

# 16-2321-CV

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**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,*

– v. –

REDIGI INC., JOHN OSSENMACHER, LARRY RUDOLPH,  
AKA Lawrence S. Rogel,

*Defendants-Appellants.*

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

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**BRIEF FOR *AMICUS CURIAE* THE COPYRIGHT ALLIANCE  
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Copyright Alliance states that it does not have a parent corporation, and that no publicly held corporation owns 10% or more of *amicus'* stock.

**TABLE OF CONTENTS**

CORPORATE DISCLOSURE STATEMENT ..... C-1

TABLE OF AUTHORITIES ..... *ii*

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 5

I. THE DISTRICT COURT PROPERLY APPLIED THE LAW TO FIND THAT THE FIRST-SALE DOCTRINE DOES NOT APPLY TO REDIGI’S SERVICE ..... 5

A. Section 109 of the Copyright Act Does Not Apply to the Reproduction Right ..... 5

B. Section 109 Should Be Construed Narrowly as Written, Specifically to Apply to Distribution Only. .... 9

C. Legislative History and Other Authority Confirms That Rights Are Separate and That Section 109 is Limited to the Distribution Right ..... 12

D. Courts Have Rejected Similar Efforts to Misconstrue Copyright Law ..... 14

E. U.S. Copyright Office Review and Rulemaking Run Counter to the Outcome ReDigi Seeks..... 16

F. The Policy Justifications That ReDigi’s *Amici* Advance Are Unsupported ..... 18

II. JUDGE SULLIVAN PROPERLY REJECTED REDIGI’S ATTEMPTS TO RELY ON THE FAIR USE DOCTRINE..... 19

A. ReDigi and Its *Amici* Are Wrong to Suggest That Fair Use Applies When Other Exceptions Fail..... 21

B. The Fair Use Analysis Conducted by ReDigi’s *Amici* Is Off-Base ..... 24

CONCLUSION ..... 32

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>A&amp;M Records, Inc. v. Napster, Inc.</i> , 239 F.3d 1004 (9th Cir. 2001) .....	26
<i>American Broad. Cos., Inc. v. Aereo, Inc.</i> , 134 S. Ct. 2498 (2014).....	15, 17
<i>American Broad. Cos. v. Aereo, Inc.</i> , 874 F. Supp. 2d 373 (S.D.N.Y. 2012) .....	15
<i>Arista Records, LLC v. Doe 3</i> , 604 F.3d 110 (2d Cir. 2010) .....	26
<i>Authors Guild, Inc. v. HathiTrust</i> , 755 F.3d 87 (2d Cir. 2014) .....	23
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015) .....	23, 25
<i>Basic Books, Inc. v. Kinko’s Graphics Corp.</i> , 758 F. Supp. 1522 (S.D.N.Y. 1991) .....	13
<i>C.I.R. v. Clark</i> , 489 U.S. 726 (1989) .....	9
<i>Fame Publ’g Co. v. Ala. Custom Tape, Inc.</i> , 507 F.2d 667 (5th Cir. 1975) .....	10
<i>Harper &amp; Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985) .....	28, 29
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998) .....	22
<i>Kirtsaeng v. John Wiley &amp; Sons</i> , 133 S. Ct. 1351 (2013).....	11



<i>MAI Sys. Corp. v. Peak Comput., Inc.</i> , 991 F.2d 511 (9th Cir. 1993) .....	9
<i>Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005) .....	26
<i>Princeton Univ. Press v. Mich. Doc. Servs.</i> , 99 F.3d 1381 (6th Cir.1996) ( <i>en banc</i> ).....	13
<i>Quality King Distribs. v. L'Anza Research Int'l</i> , 523 U.S. 135 (1998) .....	10, 11
<i>Ryan v. CARL Corp.</i> , 23 F. Supp. 2d 1146 (N.D. Cal. 1998).....	10
<i>Sega Enters. Ltd. v. Accolade, Inc.</i> , 977 F.2d 1510 (9th Cir. 1992).....	9
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984) .....	27, 28
<i>Tasini v. N.Y. Times Co.</i> , 206 F.3d 161 (2d Cir. 2000), <i>aff'd</i> , 533 U.S. 483 (2001).....	10
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001) .....	9
<i>UMG Recordings, Inc. v. MP3.com, Inc.</i> , 92 F. Supp. 2d 349 (S.D.N.Y. 2000) .....	14, 15, 26
<i>Walker v. Univ. Books</i> , 602 F.2d 859 (9th Cir. 1979) .....	9
<i>Warner Bros. Entm't Inc. v. WTV Sys., Inc.</i> , 824 F. Supp. 2d 1003 (C.D. Cal. 2011).....	14
<i>WPIX, Inc. v. ivi, Inc.</i> , 691 F.3d 275 (2d Cir. 2012) .....	14
<b>Constitution and Statutes</b>	
17 U.S.C. § 102(a) .....	9
17 U.S.C. § 106.....	6, 11, 21

17 U.S.C. § 107(2).....	27
17 U.S.C. § 109(a).....	<i>passim</i>
17 U.S.C. § 115.....	6
17 U.S.C. § 121.....	6
17 U.S.C. § 201(d)(2) .....	6
17 U.S.C. § 202.....	7, 12, 13
U.S. Const., art. I, § 8, cl. 8 .....	24
<b>Other Authorities</b>	
DMCA Section 104 Report, August 2001, <i>available at</i> <a href="http://www.copyright.gov">http://www.copyright.gov</a> .....	16
H.R. Rep. No. 89-2237 (1966) .....	12, 13
H.R. Rep. No. 94-1476 (1976) .....	6
IFPI, Global Music Report 2017 (Apr. 25, 2017), <i>available at</i> <a href="http://www.ifpi.org/downloads/GMR2017.pdf">http://www.ifpi.org/downloads/GMR2017.pdf</a> .....	22

Pursuant to Federal Rule of Appellate Procedure 29(b), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of plaintiffs-appellees Capitol Records, LLC, Capitol Christian Music Group, Inc., and Virgin Records IR Holdings, Inc. (collectively, “Appellees”). This brief is submitted with consent of all parties.<sup>1</sup>

### **INTEREST OF *AMICUS CURIAE***

The Copyright Alliance is a nonprofit, nonpartisan 501(c)(4) membership organization dedicated to promoting and protecting the ability of creative professionals to earn a living from their creativity. It represents the interests of individual authors from a diverse range of creative industries – including, for example, writers, musical composers and recording artists, journalists, documentarians and filmmakers, graphic and visual artists, photographers and software developers – and the small businesses that are affected by the unauthorized use of their works. The Copyright Alliance’s membership encompasses these individual creators and innovators, creative union workers, and small businesses in the creative industry, as well as the

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution. Some Copyright Alliance members are, or are affiliates of, Appellees in this matter. Some may join other *amicus* briefs in support of Appellees.

organizations and corporations that support and invest in them. Moreover, members of *amicus* are among the even larger and even more diverse array of citizens and companies that owe their livelihoods to the Copyright Act.

The concept of innovation is of fundamental importance to the Copyright Alliance. The copyright laws spur the development and distribution of new creative works and innovations for the benefit of public consumption by ensuring that those who contribute to these works and innovations are entitled to determine how their efforts will be used and disseminated, and by ensuring that the market provides proper reward for their efforts. Accordingly, the Copyright Alliance encourages partnerships between creators and technology companies to develop and take advantage of new technologies that help the public access copyrighted works in new and legal ways, and that do not result in the shifting of incentives from creators to those who invest in parasitic business models.

Accordingly, ReDigi's and its *amici*'s advocacy for a system that purports to allow "sales" of digital copies of copyrighted works does not merit judicial legislation to permit a new, and heretofore illegal, enterprise. Nor is such a for-profit enterprise, which floods the market with discounted, identical-quality copies that cannibalize the market for legitimate versions, consistent with the policies behind the Copyright Act or the realities of the

marketplace. The Copyright Alliance submits this brief to help the Court understand the broad-reaching legal and practical consequences that reversal would have on creators and owners of copyrighted works – not just musical works, but all types of works. The Copyright Alliance also submits this brief to help the Court understand the policy reasons that support the propriety of Judge Sullivan’s correct reading of the law, and to underscore that this Court should reject ReDigi’s myopic, dangerous, and unfounded view of the law.

### **SUMMARY OF THE ARGUMENT**

ReDigi’s positions and those of its *amici* are fraught with logical flaws and unsupported conjecture. Law review articles and advocacy-laden books written by some of the authors are cited, but to the extent any binding authorities are cited, they are misconstrued and misapplied. The plain language of the Copyright Act, its history, and its interpretation by the Copyright Office and the courts are ignored, as are basic principles of statutory construction.

The sum and substance of ReDigi’s arguments is: “We want the outcome; who cares what the law says.” Indeed, no consideration is given to the fact that the Copyright Office – after carefully assessing numerous viewpoints from stakeholders – opined years ago and restated recently that

so-called “digital first sale” is illegal and bad policy. The damage that reversal would cause to copyright owners resulting from ReDigi’s system and others is given no ink at all. According to ReDigi and its *amici*, a poorly secured, legally deficient copying system is an “entitlement” that those who add to the creation of works should simply tolerate.

The Copyright Act, the legislative history, the case law, and the Copyright Office each squarely confirm that ReDigi cannot avail itself of the first-sale doctrine. A straightforward fair use analysis, like the one that the district court below engaged in, turns all four factors against ReDigi. And for good reason: ReDigi threatens to damage if not destroy entire markets that are necessary to support the development of creative works. It may start here with music, and by judicial extension, could threaten motion pictures, books, and other works that have enriched our society as a result of the copyright laws that Congress has created in line with the principles set forth in Article I of the Constitution. To undercut all of this so that a commercial actor can profit from sales of unauthorized copies of mp3 files is not just improper, it is unwise. Judge Sullivan’s well-reasoned opinion was correct, and it should be affirmed accordingly.

## ARGUMENT

### **I. THE DISTRICT COURT PROPERLY APPLIED THE LAW TO FIND THAT THE FIRST-SALE DOCTRINE DOES NOT APPLY TO REDIGI'S SERVICE**

#### **A. Section 109 of the Copyright Act Does Not Apply to the Reproduction Right.**

ReDigi is not a used bookstore or a used record store. It is a service built around copying in violation of the reproduction right embodied in Section 106(1) of the Copyright Act. 17 U.S.C. § 106(1). ReDigi makes pristine copies of countless files, offers those unauthorized copies to the public at a discounted price, and then takes a cut of the sale. SPA-2-3. As a result, ReDigi is able to enter the market and compete directly with iTunes and other providers, yet ReDigi – despite offering the *identical* product as those legitimate providers – can offer limitless copies at a fraction of the price. As Appellees point out in their brief (at 7-8), the potential for error and loss of sales is immeasurable.

ReDigi's primary defense is that it is standing in the shoes of its customers' affirmative defense of "first sale," as embodied in 17 U.S.C. § 109(a), but Section 109(a) has no application to Section 106(1). Its application is expressly limited to Section 106(3), *i.e.*, the distribution right. *See* 17 U.S.C. § 109(a) ("Notwithstanding the provisions of section 106(3) . . ."). While ReDigi and its *amici* advocate to have the first-sale

doctrine expanded to cover the reproduction right under various scenarios, no basis exists for the Court to engage in such an expansion of the law. To the contrary, the law contains concrete and explicit instructions that prohibit the outcome that ReDigi seeks.

*First*, Congress deliberately constructed the Copyright Act such that copying is copying unless an exception applies. This is inherent in the legislative history, which explains that the “approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106[.]” H.R. Rep. No. 94-1476, at 61 (1976). The breadth of the Act is important, because it is the vehicle whereby creators and copyright owners realize a return on their investments. When an exception to these broad rights is created, such as with compulsory licenses that permit certain copying under 17 U.S.C. §§ 115 and 121, it is done carefully and with all stakeholder interests taken into account.

*Second*, the law cannot be read to force an exception to a specific right to take over all rights. The Copyright Act expressly acknowledges the independence of the exclusive rights under a copyright. *See* 17 U.S.C. § 201(d)(2) (“Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred . . . and owned separately.”). ReDigi’s *amici* make an argument



that underscores that the court below understood the distinction between these exclusive rights. Specifically, the *amici* professors claim that the ruling below “contradicts itself” with inconsistent application of whether electronic distribution is a “distribution” under various sections of the Copyright Act. Brief of Copyright Law Scholars as *Amici Curiae*, Dkt. #90 (Feb. 15, 2017) (“Professors’ Br.”) at 14, 22-23. But the district court is clear in its opinion that unauthorized distribution of electronic files violates an owner’s distribution right “[i]n addition to the reproduction right.” SPA-8 (emphasis added). Accordingly, the district court’s logic in holding that the reproduction component of this dual infringement is not subject to the exception created by Section 109 is both internally consistent and consistent with the structure of the statute.

Nor is there any basis for taking an exception designed to apply to one right and applying it to another right (including one that may have been separately divested). Section 202 confirms that a copy of a work that is subject to a sale or resale does not bring with it other rights or exceptions for the benefit of the purchaser. 17 U.S.C. § 202 (“Transfer of any material object . . . does not itself convey any rights in the copyrighted work embodied in the object”). And indeed, Section 109(a) itself focuses solely on the specific copy: the only action that the owner of the particular copy

can take is to “sell or otherwise dispose of the possession of *that copy*[.]” 17 U.S.C. § 109(a) (emphasis added).<sup>2</sup>

*Third*, the structure of Section 109 itself confirms that there is no reproduction right exception. In particular, Section 109 also specifically adds an exception for the display right under Section 106(5), and another for the performance right under Section 106(4). *Id.* at § 109(c), 109(e). Had Congress intended to allow the first-sale doctrine to bleed over into other rights, such as the reproduction right under Section 106(1), Congress presumably would have said so. Of course, such an interpretation would also obviate the need for Sections 109(c) and (e), which would conflict with fundamental rules of statutory interpretation: “[i]t is a cardinal principle of statutory construction” that enactments of the legislative branch should not be construed in a way that would cause any sentence, clause, or word to be

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<sup>2</sup> Even the *amici* professors echo that language in their briefing, using the phrases “*that copy* or phonorecord” or “*any copy* of a copyrighted work.” Professors’ Br. at 5-6, 8 (emphases added). Indeed, many of the professors’ semantic arguments fall apart under this plain reading, such as the argument that the word “particular” in “particular copy or phonorecord” in Section 109 either means “personal” (which they adopt), or “fixed” (a strawman definition they force upon the district court). However, Congress and the court below both used the word according to its usual meaning, “an individual member of a group or class,” and there is no indication that either one chose the odd, presumably archaic, or newly-coined meaning the professors employ. SPA-12-13.

“superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).<sup>3</sup>

**B. Section 109 Should Be Construed Narrowly as Written, Specifically to Apply to Distribution Only.**

The readings of Section 109 advanced by ReDigi and its *amici* violate the fundamental canon of construction that presumes that exemptions to statutes should be construed narrowly. *See C.I.R. v. Clark*, 489 U.S. 726, 739 (1989). This basic principle of interpretation is even more important when,

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<sup>3</sup> The novel attempts to claim that the copies made are “incidental,” Professors’ Br. at 12-13, fundamentally misunderstand the nature of ReDigi’s business, which is to make stable, final copies. In any event, making copies for some other purpose – unless a specific exception or defense applies – is copying nonetheless. *See Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518 (9th Cir. 1992) (following *Walker v. Univ. Books*, 602 F.2d 859, 864 (9th Cir. 1979) (“[T]he fact that an allegedly infringing copy of a protected work may itself be only an inchoate representation of some final product to be marketed commercially does not in itself negate the possibility of infringement.”); *see also MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993) (loading copy into RAM may result in the creation of unauthorized copies). Likewise, ReDigi’s model hinges on actual copying of protected works from one material object to another, and ReDigi’s tortured efforts to divorce copies from material objects are unavailing. Copyright law is fundamentally grounded on the concept of fixation in tangible media, and the distinction between the two is integral to the operation of the statute. *See* 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . .”); *id.* § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

as here, the constitutionally protected rights of artists and copyright holders are at issue. *See, e.g., Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000), *aff'd*, 533 U.S. 483 (2001); *Fame Publ'g Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975); *Ryan v. CARL Corp.*, 23 F. Supp. 2d 1146, 1150 (N.D. Cal. 1998).

Congress is careful to make any statutory exceptions to a copyright owner's rights very technical, specialized, focused, and precise. Even when importing a pre-existing common law concept, the application is no broader than that concept. And indeed, Section 109 itself is written with specificity, leaving no doubt as to scope.

The overbroad readings of Section 109 that ReDigi and *amici* propound violate that fundamental canon by advancing the first-sale doctrine past the distribution right to the reproduction right. But the support that the professor *amici* cite is inapposite: the cases note the breadth of the first-sale doctrine *when applied to different forms of distribution*. *See, e.g.,* Professors' Br. at 9 (citing to the syllabus of *Quality King Distribs. v. L'Anza Research Int'l*, 523 U.S. 135, 137 (1998)). For example, the professors make much of the Supreme Court's observation in *Quality King* that "there is no reason to assume that Congress intended either § 109(a) or the earlier codifications of the doctrine to limit its broad scope." *Id.* (citation

to syllabus in original). Yet even a cursory review of the case reveals that the issues at bar were confined entirely to the distribution right and entirely to physical articles. Indeed, the Supreme Court’s observation about Section 109’s “broad scope” was referring to the government’s statutory interpretation that would define “importation” as not being a sale or distribution within the meaning of Section 108. *Quality King*, 523 U.S. at 151-152; *accord Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1363 (2013).

The professors’ claim that Section 109’s use of the word “entitlement” indicates a broad reading also is unsupported by the statute’s legislative history, or case law. Professors’ Br. at 5-7. The “entitlement” is nothing more than the entitlement to make a first sale of a particular copy. Giving additional weight to the word “entitlement” would wreak havoc on settled statutory interpretation of the Copyright Act, effectively privileging “entitlement” to rights such as that of receiving a royalty under a compulsory license, or to termination of transfers over the fundamental exclusive Section 106 rights themselves. *Compare* 17 U.S.C. § 106 *with* 17 U.S.C. §§ 115, 203. Of course, such an argument is purely self-serving to advocates of decreased copyright protection because the word “entitled” is

used in the limitation of rights at issue in this case. *See e.g.*, 17 U.S.C. § 109. As such, the argument cannot be taken seriously.

**C. Legislative History and Other Authority Confirms That Rights Are Separate and That Section 109 is Limited to the Distribution Right.**

The professors cite to a law review article entitled *Why Patent Exhaustion Should Liberate Products (Not Just People)* for the principle that guarding against double recovery was a justification for the first-sale doctrine. Professors' Br. at 29. More persuasive authority shows otherwise. In enacting the current Copyright Act and its specific exceptions, Congress was very aware of the principles at play, and a comprehensive review of the legislative history shows that the motives of Congress were not what the professor *amici* suggest they were.

Congress noted that Section 109(a) was “established by the court decisions and section 27 of the present law.” H.R. Rep. No. 89-2237, at 67 (1966). The same House Report explains, “[u]nder section 202 . . . , the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner’s consent.” *Id.*<sup>4</sup> The Report goes on to note that if an exception such as Section 115 applied, then the owner would be entitled legally to make a copy despite not having

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<sup>4</sup> Subsequent Senate and House Reports contain identical language.

the copyright owner's express consent. *Id.* And, notably, the same Report expressly contemplates "new communications media." *Id.* at 68. It is true that ReDigi did not exist in 1966, but to suggest that Congress never contemplated new technologies in enacting Section 109 is just false.

Under the current law, it is clear that members of the public do not have the right to make or distribute digital copies of copyrighted works if such distribution also involves violating the distribution right.<sup>5</sup> Apart from its citations to other professors who have similar views toward intellectual property law, ReDigi has no explanation as to why it should be able to simultaneously assert the "first sale" rights of the public, yet receive a benefit that the public does not have under copyright law. *See Princeton Univ. Press v. Mich. Doc. Servs.*, 99 F.3d 1381, 1389 (6th Cir.1996) (*en banc*) (courts have rejected attempts by for-profit users to stand in the shoes of their customers); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991) (same). Thus, these arguments that ReDigi and its *amici* advance collapse under their own weight.

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<sup>5</sup> For example, the owner of an authorized copy of a DVD or other material object on which the digital copy resides may convey that material object.

**D. Courts Have Rejected Similar Efforts to Misconstrue Copyright Law.**

ReDigi asks this Court to ignore the above constructs entirely. Fortunately, additional precedent exists for rejecting such an approach: indeed, courts repeatedly rebuke attempts to dress up infringement as something that is magically legal based not on well-founded legal authority, but because a lawyer is able to analogize a component of the infringing system to an analog technology. A court shut down an enterprise that involved the purchase of hundreds of DVD players and hundreds of copies of copyrighted works for customers to “rent” for 14 days. *Warner Bros. Entm’t Inc. v. WTV Sys., Inc.*, 824 F. Supp. 2d 1003, 1011 (C.D. Cal. 2011). This Court recently rejected an effort by an internet retransmitter to claim it was a “cable system” where the retransmitter argued that the effect of its service was to retransmit broadcast television programming to the public via non-broadcast means. *WPIX, Inc. v. ivi, Inc.* 691 F.3d 275, 283-84 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). Judge Rakoff rejected an argument that a service that bought tens of thousands of popular CDs and uploaded them for access by subscribers who could prove they owned the work, was legal, despite the defendant’s argument that the service was the “functional equivalent” of a cloud locker that allowed space-shifting. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350-51 (S.D.N.Y.



2000). Indeed, rejecting the very sort of “consumer demand” arguments that ReDigi makes, the district court explained:

Stripped to its essence, defendant’s “consumer protection” argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs’ property simply because there is a consumer demand for it. This hardly appeals to the conscience of equity.

*Id.* at 352.

The professors are right that the letter of the Copyright Act should apply with equal force to old and new technologies. ReDigi is just not the right technology. Indeed, it is legally no different from the technology in the Supreme Court’s *Aereo* decision (which the professors mischaracterize heavily, Professors’ Br. at 17-18 n.6) – a system that tried to model itself so that it would appear to make private performances rather than public performances. The Supreme Court rejected that construct. *American Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014). Before the case got to the High Court, like the court in *MP3.com*, the trial court rejected Aereo’s “consumer demand” arguments. *See American Broad. Cos. v. Aereo, Inc.*, 874 F. Supp. 2d 373, 404 (S.D.N.Y. 2012) (noting the “numerous other methods through which the public can lawfully receive access to [plaintiffs’] content” – and rejecting the argument that the public has the right to receive

programming through Aereo's *particular* service). This Court should do the same here.

**E. U.S. Copyright Office Review and Rulemaking Run Counter to the Outcome ReDigi Seeks.**

In 2001, the U.S. Copyright Office looked at this type of “digital first sale” and concluded, following a very thorough inquiry and analysis, that copying for the sake of selling “used” digital files was both illegal under the current law and undeserving of legislative change. *See* Copyright Office, DMCA Section 104 Report, August 2001, at 79-80, 97-98, *available at* <http://www.copyright.gov> (rejecting application of first-sale defense to the creation of digital copies). The Copyright Office's Section 104 Report is in-depth and identifies serious concerns with the concepts that ReDigi puts forth. Notably, the Office has not departed from its conclusion since.

Contrary to suggestions from *amici*, the Copyright Office's rulemaking under Section 1201 does not open the door to ReDigi's service; if anything, the fact that ReDigi's service was *not* included confirms that the Copyright Office has not changed its views. Putting aside the logical flaw in suggesting that a temporary exception under Section 1201 rulemaking can be alchemized into a permanent, *de facto* fair use under Section 107, the professors' analogy fails. For obvious reasons, operating a system that owes its entire existence to making copies of mp3s for sale is not analogous to

ensuring interoperability between independently created computer programs or addressing other challenges relating to technological measures used to protect copyrights. The Court is far too versed to fall for the idea that somehow a use is excised from the law simply because it involves technology and someone thinks it is a useful idea.

Likewise, the statement that affirmance would “nullify § 109(a)’s entitlement for all cases involving modern digital technology,” Professors’ Br. at 12, is unsupported overstatement. In claiming that a person who elected to put music on her smartphone must sell an entire smartphone in order to sell a specific song, the professor *amici* (at 2) likewise put forth a hypothetical problem that is nothing new: for example, someone who owns a physical compact disc has never been able to make a copy of it because they wish to sell only one song on that disc, nor can anyone make a copy of a book in order to sell a copy. If *amici* are frustrated by the constraints of certain new technology, the recourse is to go to Congress, not to lobby the courts. *Aereo*, 134 S. Ct. at 2511 (“[T]o the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of [new] technologies and the Copyright Act, they are of course free to seek action from Congress.”).

**F. The Policy Justifications That Redigi's *Amici* Advance Are Unsupported.**

As in other cases, the policy justifications proffered by ReDigi's *amici* are unsupported. Even the section of the Constitution cited by the Professors in their brief is misquoted (Professors' Br. at 14 n.5). The "entitlement" they advocate would allow companies to earn revenue from their own self-policed platforms, and could easily expand to negatively impact the ever-dwindling incentives that creators have to produce new works, which would ultimately stunt the progress of science and of the useful arts. This should be a question for Congress in a broad discussion, not within the scope of one case involving one system that purports to "transfer" "used" mp3s.

Indeed, the judicial changes to the Copyright Act that ReDigi and its *amici* suggest would bankrupt quintessential American cultural industries that support large and small artists and companies, because popular musical compositions, sound recordings, films, and books are expensive to create, produce, and distribute.

As an initial matter, the artistic creations upon which creative industries are built represent the irreplaceable intellectual and artistic labor of authors and other creators. These works are often created only intermittently by creators over their lifetimes spent honing their crafts. Additionally, companies in these fields invest massive resources in efforts to

discover new creative works likely to appeal to the public, as well as in ways to develop and distribute those works; in turn, individual creators work with those companies to develop new works for the public to receive and enjoy.

For every successful artistic endeavor, there are tens of thousands of failures that incur the same costs. That is why creative industries must continue to enjoy the protections of the strong copyright framework that Congress intended. Allowing ReDigi to simply skim off the top of others' successes, while ignoring the costs, is unfair to creators and owners alike and runs counter to the essential purposes of copyright law. At its core, it is an assault on a fundamental right of all copyright owners, and the arguments, if adopted, could eviscerate the exclusive rights of copyright owners and fatally damage the value of their licenses and licensing structures, while ultimately emboldening the next wave of pirates.

## **II. JUDGE SULLIVAN PROPERLY REJECTED REDIGI'S ATTEMPTS TO RELY ON THE FAIR USE DOCTRINE**

The court below correctly determined that ReDigi's uses of Appellees' works incident to sales on its platform were not fair use. SPA-9-11. As the district court noted, "[t]he ultimate test of fair use . . . is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it."

SPA-9, citing *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. Const., art. I, § 8, cl. 8).

The district court had “little difficulty” finding that it would not. In answering this question in the negative, the district court explicitly considered the equities of the case before it, including (but not solely) through the application of the statutory fair use factors enacted in Section 107 of the Copyright Act. SPA-9-11. After its thorough application of the fair use “rule of reason” to the entirety of the facts before it, the district court held that “[i]n sum, ReDigi facilitates and profits from the sale of copyrighted commercial recordings, transferred in their entirety, with a likely detrimental impact on the primary market for these goods.” SPA-11.

Unable to find fault with Judge Sullivan’s application of this “ultimate test,” ReDigi and its *amici* adopt the tactics of a stolen-car ring, and try to chop the district court’s reasoning into parts in an attempt to evade scrutiny of the entirety of its argument at hand. As an initial matter, they argue that the so-called important public interest in allowing ReDigi to undercut the recorded music industry requires the extension of the first-sale doctrine to reproduction by way of the fair use doctrine. Additionally, they find fault with the district court’s application of each of the four statutory factors, often relying on purely semantic arguments.

However, ReDigi and its *amici*'s efforts to "part out" Judge Sullivan's opinion below fail on constitutional, statutory, and precedential grounds. As Judge Sullivan significantly points out, despite what may be a fascinating scholarly debate, this Circuit is composed of "court[s] of law and [is] not a congressional subcommittee or technology blog." SPA-1. Accordingly, the pertinent "issues are narrow, technical, and purely legal." *Id.*

**A. ReDigi and Its *Amici* Are Wrong to Suggest That Fair Use Applies When Other Exceptions Fail.**

ReDigi and its *amici* rely on the same basic argument that judicial applications of the fair use doctrine should be used to blur and enlarge limited exceptions to copyright protection that were enacted only after years of congressional study and deliberation. Professors' Br. at 24-27. Under ReDigi's preferred formulation, infringers need only point to the public interest embodied in any statutory exception, and if they *almost* satisfy its conditions, the fair use "tie goes to the runner." *See id.*

This is, of course, nonsense. Every act of Congress is motivated by competing interests. The strong protections of Section 106 are motivated by the public interest just as fully as the carefully-drawn exceptions of Section 109. Indeed, it is of fundamental importance to creators and the copyright community that all exceptions remain within the scope contemplated by Congress.

The Copyright Act as a whole, and not individual subsections, represents Congress' distillation of the entire public interest. Thus, it is for Congress, not the courts, to determine when proponents of higher or lower copyright protections are the "runner" and when they are the first baseman.

Moreover, it is far from clear that ReDigi's sales of digital files serve any public interest at all. First, there is no access issue for users of digital music. The retail price is cheap (or free with advertising sponsorship) and authorized streaming services have been widely adopted. *See* IFPI, Global Music Report 2017, at 7 (Apr. 25, 2017), *available at* <http://www.ifpi.org/downloads/GMR2017.pdf>. There is no "public benefit" factor provided by ReDigi's sale of new copies of works at a price much lower than what iTunes or other legal retailers sell them for. Instead, ReDigi provides a private benefit to itself that cannot plausibly rise to the level of the societal benefits enumerated in the preamble to Section 107, "criticism, comment, news reporting, teaching . . . , scholarship, or research. 17 U.S.C. § 107. Although these categories have an illustrative and not limitative function, . . . the illustrative nature of the categories should not be ignored." *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir. 1998) (internal quotations omitted).



The legal support cited by ReDigi's *amici* for the principle that the public interest implicit in any statutory section is, without more, strong enough to trigger a fair use finding, comes principally from the authors' own articles and books, not from persuasive legal authority. Indeed, this Court's decisions in *Authors Guild v. HathiTrust* and *Authors Guild v. Google* do not offer any support for ReDigi or its *amici*. Neither case stands for the principle the professor *amici* would like it to.

In *HathiTrust*, for instance, this Court noted that both the Supreme Court and Congress had given *explicit* guidance that accommodating print-disabled persons is a fair use. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 102 (2d Cir. 2014) (citing *Sony Corp. of Am.*, 464 U.S. at 455 n.40) (“[m]aking a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use.”). In *Authors Guild v. Google*, rather than deciding that “the copying of millions of books into a digital searchable database was fair use because the use benefited society” as the professors’ brief (at 24) maintains, this Court applied the four statutory fair use factors, putting a substantial amount of weight on a finding of transformativeness. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

Indeed, *amici* have not been able to find a single case in this or any other Circuit that supports a blanket “public interest” covering close calls for statutory exceptions. Instead, the overwhelming majority of cases acknowledge that a court’s task to “promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings,” is achieved by application of the statutory factors. *See* U.S. Const., art. I, § 8, cl. 8; 17 U.S.C. § 107.

**B. The Fair Use Analysis Conducted by ReDigi’s *Amici* Is Off-Base.**

In the district court’s opinion, Judge Sullivan acknowledged that the four statutory factors “guide courts’ application of the [fair use] doctrine” and applied the four factors in a traditional fashion. SPA-9. Tellingly, ReDigi chooses not to address *any* of the four factors directly, conceding to the district court’s analysis of each factor. Professors’ Br. at 23-28.

Under the first factor, the district court, citing numerous prior decisions involving the infringement of digital music, held that the copying and distribution of exact copies of digital music files is commercial in nature and are not transformative uses. SPA-10. The professor *amici* concede that ReDigi’s use is commercial. Professors’ Br. at 25. They also concede that ReDigi’s use is not transformative, but argue that the district court erred in holding that the first factor “requires” a court to examine transformativeness.

Professors’ Br. at 24-25. The professors instead suggest a purely “public benefit” based analysis. *Id.* at 25-26.

This is, at best, a distinction without a difference. As an initial matter, the first case of this Court that they cite for their alternative standard, *Authors Guild v. Google*, was explicitly decided on transformativeness grounds. 804 F.3d at 214. Moreover, in that same case, this Court held that “the word ‘transformative’ cannot be taken too literally” but is rather shorthand “for a complex thought” encompassing many of the goals of fair use. *Id.* In criticizing Judge Sullivan for using the word “transformative,” the professors succumb to the “oversimplified” definition of the term which this Court criticized in *Authors Guild v. Google*.

Yet, the professors’ argument fails on the ground on which they choose to fight. This is because there can simply be no “public benefit” absent transformation (in the broad sense endorsed by this Court). Where an infringement merely “supersedes the objects [or purposes] of the original creation,” the public receives nothing from the infringement it could not have gotten from the authorized use. *See id.* (citing *Campbell*, 510 U.S. at 579) (internal quotations omitted).

ReDigi’s ALA *amici* prefer a balancing test that weighs whether allowing or preventing an infringing use is better for promoting innovation

in intellectual property. Brief of Amici Curiae American Library Association, *et al.*, Dkt. #98 (Feb. 21, 2017) (“ALA Br.”), at 16-21. This is the wrong approach, and the ALA advances the wrong outcome. Indeed, neither the Supreme Court, this Court, nor any court within this Circuit has applied the “degree of innovation” factor to a shuttered technology-based infringer. *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005); *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 124 (2d Cir. 2010); *MP3.Com*, 92 F. Supp. 2d at 351.

Under the second factor, the district court relied upon the Southern District’s holding in *MP3.com* that sound recordings are “close to the core of the intended copyright protection” and “far removed from the . . . factual or descriptive work more amenable to fair use.” SPA-10 (citing *MP3.Com*, 92 F. Supp. 2d at 351). ReDigi’s professor *amici* offer a countervailing and disingenuous analysis, noting that courts have not found that this factor “in isolation” to be dispositive. Professors’ Br. at 26-27. Of course, the district court did not examine this point in isolation. The professors also argue (at 26) that the overall purpose of ReDigi’s use must be considered in the second factor, but this is beside the point when analyzing the second factor, which focuses solely on the purpose of the original work, not the purpose of

the infringement. 17 U.S.C. § 107(2). Here, that purpose, the creation of a creative musical expression, weighs firmly in the direction of no fair use.

Applying the third factor, the amount and substantiality of the infringing use, the district court noted that ReDigi takes the entire work without degradation, negating any claim of fair use. SPA-10-11 (citing *MP3.Com*, 92 F. Supp. 2d at 352). ReDigi's professor *amici* urge this Court to find that this was in error, and announce a new rule that "[u]se of a work in its entirety is not dispositive where it is reasonably related to the purpose of the secondary use." Professors' Br. at 27. For this principle they cite only to the dissent in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 497 (1984) (Blackmon, J.), without proper indication that it is a dissent. That dissent makes clear that the majority's decision in that case was limited to the facts of time-shifting for VCRs, which is not at issue here. *Id.* More damaging to ReDigi's case, the dissent is sharply critical of arguments like ReDigi's regarding the third factor. Indeed, Justice Blackman writes that "[f]air use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors." *Id.* Far from announcing the reasoning of the Supreme Court that would support such a rule as the professor *amici* advocate, the dissent notes that in light of the creation of entire copies, "[i]t

is little wonder that the Court *has chosen to ignore* this statutory factor.” *Id.* (emphasis added).

Clearly, this case is not about a VCR being sold to time-shift television programs broadcast without charge where a court could plausibly find no objection to the infringing use at issue from copyright holders, and find no risk of financial harm to them. *Id.* at 421. Instead, this case is about sales of entire, identical copies of digital music files offered for sale in direct competition with the authorized vendors of those same files. Because the sale is the same as in *MP3.com*, not *Sony*, the result should be the same as in *MP3.com* as well.

Finally, under the fourth factor, which is “undoubtedly the single most important element of fair use,” the district court found that ReDigi’s sales are likely to undercut the “market for or value of the copyrighted work[.]” SPA-11; *see Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). The district court was correct, and ReDigi (to the extent it addresses the factor indirectly) and its *amici* are dead wrong here. Indeed, the argument that the professor *amici* urge, that competing sales of perfect digital copies are permissible because resales of used books and imported textbooks are, would quickly swallow the rule that courts must weigh the

effect of the use upon the potential market for or value of the copyrighted work. *Harper & Row*, 471 U.S. at 566.

The red-herring arguments suggesting that ReDigi is a lending library or another party that serves a similar purpose should be rejected. ReDigi is not a library or a “small used book store,” and nothing about this decision affects these traditional entities. This issue is not posed in this case nor is it analogous to what is at issue before the Court. The use here is a centralized system that not only distributes unauthorized copies, but profits from it. And the question is about whether the Court should disregard the plain language of the Copyright Act and make an exception for a business that is to be trusted with ensuring that the seller does not keep any copies (which is impossible).

Indeed, somewhat shamefacedly, in a footnote, the professor *amici* rely on ReDigi’s touting of its self-created technical measures by which they prevent sellers of digital files from retaining copies on their computers or connected devices. However, they never deal with the simple fact the district court immediately identified, namely, that nothing prevents a user from keeping the file on another computer, a DVD, or other unconnected media. SPA-2 (noting that ReDigi’s software cannot detect retained copies of music files in such other locations). Moreover, the recent “Global Music

Report 2017” by the International Federation of the Phonographic Industry (“IFPI”) shows that “stream ripping” and other technological circumvention of supposed limits on users by music platforms (including, but not limited to, “stream ripping”) is prevalent. IFPI Global Music Report 2017, at 37. Even if the foregoing were not logically sound and well-documented concerns, this Court is not the appropriate venue for determining which, if any, technical measures are sufficiently tamper-proof to permit activity like ReDigi’s.

ReDigi and its *amici* show only one side of the story and oversimplify the complicated issues that are involved in what ReDigi proposes. They are too dismissive of the near-term and long-term impacts of a system that incentivizes fast and easy copying to another device and then sending the “original” back in the marketplace to compete with an identical copy at full price. ReDigi and the professors are wrong: the secondary market would be not only be unfairly competitive with the primary market, *but virtually indistinguishable from it*. Indeed, because unlicensed secondary sellers would offer prices significantly below cost, they would absolutely cannibalize and supersede the primary market, hurting artists and creative industries alike.



Not only does ReDigi hurt the main market for the sale of digital files, but it hurts legitimate subsidiary markets as well. There is a history of a licensed market for transferring music files via the cloud. Indeed, ReDigi itself had an analogous license at one time. SPA-7 n.5. The value of that market has been decreased by ReDigi's insistence on its ability to proceed without a license. Damage to this market – as explained above – is just as harmful as damage to Appellees' primary markets, because all creators of copyright works need access to all potential markets in order to recoup the kinds of expensive investments that they make in order to promote the progress of science and useful arts.

**CONCLUSION**

For the reasons set forth above, and for those set forth in Appellees' brief, *amicus curiae* respectfully requests that the decision below be affirmed.

Dated: New York, New York  
May 12, 2017

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on May 12, 2017, a true and correct copy of the foregoing Brief of Amicus Curiae The Copyright Alliance was timely filed in accordance with FRAP 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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