and from users’ Cloud Lockers are unauthorized reproductions of its copyrighted works. Regardless of whether the original file is deleted, a copy must still be made to transfer the file from a user’s computer to the Cloud Locker and vice versa. ReDigi admits that this is true, but says that the copying is non-infringing under fair use and the “essential step” defense. It argues that the copying necessary to transfer the files is simply space-shifting – the copying of a file from one storage medium to another for personal, noncommercial use –which has been found to be a fair use and is widely accepted. *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999). Capitol Records counters this argument by pointing out that ReDigi’s space-shifting is not a personal, non-commercial use because it occurs as part of ReDigi’s business operations. Even if the copying is not accepted fair use, ReDigi claims that it is “an essential step in the utilization of the computer program in conjunction with a machine,” which is expressly listed as a non-infringing act in the Copyright Act. 17 U.S.C. 117(a).

Capitol Records also alleges that whenever ReDigi transfers a song to another user, this violates its distribution right. ReDigi’s first line of defense against this claim lies in a strict reading of the Copyright Act, which defines both a “phonorecord” and a “copy” as a “material object.” 17 U.S.C. 101. Under this definition, ReDigi argues that a CD is a phonorecord because it is a material object in which sounds are fixed, but the digital files stored on the CD are not because they are not material objects. Only copies and phonorecords are subject to the distribution right, and since digital files are not material objects and thus neither copies nor phonorecords, distributing them does not infringe on the copyright holder’s distribution right. Capitol Records asserts that the



courts have not interpreted the Copyright Act in this way, and argues that since a digital file must be fixed on a hard drive – which is a material object – before and after the transfer occurs, it constitutes a distribution.

Even if digital files are included in the distribution right, ReDigi says it is not liable under the First Sale doctrine, which is an exception to a copyright holder's distribution right. The First Sale Doctrine allows the owner of any copy that has been lawfully made to sell or otherwise dispose of the copyrighted work without the permission of the copyright owner. 17 U.S.C. 109(a). Capitol Records disagrees, pointing out the copy that is sold is not the same exact copy that is purchased because the file must be copied and deleted twice to be transferred to a different user, and since those copies are not lawfully made, ReDigi cannot be shielded by the First Sale Doctrine.

Lastly, Capitol Records claims that ReDigi violates its public display and performance rights by displaying album artwork and allowing users to listen to thirty-second clips of songs available for sale. ReDigi counters by pointing out that the artwork and song clips are not displayed or performed by it, but by streaming service Rdio pursuant to a license agreement. Capitol Records asserts that this does not get ReDigi off the hook, however, because it has violated a provision in its license agreement with Rdio that forbids ReDigi from using the licensed technology "in any manner that advocates, encourages, condones, promotes or facilitates the infringement of third party intellectual property rights, including without limitation... copyright rights." Rdio has since pulled its clip streaming services from ReDigi in what ReDigi has claimed are "extrajudicial tactics" by Capitol Records to get what it wants.

The arguments in this case bring up several fascinating issues related to cloud computing and the future of media industries, but two of the most interesting questions relate to the exclusive distribution right given to copyright holders. First, are digital files within the scope of the distribution right? Their inclusion has always been assumed, but ReDigi's interpretation of the Copyright Act has also never really been argued. The court could subscribe to the literal wording of the definitions championed by ReDigi, or it could look to what Congress intended when the relevant definitions were drafted in 1976. The idea of distributing digital content was new at the time and likely not very well understood. It is possible that the judge will interpret the distribution right to give it an updated meaning for the digital realm that was not specifically contemplated during drafting, leaving ReDigi to rely on its First Sale Doctrine defense.

Which leads to the second question: Does the First Sale Doctrine apply to copyrighted works in a digital format? The answer to this question may be more of an intellectual one at the moment as, with the exception of iTunes, most digital content is licensed to users rather than sold, but it could affect the sale – and possibly the resale – of digital works in the future. Again, assuming that ReDigi's model involves a distribution, a literal reading of the Copyright Act will lean toward a finding that the First Sale Doctrine should apply in this case. But unlike physical formats, some digital formats do not deteriorate, allowing them to be sold many more times than even the most lovingly cared for book or CD could hope to last. A look at Congressional intent and the purposes of copyright could nudge the court in a different direction.

All of the issues involved in the *ReDigi* lawsuit are part of one larger question the courts have been struggling with since Internet use became widespread: How should old intellectual property laws apply to new technologies? While how many of these unsettled areas of law should be resolved remains unclear, the one thing that is certain is that both the technology companies and the content industry will be on the edges of their seats awaiting the outcome.

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