

## Capitol Records, LLC v. ReDigi Inc.

910 F.3d 649 (2d Cir. 2018)

LEVAL, *Circuit Judge*:

Defendant ReDigi, Inc. and its founders, Defendants Larry Rudolph and John Ossenmacher,<sup>1</sup> appeal from the judgment of the United States District Court for the Southern District of New York (Richard J. Sullivan, *J.*) in favor of Plaintiffs, Capitol Records, LLC, Capitol Christian Music Group, Inc., and Virgin Records IR Holdings, Inc. ("Plaintiffs"), finding copyright infringement. Defendants had created an Internet platform designed to enable the lawful resale, under the first sale doctrine, of lawfully purchased digital music files, and had hosted resales of such files on the platform. The district court concluded that, notwithstanding the "first sale" doctrine, codified in the Copyright Act of 1976, 17 U.S.C. § 109(a), ReDigi's Internet system version 1.0 infringed the Plaintiffs' copyrights by enabling the resale of such digital files containing sound recordings of Plaintiffs' copyrighted music. We agree with the district court that ReDigi infringed the Plaintiffs' exclusive rights under 17 U.S.C. § 106(1) to reproduce their copyrighted works. We make no decision whether ReDigi also infringed the Plaintiffs' exclusive rights under 17 U.S.C. § 106(3) to distribute their works.

### BACKGROUND

#### I. Facts

Plaintiffs are record companies, which own copyrights or licenses in sound recordings of musical performances. Plaintiffs distribute those sound recordings in numerous forms, of which the most familiar twenty years ago was the compact disc. Today, Plaintiffs also distribute

their music in the form of digital files, which are sold to the public by authorized agent services, such as Apple iTunes, under license from Plaintiffs. Purchasers from the Apple iTunes online store download the files onto their personal computers or other devices.

ReDigi was founded by Defendants Ossenmacher and Rudolph in 2009 with the goal of creating enabling technology and providing a marketplace for the lawful resale of lawfully purchased digital music files.<sup>3</sup> Ossenmacher served as ReDigi's Chief Executive Officer and Rudolph, who spent twelve years as a Principal Research Scientist at the Massachusetts Institute of Technology, served as ReDigi's Chief Technical Officer. During the period addressed by the operative complaint, ReDigi, through its system version 1.0, hosted resales of digital music files containing the Plaintiffs' music by persons who had lawfully purchased the files from iTunes.

Considering the evidence in the light most favorable to ReDigi, ReDigi's system version 1.0 operates as follows.

1. *Music Manager*: A person who owns a digital music file lawfully purchased from iTunes and intends to employ ReDigi's system to resell it (the "user") must first download and install onto her computer ReDigi's "Music Manager" software program ("Music Manager"). Once Music Manager has been installed, it analyzes the digital file intended for resale, verifies that the file was originally lawfully purchased from iTunes, and scans it for indications of tampering. If the file was lawfully purchased, Music Manager deems it

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<sup>1</sup>Hereinafter "ReDigi" is used to designate all three Defendants, except where the context makes clear it refers solely to the company.

<sup>3</sup>ReDigi was not making efforts in the shadows to infringe on

copyrights. To the contrary, it invented a system designed in good faith to achieve a goal generally favored by the law of copyright, reasonably hoping the system would secure court approval as conforming to the demands of the Copyright Act.

an "Eligible File" that may be resold.<sup>4</sup>

2. *Data Migration*: The ReDigi user must then cause the file to be transferred to ReDigi's remote server, known as the "Cloud Locker." To effectuate this transfer, ReDigi developed a new method that functions differently from the conventional file transfer. The conventional process is to reproduce the digital file at the receiving destination so that, upon completion of the transfer, the file exists simultaneously on both the receiving device and on the device from which it was transferred. If connectivity is disrupted during such a standard transfer, the process can be repeated because the file remains intact on the sender's device.

Under ReDigi's method—which it calls "data migration"—ReDigi's software "begins by breaking the [digital] music file into small 'blocks' [of data] of roughly four thousand bytes in length." Once the file has been broken into blocks of data ("packets"), ReDigi's system creates a "transitory copy" of each packet in the initial purchaser's computer buffer. Upon copying (or "reading") a packet into the initial purchaser's computer buffer, ReDigi's software sends a command to delete that packet of the digital file from permanent storage on the initial purchaser's device. ReDigi's software then sends the packet to the ReDigi software to be copied into the buffer and deleted from the user's device. During the data migration process, the digital file cannot be accessed, played, or perceived. If connectivity is disrupted during the data migration process, the remnants of the digital file on the user's device are unusable, and the transfer cannot be re-initiated. In such circumstances, ReDigi (according to its brief) bears the cost of the user's loss.

Once all the packets of the source file have been transferred to ReDigi's server, the Eligible File has been entirely removed from the user's device.

The packets are then re-assembled into a complete, accessible, and playable file on ReDigi's server.

ReDigi describes its primary technological innovation using the metaphor of a train (the digital file) leaving from one station (the original purchaser's device) and arriving at its destination (in the first instance, ReDigi's server). Under either the typical method or ReDigi's method, packets are sent sequentially, such that, conceptually, "each packet is a car" moving from the source to the destination device. Once all the packets arrive at the destination device, they are reassembled into a usable file. At that moment, in a typical transfer, the entire digital file in usable form exists on both devices. ReDigi's system differs in that it effectuates a deletion of each packet from the user's device immediately after the "transitory copy" of that packet arrives in the computer's buffer (before the packet is forwarded to ReDigi's server). In other words, as each packet "leaves the station," ReDigi deletes it from the original purchaser's device such that it "no longer exists" on that device. As a result, the entire file never exists in two places at once.

After the file has reached ReDigi's server but before it has been resold, the user may continue to listen to it by streaming audio from the user's Cloud Locker on ReDigi's server. If the user later re-downloads the file from her Cloud Locker to her computer, ReDigi will delete the file from its own server.

3. *Resale*: Once an Eligible File has "migrated" to ReDigi's server, it can be resold by the user utilizing ReDigi's market function. If it is resold, ReDigi gives the new purchaser exclusive access to the file. ReDigi will (at the new purchaser's option) either download the file to the new purchaser's computer or other device (simultaneously deleting the file from its own server) or will retain the file in the new

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<sup>4</sup>Music Manager will deem a file "Eligible" if it was purchased by the

user from iTunes or it was purchased by the user through ReDigi, having been originally purchased lawfully by another from iTunes.

purchaser's Cloud Locker on ReDigi's server, from which the new purchaser can stream the music. ReDigi's terms of service state that digital media purchases may be streamed or downloaded only for personal use.

4. *Duplicates*: ReDigi purports to guard against a user's retention of duplicates of her digital music files after she sells the files through ReDigi. To that end, Music Manager continuously monitors the user's computer hard drive and connected devices to detect duplicates. When a user attempts to upload an Eligible File to ReDigi's server, ReDigi "prompt[s]" her to delete any pre-existing duplicates that Music Manager has detected. If ReDigi detects that the user has not deleted the duplicates, ReDigi blocks the upload of the Eligible File. After an upload is complete, Music Manager continues to search the user's connected devices for duplicates. If it detects a duplicate of a previously uploaded Eligible File, ReDigi will prompt the user to authorize ReDigi to delete that duplicate from her personal device and, if authorization is not granted, it will suspend her account.

Plaintiffs point out, and ReDigi does not dispute, that these precautions do not *prevent* the retention of duplicates after resale through ReDigi. Suspension of the original purchaser's ReDigi account does not negate the fact that the original purchaser has both sold and retained the digital music file after she sold it. So long as the user retains previously-made duplicates on devices not linked to the computer that hosts Music Manager, Music Manager will not detect them. This means that a user could, prior to resale through ReDigi, store a duplicate on a compact disc, thumb drive, or third-party cloud service unconnected to the computer that hosts Music Manager and access that duplicate post-resale.<sup>6</sup> While ReDigi's suspension of the original

purchaser's ReDigi account may be a disincentive to the retention of sold files, it does not prevent the user from retaining sold files.

## II. Proceedings Below

On January 6, 2012, Plaintiffs brought this action, originally solely against ReDigi, Inc., alleging *inter alia*, that in the operation of ReDigi's system version 1.0, it infringed Plaintiffs' copyrights by unauthorized reproduction and distribution of Plaintiffs' copyrighted works. The parties cross-moved for summary judgment. On March 30, 2013, the district court granted partial summary judgment in Plaintiffs' favor finding infringement. . . .

## DISCUSSION

### I. The First Sale Doctrine

The primary issue on appeal is whether ReDigi's system version 1.0 lawfully enables resales of its users' digital files. Sections 106(1) and (3) of the Copyright Act respectively grant the owner of a copyright the exclusive right to control the reproduction and the distribution of the copyrighted work. 17 U.S.C. § 106(1) & (3). Under the first sale doctrine, codified in § 109(a), the rights holder's control *over the distribution* of any particular copy or phonorecord that was lawfully made effectively terminates when that copy or phonorecord is distributed to its first recipient. Section 109(a) provides:

"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or

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<sup>6</sup>Defendants do not dispute that, under Apple iCloud's present arrangements, a user could sell her digital music files on ReDigi, delete Music Manager, and then re-download the same files to her

computer for free from the Apple iCloud. Apple's iCloud service allows one who has purchased a file from iTunes to re-download it without making a new purchase.

phonorecord."  
17 U.S.C. § 109(a).

Under this provision, it is well established that the lawful purchaser of a copy of a book is free to resell, lend, give, or otherwise transfer that copy without violating the copyright holder's exclusive right of distribution. The copy so resold or re-transferred may be re-transferred again and again without violating the exclusive distribution right. *See Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013); *Quality King Distribs. v. L'Anza Research Int'l, Inc.*, 523 U.S. 135 (1998); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908); *see also* 4 Patry on Copyright § 13:15 ("Placing a lawful copy of a work in commerce exhausts the distribution and display rights with respect to that particular copy . . ."). It is undisputed that one who owns a digital file from iTunes of music that is fixed in a material object qualifies as "the owner of a particular . . . phonorecord lawfully made," 17 U.S.C. § 109(a), and is thus entitled under § 109(a) "to sell or otherwise dispose of the possession of *that* . . . phonorecord," *id.* (emphasis added), without violating § 106(3). On the other hand, § 109(a) says nothing about the rights holder's control under § 106(1) over *reproduction* of a copy or phonorecord.

The district court found that resales through ReDigi were infringing for two reasons. The first reason was that, in the course of ReDigi's transfer, the phonorecord has been reproduced in a manner that violates the Plaintiffs' exclusive control of *reproduction* under § 106(1); the second was that the digital files sold through ReDigi, being unlawful reproductions, are not subject to the resale right established by § 109(a), which applies solely to a "particular . . . phonorecord . . . lawfully made." 17 U.S.C. § 109(a). We agree with the first reason underlying the district court's finding of infringement. As that is a sufficient reason for affirmance of the judgment, we make no ruling on the district court's second reason.

ReDigi argues on appeal that its system effectuates transfer of the *particular* digital file that the user lawfully purchased from iTunes, that it should not be deemed to have reproduced that file, and that it should therefore come within the protection of 17 U.S.C. § 109(a). ReDigi makes two primary contentions in support of these arguments.

First, ReDigi asserts—as it must for its first sale argument to succeed—that the digital files should be considered "material objects" and therefore, under 17 U.S.C. § 101's definition of "phonorecords" as "material objects," should qualify as "phonorecords" eligible for the protection of § 109(a).

Second, ReDigi argues that from a technical standpoint, its process should not be seen as making a reproduction. ReDigi emphasizes that its system simultaneously "causes [packets] to be removed from the . . . file remaining in the consumer's computer" as those packets are copied into the computer buffer and then transferred to the ReDigi server, so that the complete file never exists in more than one place at the same time, and the "file on the user's machine continually shrinks in size while the file on the server grows in size." ReDigi points out that the "sum of the size of the data" stored in the original purchaser's computer and in ReDigi's server never exceeds the "size of the original file," which, according to ReDigi, "confirms that no reproductions are made during the transfer process."

As for ReDigi's first argument, that the digital file it transfers is a phonorecord protected by § 109(a), we do not decide this issue because we find that ReDigi effectuates an unlawful reproduction even if the digital file itself qualifies as a phonorecord.

As for ReDigi's second argument, we reject it for the following reasons. The Copyright Act defines phonorecords as "material objects in which sounds . . . are fixed by any method now known or

later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101. Accordingly, when the purchaser of a digital music file from iTunes possesses that file, embodied "for a period of more than transitory duration" in a computer or other physical storage device, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) (quoting 17 U.S.C. § 101), that device—or at least the portion of it in which the digital music file is fixed (*e.g.*, the location on the hard drive)—becomes a phonorecord. . . . In the course of transferring a digital music file from an original purchaser's computer, through ReDigi, to a new purchaser, the digital file is first received and stored on ReDigi's server and then, at the new purchaser's option, may also be subsequently received and stored on the new purchaser's device.<sup>11</sup> At each of these steps, the digital file is fixed in a new material object "for a period of more than transitory duration." *Cartoon Network*, 536 F.3d at 127. The fixing of the digital file in ReDigi's server, as well as in the new purchaser's device, creates a new phonorecord, which is a reproduction. ReDigi version 1.0's process for enabling the resale of digital files thus inevitably involves the creation of new phonorecords by reproduction, even if the standalone digital file is deemed to be a phonorecord.

As for the argument that, as ReDigi copies a packet of data, it deletes the equivalent packet in the user's device so that the amount of data extant in the transfer process remains constant, this does not rebut or nullify the fact that the eventual receipt and storage of that file in ReDigi's server, as well as in the new purchaser's device (at his option), does involve the making of new phonorecords. Unless the creation of those new phonorecords is justified by the doctrine of fair use, which we discuss and reject in a later

portion of this opinion, the creation of such new phonorecords involves unauthorized reproduction, which is not protected, or even addressed, by § 109(a).

ReDigi makes several additional arguments designed to characterize its process as involving the transfer of its users' lawfully made phonorecords, rather than the creation of new phonorecords. None of these arguments negates the crucial fact that each transfer of a digital music file to ReDigi's server and each new purchaser's download of a digital music file to his device creates new phonorecords. ReDigi argues, for example, that during a transfer through ReDigi's data migration technology, each packet of data from the original source file resides in a buffer "for less than a second" before being overwritten, and thus fails to satisfy the requirement that a sound recording must be embodied "for a period of more than transitory duration" to qualify as a phonorecord, 17 U.S.C. § 101; *Cartoon Network*, 536 F.3d at 127. Even if, during transfer, ReDigi's system retains each digital file *in a computer buffer* for a period of no more than transitory duration, those files subsequently become embodied in ReDigi's server and in the new purchaser's device, where they remain for periods "of more than transitory duration." *Cartoon Network*, 536 F.3d at 127. ReDigi's server and the resale purchaser's device on which the digital music files are fixed constitute or contain new phonorecords under the statute.

ReDigi next argues that, in the course of transferring a user's file to ReDigi's own server, and to the resale purchaser's device, ReDigi sees to it that all of the original purchaser's preexisting duplicates are destroyed. As an initial matter, as noted above, ReDigi here overclaims. It does not ensure against retention of duplicate phonorecords created by the original owner. ReDigi's assertion that "there is never an

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<sup>11</sup>The new purchaser at his option may alternatively choose to leave

the digital file in the new purchaser's storage locker on ReDigi's server and stream it for access.

instance when [an] Eligible File could exist in more than one place or be accessed by more than one user" is simply not supported by ReDigi's own evidence. In addition, even if ReDigi effectively compensated (by offsetting deletions) for the making of unauthorized reproductions in violation of the rights holder's exclusive reproduction right under § 106(1), nonetheless ReDigi's process itself involves the making of unauthorized reproductions that infringe the exclusive reproduction right unless justified under fair use. We are not free to disregard the terms of the statute merely because the entity performing an unauthorized reproduction makes efforts to nullify its consequences by the counterbalancing destruction of the preexisting phonorecords.

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*[The court's discussion of Redgi's fair use defense is omitted. - JDL]*

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We conclude by addressing policy-based arguments raised by ReDigi and its amici. They contend that ReDigi's version 1.0 ought to be validated as in compliance with § 109(a) because it allows for realization of an economically beneficial practice, originally authorized by the courts in the common law development of copyright, *see Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), and later endorsed by Congress. They also contend that the Copyright Act must be read to vindicate purchasers' ability to alienate digital copyrighted works under the first sale doctrine—emphasizing that § 109(a) is styled as an entitlement rather than a defense to infringement—without regard to technological medium. On this score, they rely heavily on the breadth of the common law first sale doctrine, and on a purported imperative, described as the "principle of technological neutrality" by amici and the "equal treatment principle" by ReDigi, not to disadvantage purchasers of digital copyrighted works, as compared with purchasers

of physical copyrighted works.

As for whether the economic consequences of ReDigi's program are beneficial and further the objectives of copyright, we take no position. Courts are poorly equipped to assess the inevitably multifarious economic consequences that would result from such changes of law. So far as we can see, the establishment of ReDigi's resale marketplace would benefit some, especially purchasers of digital music, at the expense of others, especially rightsholders, who, in the sale of their merchandise, would have to compete with resellers of the same merchandise in digital form, which, although second hand, would, unlike second hand books and records, be as good as new.

Furthermore, as to the argument that we should read § 109(a) to accommodate digital resales because the first sale doctrine protects a fundamental entitlement, without regard to the terms of § 109(a) (and incorporated definitions), we think such a ruling would exceed the proper exercise of the court's authority. The copyright statute is a patchwork, sometimes varying from clause to clause, as between provisions for which Congress has taken control, dictating both policy and the details of its execution, and provisions in which Congress approximately summarized common law developments, implicitly leaving further such development to the courts. . . . In the provisions here relevant, Congress dictated the terms of the statutory entitlements. Notwithstanding the purported breadth of the first sale doctrine as originally articulated by the courts, *see Bobbs-Merrill Co.*, 210 U.S. at 350 ("[T]he copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose . . . a limitation at which the book shall be sold at retail by future purchasers . . ."); *Bureau of Nat'l Literature v. Sells*, 211 F. 379, 381-82 (W.D. Wash. 1914) (finding no infringement, in light of first sale doctrine, where reseller re-bound used books and held them out as new books), Congress, in promulgating § 109(a),

adopted a narrower conception, which negates a claim of unauthorized *distribution* in violation of the author's exclusive right under § 106(3), but not a claim of unauthorized *reproduction* in violation of the exclusive right provided by § 106(1). If ReDigi and its champions have persuasive arguments in support of the change of law they advocate, it is Congress they should persuade. We reject the invitation to substitute our judgment for that of Congress.

#### CONCLUSION

We have considered ReDigi's remaining arguments against the district court's ruling and find them to be without merit. The judgment of the district court is **AFFIRMED**.