

# 16-2321-CV

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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CAPITOL RECORDS, LLC, CAPITOL CHRISTIAN MUSIC GROUP, INC.,  
VIRGIN RECORDS IR HOLDINGS, INC.,

*Plaintiffs-Appellees,*

—against—

REDIGI INC., JOHN OSSENMACHER, LARRY RUDOLPH,  
AKA LAWRENCE S. ROGEL,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**REPLY BRIEF FOR DEFENDANTS-APPELLANTS**  
**[REDACTED]**

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## I. INTRODUCTION

The briefs submitted by Plaintiffs and Appellees (hereafter “Capitol”) and their supporting *amici* confirm that the district court’s summary adjudication ruling is predicated on a fundamental contradiction that undermines its entire holding. On the one hand, neither Capitol nor the district court quarrel with the proposition that Apple’s conveyance of an iTunes music file to a consumer constitutes the “distribution” of a “phonorecord.” However, in order to make out its infringement case against Appellants, the district court had to accept Capitol’s contention that the consumer’s conveyance of the identical material to ReDigi’s server is not a “phonorecord” but, as Capitol now describes it, “data free-floating in the air.” (Brief for Plaintiff-Appellees, *Capitol Records, LLC v. ReDigi, Inc.*, No. 16-2321-cv (2d Cir. May 5, 2017) (Dkt. No. 110 at 19).) Capitol and the district court are mistaken. If an iTunes music file or download is considered sufficiently “material” to qualify as a “distribution” under 17 U.S.C. § 106(3), it is sufficiently “material” to satisfy the definition of “phonorecord” and qualify for protection under the first sale doctrine under 17 U.S.C. § 109(a).

Further, consideration of the evidence Appellants submitted about how ReDigi’s technology actually operates, coupled with the recognition that iTunes music files or downloads are the “phonorecords,” shows that substantial triable issue of fact exist as to whether ReDigi’s technology infringes any of Capitol’s

rights as well as whether the technology is protected under the first sale doctrine.

The district court's summary adjudication ruling should be reversed.

**II. REDIGI'S TECHNOLOGY DOES NOT INVOLVE THE MAKING OF ANY INFRINGING "COPIES" OF CAPITOL'S SOUND RECORDING.**

Capitol asserts that ReDigi's technology is infringing because any transfer of an iTunes music file from a consumer's computer hard drive to ReDigi's server causes the sound recording to be duplicated into a second phonorecord. Capitol's reproduction right claim hinges on the unsupportable premise that the "phonorecord" embodying Capitol's sound recording is the lawful purchaser's computer hard drive. Capitol's defense of this position amounts to little more than ever-stridently asserting that the Copyright Act's definition of "phonorecords" as "material objects" means that phonorecords must be "physical objects" like vinyl records, cassette tapes, and CDs. In terms of legal support, Capitol offers little more than a single passage from the 1976 House Report. (Dkt. No. 110 at 16.)

What is missing from Capitol's Brief is any substantive response to Appellants' discussion of amendments to the Copyright Act in which Congress recognized that digital transmissions embodying sound recordings are "material objects" and thus eligible to be considered "phonorecords." (Brief for Defendants-Appellants, *Capitol Records*, No. 16-2321-cv (Dkt. Nos. 55 & 63 at 13-18).) Also missing is any response to the Copyright Act's provisions that preclude computer

hard drives from satisfying the definition of “phonorecords.” (*Id.* at 13 n.3.)

Capitol’s position is so extreme that it calls into question whether Apple’s initial transmission of an iTunes music file to the consumer even qualifies as a *bona fide* “distribution” within the meaning of 17 U.S.C. § 106(3) and thus, whether ReDigi can be held liable for infringing Capitol’s distribution right.

**A. What Appellants Mean By the Phrase “iTunes Music File or Download.”**

Capitol argues it is unclear what Appellants mean when they refer to the phonorecord as the iTunes music file that the consumer downloads from Apple. Capitol conveniently omits Appellants’ discussion of the definitions set forth in Apple’s Agreement with EMI (which governs Capitol’s sound recordings) and, in particular, the Agreement’s definitions of “eRecord,” “Download,” and “End User Device.”<sup>1</sup> (Dkt. Nos. 55 & 63 at 19-20.) Under the Agreement, a “Download”

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<sup>1</sup> [REDACTED]

embodies the “eRecord,” whose definition corresponds to the sound recording, as well as contains additional data and material. Appellants submitted evidence showing that the Download also includes the computer data necessary to configure an iTunes music file as an Mp3 and thus render the file capable of being played by the consumer using an Mp3 player or other program. (A-191-192; A-309-310; A-312; A-689-691; A-701; A-707.) This evidence creates a triable issue of fact as to whether the “Downloads” transmitted by Apple qualify as “phonorecords” for purposes of assessing Capitol’s infringement claim.

**B. Capitol Has No Response To Appellants’ Authorities Showing That Digital Music Files Can Satisfy The Definition of “Phonorecords.”**

Capitol’s contention that ReDigi’s technology infringes its reproduction right hinges upon being able to convince this Court that only “physical objects” like vinyl records, cassette tapes, and CDs can satisfy the Copyright Act’s definition of “phonorecords.” However, Capitol’s argument (1) ignores the provisions of the Copyright Act discussed in Appellants’ Brief showing that Congress affirmatively recognized that digital transmissions of sound recordings are capable of satisfying the “materiality” requirement necessary to be considered “phonorecords” and (2) ignores those limitations in the Copyright Act and governing case law that preclude computer hard drives from being considered “phonorecords.”

As discussed in Appellants' Brief, Congress amended the Copyright Act on at least two occasions to indicate that electronic music files qualify as "phonorecords." In 1992, Congress enacted the Audio Home Recording Act, 17 U.S.C. § 1001 *et seq.* In relevant part, section 1001(5)(A) states that a "digital musical recording" is,

***"a material object . . . (i) in which are fixed, in a digital recording format, only sounds, and material, statements, or instructions incidental to those fixed sounds, if any, and (ii) from which the sounds and material can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."***

17 U.S.C. § 1001(5)(A) (emphasis added). A few years later, Congress passed the Digital Performance Right in Sound Recording Act, 17 U.S.C. § 115. Section 115(d) states that a "digital phonorecord delivery" occurs upon the "digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording . . ." These provisions show that Congress recognized that "digital distributions of nondramatic musical compositions . . . were the equivalent in every respect, of hard copy distribution." 9 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:23 (West 2013).

**C. Capitol Has No Response To Appellants' Authorities Showing That A Computer Hard Drive Cannot Satisfy The Copyright Act's Definition of "Phonorecords."**

Capitol also ignores those provisions of the Copyright Act discussed in Appellants' Brief that preclude any finding that a consumer's computer hard drive could qualify as the "phonorecord." Capitol is unable to even mount a response to the fact that the Copyright Act's definition of "phonorecord" includes the requirement that it may only embody a sound recording and to the extent it includes other types of copyrighted works, such as audio visual works or computer programs, it is not a "phonorecord" but a "copy." See 17 U.S.C. § 101 (defining "phonorecords" and "copies"); see also *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 66 (2d Cir. 1996) (holding karaoke-style compact discs containing sounds and visual displays of lyrics were "copies," not "phonorecords"); accord *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072, 1076 (9th Cir. 1999) (under the Audio Home Recording Act, 17 U.S.C. § 1001 *et seq.*, a computer hard disk cannot be a "digital musical recording" because "a hard drive is a material object in which one or more programs are fixed."). The careful distinctions Congress made between "copies" and "phonorecords" would be obliterated if courts accepted the proposition that portions of a computer hard drive could be considered a "phonorecord" whereas the remaining portions would be considered a "copy."

The inconsistencies in Capitol’s approach to the definition of “phonorecord” are symptomatic of the inherent contradictions in its larger legal position. As the case of *Davis v. Capitol Records LLC*, 2013 WL 1701746, at \*7 (N.D. Cal. Apr. 18, 2013) shows, Capitol wants nothing less than to have its cake and eat it too: Capitol told the *Davis* court that iTunes music files transmitted to consumers are “phonorecords” for the purpose of calculating royalties to artists, but then tries to convince this Court that the same downloads consumers receive from Apple are not “phonorecords” at all and therefore cannot be resold under the first sale doctrine. If what Apple conveys to consumers is a “material object” for purposes of constituting the distribution of a “phonorecord,” as Capitol maintains, then what the consumer transfers to ReDigi’s server is also a “material object” that satisfies the Copyright Act’s definition of “phonorecord.”

Capitol also ignores this Court’s decisions that any medium can satisfy the materiality requirement for copies or phonorecords so long as it complies with the Copyright Act’s embodiment and duration requirements. (Dkt. Nos. 55 & 63 at 17-18.) Capitol does not dispute that iTunes music files satisfy both requirements or that consumers can play, copy, or transmit an iTunes music file while the file remains in the computer’s random access memory (RAM) and without ever saving the file to the consumer’s computer hard drive. (*Id.* at 27-28.) Thus, even Capitol

concedes that even without copying to a computer hard drive, an iTunes music file performs all the functions required of a “phonorecord” under the Copyright Act.

**D. Capitol’s Position Calls Into Question Whether Apple Makes A Distribution Of iTunes Music Files Under Section 106(3).**

Capitol asserts that ReDigi’s technology infringes Capitol’s reproduction right because consumers transfer to ReDigi’s server “exact duplicates” of what they lawfully received from Apple. (Dkt. No. 110 at 54.) At the same time, Capitol asserts that what consumers transfer to ReDigi’s server are not “phonorecords” but just “some sequence of data free-floating in the air.” (*Id.* at 19.) If consumers are sending to ReDigi exactly what they received from Apple, then it follows that Apple’s conveyance to a consumer does not amount to an exchange of a “material object” embodying a sound recording.

Capitol attempts to justify its incongruous position by invoking the statement in the *London-Sire Records* case that “while the statute requires that a distribution be of ‘material objects’ there is no reason to limit ‘distribution’ to processes in which the material object exists throughout the entire process—as opposed to a transaction in which a material object is created elsewhere at its finish.” (Dkt. No. 110 at 25 (quoting *London-Sire Records Inc. v. Doe 1*, 542 F.Supp.2d 153, 173 (D. Mass. 2008).). In truth, there are many problems with this formulation.

The proposition that “distribution” can occur without an exchange of a “material object” between the copyright owner and purchaser is wrong both legally and conceptually. It is wrong as a matter of law because both Congress and this Court have stated that the mere transmission of data cannot be a “distribution” within the meaning of section 106(3) because it does not involve the exchange of a “material object:”

“[D]istribution is generally thought to require transmission of a ‘material object’ in which the sound recording is fixed: a work that is of ‘more than transitory duration. “ See 17 U.S.C. § 101 (defining ‘copy’); David Nimmer & Melville B. Nimmer, 2 *Nimmer on Copyright*, § 8.11[A] (1993) (distribution right is right ‘publicly to sell, give away, rent or lend any material embodiment of copyrighted work’). *See also* House Report at 138 (‘any form or dissemination in which a material object does not change hands—performances or displays on television, for example, --is not a publication no matter how many people are exposed’).”

*Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 325 (2d Cir. 1995).

Conceptually, Capitol’s argument conflates the *creation of a phonorecord*—which is an exercise of the reproduction right—with the entirely separate and distinct right to *distribute existing copies of the phonorecord* to the public. Unless the iTunes music file or download is considered the phonorecord, there is nothing else that a lawful purchaser receives from Apple that would qualify as an exchange of a “material object” comprising a phonorecord. As a result, Capitol has no choice but to completely distort the meaning of “distribution” to include situations where the phonorecord never comes into existence until after Apple completes its

transmission and the iTunes music file or download is saved on the consumer's computer hard drive.

**E. Capitol's Estoppel Argument Fails As A Matter Of Law And Common Sense**

Next, Capitol contends that "even if the music file could itself be considered a material object ReDigi still violated Capitol's reproduction right." (Dkt. No. 110 at 27.) Tellingly however, the *only* argument Capitol presents has nothing to do with copyright law or the particulars of ReDigi's technology. Instead, Capitol is reduced to arguing that Appellants cannot succeed because they made purportedly *general statements* about ReDigi's technology at the initial stages of proceedings that are purportedly inconsistent with the *more detailed statements* Appellants made about ReDigi's transfer process during their depositions and in declarations submitted in connection with Capitol's summary judgment motion. Based solely on its convoluted estoppel theory, Capitol urges the Court to determine that ReDigi's technology infringes Capitol's rights without ever considering Appellants' evidence about how ReDigi's technology actually works.

Capitol's estoppel argument fails for two basic reasons. First, Appellants are not seeking to create a triable issue of fact by submitting inconsistent testimony that contradicts prior sworn testimony. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir.1991). To the contrary,

Appellants have presented a consistent account about the specifics of ReDigi's technology.

Second, the inconsistencies identified by Capitol all involve Appellants' *general descriptions* that were made at the initial stages of proceedings (on which Capitol relies) which appear to be inconsistent with the *specific details* Appellants provided in their deposition testimony and declarations submitted in connection with Capitol's summary judgment motion (on which Appellants rely). Such inconsistencies do not give rise to estoppel because federal law allows the admission of more detailed and specific evidence or testimony to provide context as well as help explain otherwise ambiguous testimony. *See Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 43 (2d Cir. 2000); *Langman Fabrics, a div. of Blocks Fashion Fabrics, Inc. v. Graff Californiawear, Inc.*, 160 F.3d 106, 112 (2d Cir. 1998), *amended*, 169 F.3d 782 (2d Cir. 1998); *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). Moreover, any inconsistencies between testimony "go[] to weight, not admissibility." *Silverstein v. Penguin Putnam, Inc.*, No. 01 CIV. 309 (JFK), 2006 WL 2506363, at \*1 (S.D.N.Y. Aug. 29, 2006); *see also Palazzo*, 232 F.3d at 44 ("[C]onflict in a witness's testimony . . . affects the weight of the testimony, not its admissibility.").

Judicial consideration of potentially inconsistent testimony is especially important in the context of summary judgment motions. "If there is a plausible

explanation for discrepancies in a party's testimony, the court considering a summary judgment motion should not disregard the later testimony because of an earlier account that was ambiguous, confusing, or simply incomplete.” (*Langman Fabrics*, 160 F.3d at 112 (ruling that expanded testimony that contradicted deposition testimony should be considered where later testimony was “far more detailed than the first” and provided more context). *See also Rule v. Brine, Inc.*, 85 F.3d at 1011 (“[A] material issue of fact may be revealed by [a party’s] subsequent sworn testimony that amplifies or explains, but does not merely contradict, his prior testimony, especially where the party was not previously asked sufficiently precise questions to elicit the amplification or explanation.”) (citations omitted) (emphasis added). Thus, courts are fully entitled to consider, and should consider, subsequent testimony that is “not actually contradictory” to earlier testimony is acceptable “where the later sworn assertion addresses an issue that was not, or was not thoroughly or clearly, explored in the deposition.” *Palazzo*, 232 F.3d at 43.

Capitol’s estoppel argument should be seen for what it is—a desperate eleventh hour attempt to prevent the Court from considering how ReDigi’s technology works. As Capitol realizes, consideration of Appellants’ evidence raises triable issues of fact as to whether Appellants may be held liable for infringing Capitol’s reproduction right.

**F. Recognition That iTunes Music Files Are “Phonorecords” Precludes Any Blanket Determination That ReDigi’s Technology Infringes Capitol’s Reproduction Right.**

Recognition that iTunes music files are the phonorecords prompts a different inquiry as to whether ReDigi’s technology infringes Capitol’s reproduction right. For example, even Capitol concedes that any “copying” that may occur as part of “any movement of copyrighted files on a hard drive, including relocating files between directories and defragmenting” is not infringing. *See Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013). The obvious reason such “copying” is not infringing is because *at all times the consumer has access to only one copy of the file*. In other words, in the context of the transmission or storage of iTunes music files, infringement of Capitol’s reproduction right must be determined on the basis of whether the consumer is able to access more than one copy of the copyrighted work rather than whether the electrons comprising the iTunes music file are or are not identical to the ones that in the first instance comprised the version transmitted by Apple. This is fully consistent with—if not the logical consequence of—this Court’s holding in *The Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008) that a copyright owner’s reproduction right is not infringed by any copying by a computer that does not satisfy the Copyright Act’s “embodiment” and “duration” requirements.

The issue of access is also relevant in assessing whether ReDigi's technology infringes Capitol's reproduction right. As set forth in Appellants' summary judgment declarations—the accuracy of which is not disputed by Capitol—*only a single copy of the iTunes music file or any portion of that file exists during the entirety of the transfer process.* (See A-687- A-694; A-697-A-701; A-703-A-707.) As a result, there is no infringement of Capitol's reproduction right. See *C.M. Paula Co. v. Logan*, 355 F. Supp. 189, 190 (N.D. Tex. 1973) (no violation of the reproduction right occurred where purchaser transferred copyrighted image from article on which it was sold to another medium and no second copy was made); accord *Lee v. A.R.T. Company*, 125 F.3d 580, 581-582 (7th Cir. 1997) (relying on *Paula* decision, holding that mounting a copyright owner's works on ceramic tiles was not infringing and was protected under the first sale doctrine).<sup>2</sup> Finally, Capitol appears to concede that the updated version of ReDigi's technology (ReDigi 2.0) does not infringe Capitol's reproduction right because it allows consumers to completely skip the step of transferring lawfully

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<sup>2</sup> Capitol also alleges that “the download of a newly purchased recording from ReDigi's server to a user's computer create[s] another unauthorized reproduction.” (Dkt. No. 110 at 10.) This is nothing more than a restatement of the same flawed computer-hard-drive-is-the-phonorecord argument. Plainly, should the Court determine that triable issues of fact exist regarding whether ReDigi's technology violates Capitol's reproduction right, such determination would apply equally to this claim. Additionally, Apple permits lawful purchasers of iTunes music files to download each file on up to 10 separate devices. See <https://support.apple.com/en-us/HT204839>.

purchased iTunes music files from their computer to ReDigi's server. (Dkt. Nos. 55 & 63 at 23.) In short, substantial triable issues of fact exist as to whether ReDigi's technology infringes Capitol's reproduction right.<sup>3</sup>

### **III. THE FIRST SALE DOCTRINE APPLIES TO LAWFULLY PURCHASED ITUNES MUSIC FILES.**

Capitol and supporting *amici* advance three basic arguments for why the first sale doctrine does not permit consumers to lawfully resell their lawfully purchased iTunes music files. None are meritorious. First, they argue that Appellants' reliance on the first sale doctrine is unavailing because any transfer of the iTunes music file to ReDigi's server infringes Capitol's reproduction right. As the

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<sup>3</sup> The cases cited on pages 14-15 of Capitol's brief for the proposition that transmitting copyrighted content over the internet necessarily results in an infringement of the copyright owner's reproduction right all involve technologies entirely different from ReDigi's, which does not reproduce music files. *See In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (service facilitated "the swapping of digital *copies* of popular music") (emphasis added); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (defendant allowed users to make copyrighted MP3 files "available for copying by other" users and transferred *exact copies* of those files over the internet); *Yesh Music, LLC v. Amazon.com, Inc.*, 2017 U.S. Dist. LEXIS 54417, at \*5 (E.D.N.Y. Apr. 8, 2017) (services creates a "fixed copy" on users' devices); *UMG Recordings, Inc. v. Brown*, No. 3:07CV0289, 2008 U.S. Dist. LEXIS 122123, at \*7 (S.D. Ohio Aug. 6, 2008) (service allowed users to download *reproductions* and distribute to others); *United States v. Am. Soc. of Composers, Authors, Publishers*, 627 F.3d 64, 69 (2d Cir. 2010) (service "offer[ed] to users *copies* of recordings of musical works") (emphasis added); *Maverick Recording Co. v. Goldshteyn*, Civil Action No. CV-05-4523 (DGT), 2006 U.S. Dist. LEXIS 52422, at \*9 (E.D.N.Y. July 31, 2006) (service *reproduced* and distributed copyrighted files); *Sega Enterprises Ltd. v. MAPHIA*, 948 F. Supp. 923, 929 (N.D. Cal. 1996) ("A *copier* is necessary to play games which have been downloaded from the" service) (emphasis added).

previous Section demonstrates, ReDigi's technology does not infringe Capitol's reproduction rights for reasons that are independent of the first sale doctrine.

ReDigi's technology also fulfills the basic bargain on which copyright law and the first sale doctrine were founded, which is that copyright owners retain exclusive rights in the "intangible" elements of the copyrighted article, while the lawful purchaser of the "tangible" copy retains the right to control any downstream sales or dispositions of that copy. All parties appear to agree that under the first sale doctrine, "[t]he purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, *although he could not publish a new edition of it.*" (Brief of MPAA and RIAA as *Amici Curiae* Supporting Plaintiffs-Appellees, *Capitol Records, LLC v. ReDigi, Inc.*, No. 16-2321-cv (2d Cir. Feb. 15, 2017) (Dkt. No. 131 at 7) (citing *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908) (emphasis added).) ReDigi's technology is consistent with this basic bargain as it allows consumers to (1) identify and transfer only the source copy of the music file or download that the consumer received from Apple; and (2) convey the source copy to ReDigi's server without creating a second copy or "new edition" of Capitol's sound recording. In other words, just as a consumer would be required to purchase 100 separate copies of a vinyl record or cassette tape containing Capitol's sound recording in order to resell the same number of copies in the secondary market, ReDigi's technology ensures that the same thing occurs with regard to

iTunes music files. A consumer would have to lawfully purchase 100 separate copies of an iTunes music file containing a Capitol sound recording in order to resell that number of copies using ReDigi's technology. (*See* A-687- A-694; A-697-A-701; A-703-A-707.)

Even more problematic, Capitol and its *amici* completely ignore the clear legal basis for application of the first sale doctrine to lawful purchasers of iTunes music files. In *Kirstaeng v. John Wiley & Sons, Inc.*, the Supreme Court declared that “one who *owns* a copy [of a copyrighted article] *will* receive ‘first sale’ protection, *provided* , of course, that the copy was ‘*lawfully made*’ and not pirated.” 133 S.Ct. 1351, 1361 (2013) (emphasis in original). As the Supreme Court has made clear, ***Congress intended the first sale doctrine to be available to consumers as an incident of acquiring lawful ownership of a copyrighted article.*** This is confirmed by the House Report, which states that the first sale doctrine does not apply unless the purchaser “acquired ownership” of the copyrighted article. *See* H.R. Rep. No. 94-1476, at 80 (“the privileges of subsections (a) and (b) [of Section 109] . . . do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it”). Nothing in the Copyright Act supports the proposition that consumers can be deemed the “owners” of a copyrighted article but remain powerless to sell or otherwise dispose of the article they rightfully own. The onerous and costly restrictions Capitol and the district

court have imposed on lawful purchasers of iTunes music files are simply inconsistent with the idea of ownership and contrary to the first sale doctrine's roots in the common law's prohibition against restraints on the alienation of chattels. DAVID NIMMER & MELVILLE B. NIMMER, 2 NIMMER ON COPYRIGHT, § 8.12[A] (1993) (“[T]he policy favoring a copyright monopoly for authors gives way to the policy opposing unduly limiting trade and restraints on alienation.”). Also, any blanket denial of first sale protection to all digital goods is inconsistent with section 109(a)'s “‘equal treatment’ principle.” *Kirstaeng*, 133 S.Ct. at 1362.

**A. ReDigi's Technology Satisfies Section 109's “Particular” Phonorecord Requirement.**

Next, Capitol argues that “the plain language of the Copyright Act itself, including its specific definitions, renders the first sale doctrine inapplicable in the context of digital transmission.” (Dkt. No. 110 at 37.) However, the only language that Capitol actually relies on is section 109(a)'s statement that the lawful purchaser of a copyrighted article may convey “that particular<sup>4</sup> copy or phonorecord” without violating the copyright owner's distribution right under section 106(3).” Notably absent from Capitol's discussion is the citation to any legal authorities regarding what is meant by that phrase.

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<sup>4</sup> American Heritage Dictionary, *available at* <https://ahdictionary.com/word/search.html?q=particular&submit.x=36&submit.y=19> (defining “particular” as “Of, belonging to, or associated with a specific person, group, thing, or category; not general or universal”).

In their Opening Brief, Appellants explained how ReDigi’s technology identifies the source file or download the consumer received from Apple and transfers that “particular” file to ReDigi’s server. (Dkt. Nos. 55 & 63 at 23-28.) As a result, the only iTunes music file that may be offered for sale using ReDigi’s technology is the original source file lawfully purchased from Apple as well as the only instance of that file residing on the consumer’s computer or connected devices.<sup>5</sup> (See A-694 – 695; A-707; A-1486.) This is more than sufficient evidence to raise a triable issue of fact as to whether ReDigi’s technology satisfies the plain meaning of § 109(a).

**B. Capitol’s Heavy Reliance On The Copyright Office’s 2001 DMCA Report And 2016 Making Available Report Is Unavailing.**

Capitol and its supporting *amici* also rely extensively on the Copyright Office’s 2001 DMCA Report, believing it supports Capitol’s conclusion that a “digital first sale” right is not available under the Copyright Act. (Dkt. No. 110 at 37.) Capitol would have the Court believe that the Copyright Office condemned all “forward and delete” technologies—which Capitol erroneously asserts are the

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<sup>5</sup> Capitol notes on page 7 of its brief that “users could circumvent [ReDigi’s] system and retain copies of the recordings” before uploading their file to the service, or even “have additional copies of a music file on other devices” not connected to the computer when ReDigi Media Manager is running. This point is inapposite because ReDigi is not responsible for any potentially infringing “prior copying activities” that take place *before* ReDigi’s services are even in use. And ReDigi is certainly not required to prevent all infringements before it is entitled to the protections of the first sale doctrine.

same as ReDigi’s technology—as copyright infringements. To the contrary, a careful reading of the portions of the DMCA Report cited by Capitol shows that the Copyright Office never reached any final conclusions about so-called “forward and delete” technology, noting that “no one has offered evidence that this technology is viable at this time.” (U.S. Copyright Office, Library of Cong., DMCA § 104 Report (2001) at 84.)

Also, the Copyright Office’s discussion of so-called ““forward and delete’ technology” was predicated on the belief that such technology operates by “disabl[ing] access to or delet[ing] entirely the source file upon transfer of a copy of that file.” (*Id.* at 82.) In other words, the Copyright Office assumed that such technology necessarily involved the creation of two copies of the copyrighted work, but that access to the second copy would be restricted or the second copy would be automatically deleted. As noted, ReDigi’s technology permits consumers to transfer iTunes music files without causing the creation of two copies of Capitol’s sound recording. Finally, the 2001 DMCA Report has nothing to say about ReDigi 2.0, which, as Capitol concedes, does not involve any copying of Capitol’s sound recording and accomplishes a change in ownership by modifying the file’s “file-pointer” metadata to associate the file with the new purchaser. (Dkt. No. 110 at 6.)

Capitol's reliance on the Copyright Office's 2016 Making Available Report only highlights the inherent contradictions in Capitol's argument. The Making Available Report adopted in full the reasoning in the *London-Sire Records* case, which simultaneously held that (1) digital downloads containing sound recordings can satisfy the Copyright Act's definition of "material objects," but (2) a digital file transfer creates a new copy of phonorecord in the transferee's computer. *London-Sire Records*, 542 F.Supp.2d at 171-172. Capitol vehemently rejects the first proposition and only accepts the second, undoubtedly because it realizes that if the downloads consumers receive from Apple can be considered "phonorecords," then the additional act of storing an iTunes music file on a computer hard drive is unnecessary for the creation of a "phonorecord."

In short, Capitol is asking this Court to cherry-pick those portions of the Copyright Office reports with which it agrees and to ignore the rest. Even more troubling, Capitol and its supporting *amici* ask this Court to adopt these policy recommendations even though, despite all the government white papers and reports by the Copyright Office, ***Congress has never amended section 109(a) to exempt digital goods from first sale protection.*** To the contrary, Congress has consistently amended the Copyright Act to extend copyright status to digital goods—and thereby render those digital goods subject to a lawful purchaser's first sale rights.

As this Court has recognized on multiple occasions, the opinions of the Copyright Office are only entitled to *Skidmore* deference—meaning courts are to show deference only to the extent they find the material to be persuasive. *EMI Christian Music Grp., Inc. v. MP3tunes, LLC*, 844 F.3d 79, 97 (2d Cir. 2016) (“The Copyright Office's interpretations of the Copyright Act are entitled to some deference insofar as we deem them to be persuasive.”); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002) (“We recognize that “the Copyright Office has no authority to give opinions or define legal terms, and [that] its interpretation on an issue never before decided should not be given controlling weight.”). Here, the Copyright Office’s 2001 DMCA Report and 2016 Making Available Report are simply not persuasive because, among other reasons, neither report addresses the specifics of the way ReDigi transfers ownership of iTunes music files from one purchaser to another.

**C. The Supreme Court’s *Kirstaeng* Decision Trumps Capitol’s Policy Arguments.**

Capitol wrongly accuses Appellants and *amici* of relying on “policy” arguments to support their position when the opposite is true. Appellants and *amici* maintain the first sale doctrine applies to the sale of iTunes music files or downloads because, as the Supreme Court stated unequivocally in *Kirstaeng*, “one who *owns* a copy *will* receive first sale protection.” 133 S.Ct. at 1361 (emphasis in original). Capitol and *amici*’s only response is to ask this Court to ignore the

Supreme Court’s unequivocal holding and instead follow what it calls the “persuasive reasoning” in the Department of Commerce White Paper and Copyright Office Reports. (Dkt. No. 110 at 42.) Plainly, it is Capitol and supporting *amici* that are engaging in “the kind of policy judgment reserved for Congress” (*id.* at 43), not Appellants.<sup>6</sup>

Turning to *Kirstaeng*, Capitol asserts that the decision’s reference to a first sale doctrine’s “equal treatment” principle “has no bearing on the relationship between digital and physical goods.” (*Id.* at 44.) Capitol’s own argument shows the opposite.

As Capitol acknowledges, “the Supreme Court found that the plain language of the words “lawfully made under this title” did not impose a geographical distinction between copies manufactured abroad and those manufactured in the United States.” (*Id.*) Likewise, here, the Supreme Court has held that a lawful purchaser is “entitled”<sup>7</sup> to the protections of the first sale doctrine as a result of the

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<sup>6</sup> Capitol also argues Appellants and *amici* “ignore[] . . . the ‘tangible nature’ of physical goods [that] lies at the heart of the first sale doctrine.” (Dkt. No. 110 at 42.) But the “tangible nature” of goods also lies at the heart of what it means to make a “distribution” within the meaning of section 106(3). If an iTunes music file or download is considered sufficiently “tangible” to constitute a “distribution,” it is sufficiently “tangible” to qualify for protection under section 109(a).

<sup>7</sup>As the Copyright Scholars point out in their *amicus curiae* brief, “[s]ection 109(a) is unique among the many limitations of the rights of copyright holders [in that] . . . [e]very other limitation defines uses that are simply ‘not an infringement of copyright,’ but § 109(a) defines an affirmative *entitlement*.” (Brief for Copyright

copyright owner's transfer of ownership of the copyrighted article to the purchaser. *Kirstaeng*, 133 S.Ct. at 1361. It is undisputed that lawful purchasers of iTunes music files acquire ownership of that file or download. (Dkt. Nos. 55 & 63 at 30-31.) And just as in the case of geographical limitations, "the plain language" of section 109(a) does not impose a distinction between "copies" or "phonorecords" delivered by Amazon or "copies" or "phonorecords" conveyed by Apple over the Internet. As the Supreme Court made clear in *Kirstaeng*, the "equal treatment" principle is intended to ensure that limitations on first sale rights are clearly stated by Congress and will not be implied by courts—as Capitol asks this Court to do.

Not surprisingly, Capitol has little to say about that portion of the district court's ruling requiring consumers to sell their entire computer hard drive in order to legitimately convey ownership of a lawfully obtained iTunes music file to another purchaser. Neither Capitol nor its supporting *amici* offer any *legal* justification for such onerous restraints on purported "lawful owners" of iTunes music files. Instead, Capitol and *amici* simply assert that the inapposite policy arguments advanced by the Department of Commerce and Copyright Office somehow "fully justify any 'obstacles to resale'" imposed by the district court's opinion. (Dkt. No. 110 at 46.) Plainly, triable issues of fact exist as to whether

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Scholars as *Amici Curiae* Supporting Defendants-Appellants, *Capitol Records*, No. 16-2321-cv (Dkt. No. 90 at 5) (emphasis in original.)

ReDigi's technology is protected by the first sale doctrine as well as whether the district court's order imposes an unreasonable restraint under the first sale doctrine.

**IV. REDIGI'S TECHNOLOGY MERITS FAIR USE PROTECTION BECAUSE IT PROMOTES THE PUBLIC INTEREST BY CREATING A DOWNSTREAM MARKET FOR THE RESALE OF LAWFULLY PURCHASED ITUNES MUSIC FILES.**

The briefs submitted by Appellants and supporting *amici*<sup>8</sup> clearly indicated that if the Court were to find that ReDigi's technology infringed any of Capitol's rights (which Appellants deny), such infringements are permitted as fair use under § 107 because they further the public interest by extending reasonable first sale protection to lawful owners of iTunes music files. (Dkt. Nos. 55 & 63 at 43.)

Where a party is claiming fair use protection on the basis of furthering important interests identified by the Copyright Act, the operative inquiry is "whether the purpose and character are consistent with the goals of the Copyright Act and advance socially beneficial outcomes." (Dkt. No. 90 at 24) (citing *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015) (copying of millions of books into searchable database is fair use because benefits society) and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (creating full text searchable database of copyrighted works is fair use)).)

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<sup>8</sup> Although Appellants' Brief did not discuss the individual fair use factors, they adopt the discussion of each of the fair use factors set forth in the Copyright Scholars *amicus curiae* brief. (Dkt. No. 90 at 23-29.)

In *Kirstaeng*, the Supreme Court emphasized that a principal goal of the first sale doctrine is the preservation of downstream markets for the resale of copyrighted goods. Justice Breyer’s opinion expressly linked the first sale doctrine to the “importance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of these goods.” 133 S.Ct. at 1363.

*Kirstaeng* also makes clear that the first sale doctrine has economic consequences: By “leaving buyers of goods free to compete with each other when reselling or otherwise disposing of those goods[,] American law . . . has generally thought that competition, including freedom to resell, can work to the advantage of the consumer.” *Id.* Indeed, the very purpose of the first sale doctrine is to maximize consumer welfare by encouraging copyright owners to behave competitively and not misuse their limited monopoly power. *Id.* (“[T]he principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.” (quoting 1 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 100, p. 4 (3d ed. 2006)).)

Additionally, the amicus brief submitted by the various national library associations remind us that the development of secondary markets for copyrighted articles *furthers important non-commercial interests* by, among other things, helping ensure that the societal benefits of being exposed to copyrighted works are available to a wider population. (Brief for American Library Association et al. as

*Amici Curiae* Supporting Defendants-Appellants, *Capitol Records, LLC v. ReDigi, Inc.*, No. 16-2321-cv (Dkt. No. 98 at 6-7) (2d Cir. Feb. 21, 2017).)

Capitol's and *amici*'s fair use arguments also miss the mark because they fail to acknowledge that any "loss" being claimed from such "commercial activity" is a loss from the *second sale* of the iTunes music file—*not any losses from the first sale*. The only losses Capitol will suffer arise from not being able to control all downstream sales of legitimately purchased iTunes music files. "An attempt to monopolize the market by making it impossible for other to compete runs counter to the statutory purpose of promoting creative expression and cannot constitute a strong equitable basis for resisting the invocation of the fair use doctrine." *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523-24 (9th Cir. 1992).

A similar analysis applies to the fourth statutory fair use factor, "effect on the potential market for the copyrighted work." In *Sega Enterprises*, the Court of Appeals found that defendant's copying of plaintiffs copyrighted computer code to gain an understanding of unprotected functional elements satisfied the fourth fair use factor. *Sega Enterprises*, 977 F.2d at 1523-24; *see also Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 607-608 (9th Cir. 2000) (disassembly of portions of plaintiff's copyrighted firmware was fair use and "for

this reason, some economic loss by Sony as a result of this competition does not compel a finding of no fair use.”).<sup>9</sup>

Neither Capitol nor its supporting *amici* have proffered any empirical evidence showing that recognition of a downstream market for iTunes music files would impose any unique or unduly burdensome economic consequences on Capitol that it does not already face in those areas where a secondary market already exists for its products. Even Capitol does not dispute that under the first sale doctrine, consumers may freely sell their lawfully purchased CDs and DAT tapes containing Capitol’s sound recordings without having to show they have not made exact copies of the recordings on their computer. The evidence submitted by Appellants shows that the safeguards incorporated into ReDigi’s technology far exceed the protections Capitol enjoys with regard to the resale of CDs and DAT tapes. Hence, to the extent the Court finds that ReDigi’s technology infringes any of Capitol’s rights, Appellants submit that triable issues of fact exist as to whether ReDigi’s technology is entitled to fair use protection because it furthers the

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<sup>9</sup> Appellants submit that the second factor, the nature of the copyrighted work, is non-dispositive or favors ReDigi. Both *HathiTrust*, 755 F.3d at 98 and *Authors Guild v. Google*, 804 F.3d at 220 recognize that the second factor is not “dispositive” and will not prevent a finding of fair use even when an entire work is copied. Appellants also submit the third factor, “amount and substantiality of the portion used in relation to the copyrighted work as a whole,” also favors Appellants because transferring anything less than the entirety of an iTunes music file would not fulfill the public purpose served by the first sale doctrine.

copyright interests enshrined in § 109(a) while at the same time providing meaningful safeguards against misuse of its technology.

## V. CONCLUSION

Appellants have demonstrated that substantial material issues of fact exist as to whether ReDigi's technology infringed any of Capitol's rights and whether such technology is protected under the first sale doctrine and/or constitutes "fair use." As a result, Appellants respectfully submit that the district court's order granting summary judgment to Capitol must be reversed.

Dated: Los Angeles, California  
May 19, 2007

Respectfully, submitted

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,984 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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