

# 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,*

v.

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  
HON. JUDGE RICHARD J. SULLIVAN

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**BRIEF OF *AMICI CURIAE* THE MOTION PICTURE ASSOCIATION OF  
AMERICA (MPAA) AND RECORD INDUSTRY ASSOCIATION OF  
AMERICA (RIAA) IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney of record for *Amicus Curiae* certifies as follows:

1. The Motion Picture Association of America, Inc. has no parent corporation, and no publicly held company holds more than 10% of its stock.
2. The Recording Industry Association of America, Inc. has no parent corporation, and no publicly held company holds more than 10% of its stock.

DATED: May 12, 2017

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**INTERESTS OF *AMICI CURIAE***

The Motion Picture Association of America, Inc. (“MPAA”) is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry.<sup>1</sup> MPAA member companies include Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets.

The Recording Industry Association of America, Inc. (“RIAA”) is the trade association that supports and promotes the creative and financial vitality of the major recorded-music companies. Its members are the music labels that comprise the most vibrant record industry in the world. RIAA members create, manufacture and/or distribute approximately 85% of all recorded music legitimately produced in the United States.<sup>2</sup> In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels;

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<sup>1</sup> All parties consented to *Amici* filing this brief. No party’s counsel authored any part of this brief. No person other than *Amici* contributed money intended to fund the preparation of this brief.

<sup>2</sup> Plaintiffs-Appellees are RIAA members. Plaintiffs-Appellees did not participate in the drafting of this brief or contribute any money toward the drafting of this brief.

conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations and policies.

As trade associations representing companies that invest in the creation and dissemination of copyrighted works, MPAA and RIAA have a strong interest in the Copyright Act being properly interpreted and applied. The members of MPAA and RIAA depend upon effective copyright laws to protect the music, films, television shows, and new media content that they create and disseminate and in which they invest. MPAA and RIAA members both enforce their copyrights and regularly rely on statutory exceptions to exclusive rights—including fair use—in producing and distributing their expressive works. Accordingly, MPAA and RIAA are well positioned to provide the Court with a unique and balanced perspective on the proper contours of copyright infringement, the first sale defense, and the fair use defense.

In this case, Appellant ReDigi, Inc. (“ReDigi”) asks this Court to expand the first sale and fair use defenses in ways that would conflict with longstanding copyright jurisprudence; promote the wide proliferation of infringing reproductions of copyrighted works; and harm consumers by impeding—and perhaps, upending—successful, emerging digital business models. The members of the MPAA and RIAA therefore have a significant interest in the important questions



that this case presents concerning the interpretation of the Copyright Act, 17 U.S.C. §§ 101, *et seq.*

### **SUMMARY OF ARGUMENT**

In its well-reasoned opinion, the district court correctly held that where a copyrighted work is digitally transferred over the internet (*e.g.*, as here, from one computer to another), a reproduction occurs within the meaning of the Copyright Act of 1976, 17 U.S.C. §106(1). *Capitol Records v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 649-50 (S.D.N.Y. 2013). In arguing on appeal that the first sale and fair use defenses excuse such unauthorized digital transfers, ReDigi and its *amici* flout long-established principles of copyright law; disregard the Act’s legislative history; ignore government studies concluding that a “digital first sale defense” is unnecessary and inappropriate; fail to mention that in the wake of those government studies, Congress has not amended the Copyright Act to expand the first sale defense to cover digital transmissions; and raise policy arguments that are both legally irrelevant and empirically unsupported.

The origins in the United States of the narrowly tailored first sale defense go back over a century. In *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), the United States Supreme Court established that the first sale defense limits only the exclusive right to distribute a copyrighted work and not the exclusive rights to reproduce or adapt the work. Congress codified the first sale defense in section

109(a) of the Copyright Act of 1976, 17 U.S.C. §109(a). Section 109 by its terms applies only to the distribution right. Because ReDigi effects a reproduction of Appellees' copyrighted works, the first sale defense does not immunize its infringing conduct. Not surprisingly, neither ReDigi nor its *amici* cite any statutory language or case law that supports their contrary argument here.

ReDigi and its supporters also ignore the Copyright Act's legislative history. Although Congress knew at the time of the Act's passage that the digitization of copyrighted works was likely to evolve in future years, it did not broaden the first sale defense to apply beyond its narrow and longstanding application as a limitation on the distribution right. In 1978, the Commission on New Technological Uses ("CONTU") made a series of recommendations after being tasked by Congress with determining what amendments to the Act were necessary in light of the advent of computers. CONTU did not propose any amendments to section 109(a).

By contrast, on several occasions, Congress concluded that technological advances required an amendment to section 109. For example, Congress adopted the Record Rental Amendment of 1984 in response to the growing incidence of record stores renting out sound recordings and also facilitating illegal copying by selling blank audio cassette tapes. In 1990, Congress enacted the Computer Software Rental Amendments Act of 1990, which adopted a similar statutory

scheme for computer software. Also in 1990, Congress enacted section 109(e), which applied the first sale defense to the public performance right in connection with certain electronic audiovisual games. Congress has never taken analogous action in connection with transfers of digital works.

In 1998, Congress enacted the DMCA, a major amendment to the Copyright Act that addressed numerous significant issues arising from new technology, including liability for online copyright infringement. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Although the issue of the effect of new technology on the first sale defense was considered, Congress declined in the DMCA to expand section 109 to provide for a digital first sale defense.

Moreover, the United States Copyright Office and, more recently, the United States Department of Commerce Internet Policy Task Force,<sup>3</sup> have released studies confirming that digital transfers like those that ReDigi facilitates are not subject to the first sale defense. These studies also declined to recommend a change in policy.

Unable to marshal legal support for their position, ReDigi and its *amici* assert that as a matter of policy, these government studies were incorrect and that this Court should recognize a “first sale” defense for digital transfers so long as the

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<sup>3</sup> The Task Force was led by the United States Patent and Trademark Office and the National Telecommunications and Information Administration.

transferor of the copyrighted work deletes her copy of the work. Failure to engraft such an exception, ReDigi asserts, will result in anti-competitive restraints on the first sale defense. But policy arguments cannot substitute for longstanding statutory language and well-reasoned case law. In any event, as the Copyright Office and Internet Policy Task Force have concluded, a “digital first sale” defense is unnecessary from a policy standpoint. On the contrary, within the framework of the current copyright scheme, a variety of digital business models have proliferated in the marketplace, allowing consumers to enjoy broad access to copyrighted music, motion pictures, and other works. Moreover, ReDigi’s entire argument rests on the unproven premise that at some point during the transfer process, the transferor’s copy of the copyrighted work will be deleted, such that multiple copies will not exist. This premise is not only legally insignificant but also fails to recognize that such “transfer and delete” technology has not been proven effective.

Finally, ReDigi asserts that its infringing conduct constitutes fair use. ReDigi is incorrect. Under the first fair use factor, ReDigi has created a market substitute for Appellees’ copyrighted works and, as such, its use is nontransformative, commercial, and not entitled to fair use deference for any policy reason. Moreover, under the fourth fair use factor, copyright owners would suffer manifest market harm if entities like ReDigi could compete in markets for copyrighted works, all to the detriment of consumer choice.

MPAA and RIAA therefore urge this Court to affirm the district court's order.

## ARGUMENT

### **I. The First Sale Defense Does Not Allow ReDigi To Reproduce Plaintiffs' Recordings**

In their responding brief, the Appellees cogently explain why the district court properly concluded that ReDigi's digital transfers constitute unauthorized reproductions of Appellees' copyrighted works within the meaning of the Copyright Act. The history of the first sale defense and section 109 underscores that the district court followed well-established law and that ReDigi's position has no legal support.

In *Bobbs-Merrill Co.*, 210 U.S. at 350, the Supreme Court held that a notice purporting to limit resale of books to a set price could not prevent such resales as a matter of copyright law. The Court stated: "The 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.*" (Emphasis added.) The *Bobbs-Merrill* result arose out of the common law's refusal to permit restraints on *chattels*. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363 (2013), citing 1 E. Coke, *Institutes of the Laws of England* § 360, p. 223 (1628).

Thus, for over a century, the first sale defense has been limited to the further distribution of a particular copy after a lawful first sale by the copyright owner and

does not apply to any reproduction of that copy. Later cases have reaffirmed this principle that the first sale defense is narrowly tailored to apply only to the distribution of a particular copy. *See, e.g., Design Options, Inc. v. BellePointe, Inc.*, 940 F. Supp. 86, 91 (S.D.N.Y. 1996) (first sale is no defense to unlawful reproduction); *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741 (N.D. Ill. 1983) (first sale is no defense to unlawful adaptation under section 106(2)); *see Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 160 (3d Cir. 1984) (sale of video cassette does not permit public performance from such cassette). As noted above, the reason for this limitation is clear—applying the first sale defense to exclusive rights other than the distribution right would go well beyond the doctrinal foundations of the defense and would foster the proliferation of infringing works, to the copyright owner’s detriment.

Section 109(a) of the Copyright Act specifically incorporates these limitations to the first sale defense. That section provides, in pertinent part:

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

(Emphasis added). Thus, by its terms, section 109(a) applies only to the distribution right set forth in section 106(3), as applied to a particular copy or

phonorecord. Section 109 does not limit the copyright owner's reproduction (or any other) right with respect to the particular copy or phonorecord.

The old cases that ReDigi's law-professor *amici* cite are not to the contrary. For example, *Doan v. American Book Co.*, 105 F. 772 (7th Cir. 1901), involved the resale of tattered books that the defendant restored by cleaning them and repairing the bindings. There was no reproduction of the books or adaptation of the text. No exclusive right was implicated other than the distribution right, to which the first sale defense applied. Similarly, *Kipling v. G.P. Putnam's Sons*, 120 F. 631 (2d Cir. 1903), did not involve any right other than the distribution right. There, the defendant merely purchased authorized copies of the plaintiff's writings and sold them in collections rather than individually. The writings were not reproduced. All of the other cases on which the law professors rely fit the same pattern. *See, e.g., Harrison v. Maynard, M. & Co.*, 61 F. 689 (2d Cir. 1894) (sale of books damaged in fire covered by first sale defense); *Fawcett Publ'ns v. Elliot Pub. Co.*, 46 F. Supp. 717 (S.D.N.Y. 1942) (sale of repaired books noninfringing); *Blazon, Inc. v. Deluxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965) (display of repainted hobby horse noninfringing). Accordingly, nothing in these opinions derogates from Congress and the courts' longstanding limitation of the first sale defense to the distribution right.

**II. After Receiving Input From A Congressionally Appointed Committee, From The United States Copyright Office, And From The Commerce Department, Congress Has Declined To Expand The First Sale Defense To Apply To Digital Transfers.**

When Congress enacted the last major revision of the Copyright Act in 1976, it knew that the advent of the computer would require further legislative action. The House Report on the Act noted:

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work “in conjunction with automatic systems capable of storing, processing, retrieving, *or transferring information.*”

*See* H.R. Rep. No. 94-1476 at 116 (1976) (emphasis added). Congress therefore created CONTU “to assist the President and Congress in developing a national policy *for both protecting the rights of copyright owners and ensuring public access to copyrighted works* when they are used in computer and machine duplication systems, bearing in mind the public and consumer interest.” Library of Congress, Final Report of the National Commission on New Technological Uses of Copyrighted Works at 3 (July 31, 1978) (emphasis added).

In its final report, CONTU recognized that copyrighted works could be transferred between and among computer systems. *Id.* at 8 (“Modern computer systems either are used or have the capability to transmit, store and receive information across great distances” and that “the information displayed or copied



may often be a copyrighted work . . . . [E]ach of those acts, unless authorized, constitutes a copyright infringement.”). Despite its findings, CONTU made no recommendations for any changes to section 109. Thus, CONTU recognized that digital transmissions could impact the scope of copyright protection but did not recommend expansion of the first sale defense to address such transmissions. After receiving the CONTU report, Congress likewise did not entertain expanding the first sale defense to electronic transfers.

The CONTU report also suggested that Congress should periodically review changes in the market, including competition issues, caused by use of works via computers. *Id.* at 2. Congressional review has resulted in no enactment of a digital first sale defense.

In contrast to Congress’s inaction in expanding section 109 to create a digital first sale defense, Congress has amended section 109 a number of times in response to technological developments. For example, by 1983, after the advent of the audio cassette, record stores began renting out phonorecords and often at the same time selling blank audio cassette tapes so the consumer could reproduce the sound recording. 2 *Nimmer on Copyright* § 8.12 (2017). As a result, “it became apparent that the rental of phonorecords by record stores posed a threat to the viability of the entire record industry.” *Id.* In response, Congress enacted the Record Rental Amendment of 1984, which amended section 109 to limit the rental

of phonorecords. Pub. L. No. 98-450, 98 Stat. 1727. In 1990, Congress enacted a similar exception to the first sale defense regarding the rental of computer software. Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, Sec. 801, 104 Stat. 5089.

Moreover, in *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990), the Fourth Circuit held that play on a machine in a video arcade constituted a “public performance”. Because the traditional first sale defense does not extend to the public performance right, the Fourth Circuit held the activity infringing. The decision effectively prevented purchasers of video-arcade consoles from using the video games in a public setting. In response, Congress amended section 109 to make it apply, for the first time, in a limited fashion, to the public performance right “in the case of an electronic audiovisual game intended for use in coin-operated equipment.” 17 U.S.C. §109(e).<sup>4</sup>

These examples of legislative actions show that Congress will amend section 109 where appropriate to address advances in technology. It has not done so in connection with digital transfers.

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<sup>4</sup> The Amendment expired by its terms on October 1, 1995. *See* Act of Dec. 1, 1990, Pub. L. No. 101-650, Sec. 804(c), 104 Stat. 5089. Evidently because the video arcade marketplace had changed, Congress did not extend or amend the statute. 2 *Nimmer on Copyright* § 8.15[I].

Other legislative developments demonstrate that section 109(a) does not include a digital fair use defense. In 1996, the United States became a party to the World Intellectual Property Organization (“WIPO”) Internet Treaties, which allow the member states “to determine the conditions, if any, under which the exhaustion of [the distribution right] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.” WIPO Copyright Treaty, Article 6, Paragraph 2 (1996). Congress thus had an opportunity to address the so-called digital first sale defense when it ratified and implemented the WIPO Internet Treaties.

Again, Congress declined to amend section 109. Rather, when it passed the Digital Millennium Copyright Act in 1998 to implement the WIPO Internet Treaties, it directed the United States Copyright Office to consider the digital first sale question. Pub. L. No. 105-304, Sec. 104 (1998) (instructing Register of Copyrights to evaluate “the effects of the amendments made by this title and the development of electronic commerce and associated technology of the operations of sections 109 and 117 of title 17...”). In the resulting 2001 report, the Copyright Office confirmed long-settled law, namely that section 109(a) does not apply to digital transmissions:

Section 109 provides no defense to infringements of the reproduction right. Therefore, when the owner of a lawful copy of a copyrighted work digitally transmits that work in a way that exercises

the reproduction right without authorization, section 109 does not provide a defense to infringement.

Some commenters suggested that this reading of section 109 is unduly formalistic. The language of the statute, however, must be given effect. Section 109 is quite specific about the rights that are covered, and does not support a reading that would find additional rights to be covered by implication. Where Congress intended to immunize an activity, such as fair use, from infringement of any of the exclusive rights, it did so expressly. It simply cannot be presumed that where Congress did enumerate specific rights, it somehow intended other rights to be included as well. In addition, our reading of section 109 is entirely consistent with the judicial origin of the first sale doctrine in the *Bobbs-Merrill* decision. The Supreme Court drew a sharp distinction between the two rights, creating an exception to the vending (i.e., distribution) right only to the extent that it didn't interfere with the reproduction right. We therefore conclude that section 109 does not apply to digital transmission of works.

United States Copyright Office, Library of Cong., *DMCA Section 104 Report* at 80 (2001) (“DMCA Report”) (footnotes omitted).<sup>5</sup>

Finally, last year, the Department of Commerce Internet Policy Task Force issued a *White Paper on Remixes, First Sale, and Statutory Damages* (January 2016) (“White Paper”) that analyzed the issue in detail. The Task Force affirmed the view of the Copyright Office and yet again concluded: “The first sale doctrine does not permit the distribution of a work through digital transmission where copies are created, because the reproduction right is implicated.” *Id.* at 35.

In summary, in the sixteen years since the Copyright Office first issued its report, and in accordance with the further consistent advice and recommendations

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<sup>5</sup> Moreover, as discussed in Section III below, the Copyright Office advised against amending the statute to provide a digital first sale defense.

from expert agencies, Congress has declined to amend section 109 to expand the first sale doctrine to the type of digital reproductions at issue here. Moreover, a continuous line of authority establishes that the first sale defense under section 109(a) does not excuse ReDigi's infringing conduct. Congress has known for decades that digital transfers could impact copyright, has ordered and considered studies of the issue, and has declined to amend section 109. The district court properly granted summary judgment for appellees.

### **III. The Policy Arguments Of ReDigi And Its *Amici* Are Legally Irrelevant And Misguided.**

Because their position conflicts with established law, ReDigi and its *amici* argue that a first sale defense for digital transfers should exist as a matter of policy. Such policy arguments are not legally relevant to this appeal. *See Star Athletica, LLC v. Varsity Brands, Inc.*, 197 L. Ed. 2d 354, 366 (2017) (interpretation of the Copyright Act “is not a free-ranging search for the best copyright policy, but rather ‘depends solely on statutory interpretation.’”), *quoting Mazer v. Stein*, 347 U. S. 201, 214 (1954); *see also ReDigi, Inc.*, 934 F. Supp. 2d at 645 (“[T]his is a court of law and not a congressional subcommittee or technology blog ...”). *Amici* here will nevertheless briefly discuss how adopting ReDigi's position would conflict with the policy conclusions of the Copyright Office and the Commerce Department's Internet Task Force White Paper.

ReDigi and its *amici* generally assert that the district court’s ruling imposes anti-competitive “restraints” on consumers. *E.g.*, ReDigi Opening Brief at 3. To the contrary, consumers are currently enjoying an unprecedented variety of authorized services that provide access to copyrighted music, motion pictures, and other works. *See* White Paper at 58-60. Physical copies of sound recordings and motion pictures remain a robust piece of RIAA and MPAA members’ businesses, and the first sale defense continues to enable consumers to resell physical copies—*e.g.*, used CDs, Blu-ray Discs, and DVDs. *Id.* at 60. At the same time, diverse licensed digital business models have proliferated in the marketplace. As the White Paper concluded:

[T]he marketplace for online delivery of works is providing a number of the benefits of the first sale doctrine to varying degrees. A number of popular online services permit copies to be shared with or lent to family and friends, although sharing features do not necessarily mirror the ease of the first sale doctrine. Other services offer rental of copies or access-based equivalents. While they generally do not permit transfers of ownership of a digitally transmitted copy, they typically do deliver a principal benefit of secondary markets—lower prices than for the purchase of new copies.

White Paper at 58.

These licensed digital services provide many of the benefits of the first sale defense, as described by the White Paper, but also offer additional benefits that in many cases go well beyond what the first sale defense enables. These benefits include portability, cross-platform compatibility, the ability to share multiple

copies with family or friends, the availability of cloud storage, and the ability to re-download copies of purchased titles in the event of loss or even for convenience of storage. Consumers may subscribe to, access, and share with friends and family streaming audiovisual content on Netflix, Amazon, and Hulu. Recently, Netflix announced that portions of its catalogue could also be downloaded for mobile usage. Consumers may also rent or purchase copies of motion pictures from iTunes and other retailers participating in the Ultraviolet and Disney Movies Anywhere platforms, like Wal-Mart's VUDU and GooglePlay. Furthermore, consumers can use such services to store copies of their content "in the cloud," such that they can enjoy it when they are away from home and on multiple devices.<sup>6</sup> Likewise, the recording industry offers music for download (*e.g.*, through iTunes, GooglePlay, AmazonMP3, and 7digital); via streaming (*e.g.*, through Amazon Music Unlimited, Apple Music, Napster, Soundcloud Go, and

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<sup>6</sup> American audiences had access to 112 lawful online services at the end of 2014, compared to sixty-five at the end of 2011. Consumers used these services to access 66.6 billion television episodes online, compared to 34.4 billion three years earlier, and lawfully accessed online 7.1 billion movies compared to 1.8 billion in 2011. The streaming video marketplace alone has become so robust that the FCC has already been able to subdivide it into five sub-categories: (i) subscription linear, such as Sling TV, Sony Vue, and Verizon; (ii) subscription on-demand, such as Amazon Prime Instant Video, Hulu Plus, MUBI, and Netflix; (iii) transactional on-demand, such as VUDU and Xbox Video; (iv) ad-based linear and on-demand, such as Crackle, Hulu, Yahoo! Screen, and YouTube; and (v) transactional linear, such as Ultimate Fighting Championship. The website [wheretowatch.com](http://wheretowatch.com) provides consumers with up-to-date information on all of these authorized services for viewing and downloading motion pictures online.

Spotify); via ad-supported, audio-visual streaming sites (*e.g.*, through YouTube, VEVO, and VidZone); and via satellite and traditional AM/FM terrestrial radio.<sup>7</sup>

Such benefits created by licensed marketplace options far outweigh any purported burden on consumers resulting from the absence of a digital first sale defense. Notably, these market developments validate the recommendation of the Copyright Office in its 2001 report: rather than enacting an unprecedented expansion of the first sale defense that applies to digital reproductions, Congress should allow the market to develop in response to consumer demand. Such a market has, indeed, developed.

In contrast, the White Paper noted that supporters of a digital first sale defense presented little empirical data that consumers lose value under existing law or that consumers even have an interest in reselling digital copies: “While some consumers might be interested in reselling digital files, we do not know how many, for which types of works, or what the prices would be.” *Id.* at 59. The Task Force, like the Copyright Office in its prior report, concluded, “we cannot at this time

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<sup>7</sup> To help music fans navigate among all the choices, as well as avoid sites that contain pirated content and that may expose users to malware, identity theft, and unseemly advertising, the RIAA and the Music Business Association created Why Music Matters ([whymusicmatters.com](http://whymusicmatters.com)). Why Music Matters offers music fans a comprehensive, authoritative list of legitimate digital music services in the United States.



recommend extending the first sale doctrine to apply to digital transmissions of copyrighted works.” *Id.*<sup>8</sup>

Quite simply, ReDigi’s premise—that consumers desire to resell digital copies rather than take advantage of the current business models that provide a wide-range of choices to access copyrighted content where and when they want it—has no factual basis. If there is a consumer demand for digital first sale, the current market is meeting (or presumably will meet) that demand, through the above-mentioned licensing platforms.

ReDigi’s policy arguments also ignore the deleterious effects on copyright owners that would result from a digital first sale defense.<sup>9</sup> Allowing resale of

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<sup>8</sup> In a 2015 hearing, the Register of Copyrights reaffirmed the Copyright Office’s recommendation that Congress not legislate to create a digital first sale defense. Register’s Perspective On Copyright Review, hearing Before the Committee on the Judiciary, House of Representatives, 114th Cong. 1st Sess., Apr. 29, 2015, at 55 (statement of Ms. Pallante) (“I would probably monitor that situation at this point. I don’t see a need for congressional legislation, anyway, at this point.”)

<sup>9</sup> Applying the first sale doctrine to digital goods would not, in fact, create a market that is analogous to physical goods. For example, if iTunes allows a purchaser of a ninety-nine cent song to put five copies of that song on the user’s various devices, a “digital first sale right” could result in the consumer selling all five copies at, *e.g.*, seventy cents each. Application of the first sale doctrine in that scenario would create a significant profit for the user rather than a loss on the resale, as is typical with physical goods. Allowing the purchaser to resell digital copies would also disincentivize innovative digital offerings by copyright owners (*e.g.*, providing a downloadable digital copy with the purchase of a DVD or a movie ticket, and the common “disc-to-digital” program whereby DVD owners can receive a free digital copy of every movie they own on DVD).

works in digital form would damage copyright owners' primary sales markets in ways that resale of physical copies does not.

Physical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. The "used" copy is just as desirable as (in fact, is indistinguishable from) a new copy of the same work.

White Paper at 65 (citations omitted). Moreover, so-called "forward and delete" technology does not prevent hacking and wholesale copying. *Id.* at 66. Indeed, the record in this case indicates that ReDigi's software did not actually delete the selling user's copy but merely prompted the user to delete detected copies from her computer and connected devices, leaving unconnected devices (such as iPods and mobile phones) untouched. *ReDigi*, 934 F. Supp. 2d at 645. Whether the ReDigi prompt resulted in users deleting files is unknown.

In sum, there is no reason to upset the current marketplace by threatening the primary market for copyrighted works, undermining the burgeoning digital marketplace, and depriving consumers of the wide-ranging benefits that continue to arise from the growth of that marketplace. The district court correctly held that section 109(a) does not excuse ReDigi's unauthorized reproductions. In any event, in the final analysis, the salient policy considerations also support affirmance of the district court's order.

#### IV. ReDigi's Non-Transformative, Commercial Conduct Is Not Fair Use.

In evaluating a defense of fair use, a court will consider

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. All of the factors weigh against ReDigi.

##### A. *The First Factor Favors Plaintiffs.*

ReDigi does not dispute that its use of Appellees' copyrighted works is both commercial and nontransformative under the first factor. It nevertheless asserts that under *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), a case that did not involve the first sale defense, the first factor weighs in its favor because Congress and the courts have recognized that the first sale defense is an important right for consumers. In making this argument, ReDigi and its *amici* analogize its conduct to the rights of disabled individuals to access copyrighted works, which were at issue in *HathiTrust*. ReDigi Opening Brief at 43 (also citing *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. at 1363 (holding resale in the United States of books purchased outside United States was covered by first sale defense)).

*HathiTrust* is distinguishable for several reasons. First, that case relied heavily on the legislative history of the Copyright Act, which, as the Supreme

Court has recognized, expressly stated that making a copy of a copyrighted work for the convenience of a blind person is an example of fair use. *HathiTrust*, 755 F.3d at 102, *citing Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n. 40 (1984). ReDigi cites no similar legislative history even remotely relevant to its own conduct.<sup>10</sup>

Second, ReDigi's reliance on *Kirtsaeng* in support of the fair use defense is misplaced. *Kirtsaeng* did not address the question of fair use. Moreover, that case applied the first sale defense to the ***distribution*** right and therefore does not stand

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<sup>10</sup> *Amici* American Library Association, *et al.*, also rely on inapposite analogies. They cite rulemaking decisions of the Librarian of Congress (based on Copyright Office recommendations) granting exceptions to section 1201(a)(1), which prevents circumvention of access controls (*e.g.*, encryption or passwords) used to protect copyrighted works. ALA Brief at 7-16. These administrative decisions are irrelevant here. First, this case has nothing to do with access controls subject to section 1201. Second, Congress created a rulemaking procedure to address issues that might arise under the singular provisions of section 1201. *See* H.R. Rep. No. 105-551, pt. 2, at 36 (1998). Congress has never, of course, set up any type of rulemaking procedures under section 109(a). Third, even if the rulemaking decisions were relevant to this case, nothing in those decisions supports ReDigi. In connection with the section 1201 rulemaking process or otherwise, the Register of Copyrights has never found that a reproduction to enable a commercial resale of a digital work is fair use. Indeed, in declining to recommend an exemption for “non-reproductive space shifting” of copyrighted works, the Register favorably cited the district court's opinion in this case. Recommendation of the Register of Copyrights, Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention 123 (Oct. 2015), *available at* <https://www.copyright.gov/1201/2015/registers-recommendation.pdf> (“The most closely analogous case appears instead to be *Capitol Records v. ReDigi*, which concluded that transferring digital files from one location to another implicates the reproduction right and is therefore infringing, even where the original copy is contemporaneously or subsequently deleted.”).

for the proposition that there is a special interest in applying a first sale defense to unauthorized reproductions.

Third, ReDigi ignores a fundamental principle: “A fair use must not excessively damage the market for the original by providing the public with a substitute for that original work.” *HathiTrust*, 755 F.3d at 95. In this case, the entire purpose of ReDigi’s business is to provide the public with substitutes for Plaintiffs’ original sound recordings. Rather than create a secondary market, ReDigi creates a market that mirrors the primary market. Indeed, ReDigi directly competes with the primary market for Plaintiffs’ copyrighted works. That was not the case in *HathiTrust*, where the copying at most affected an ancillary market.

In short, neither *Hathitrust* nor *Kirtsaeng* tips the first factor in ReDigi’s favor. Because ReDigi’s commercial use competes with the primary market for authorized copies, the first factor weighs heavily against fair use.

*B. The Remaining Factors Weigh Heavily Against Fair Use.*

The second and third factors also weigh against fair use. ReDigi copies entire works of the most creative nature, including all varieties of music.

The fourth fair use factor “is undoubtedly the single most important element of fair use.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985); *Authors Guild v. Google, Inc.*, 804 F. 3d 202, 214 (2d Cir. 2015). “[W]hen a commercial use amounts to mere duplication of the entirety of an

original, it clearly “supersede[s] the objects” of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994). Here, ReDigi’s perfect digital copies are used for the commercial purpose of replacing the originals. Without question, ReDigi’s conduct would harm the copyright owner’s market for original copyrighted works and would cause additional harm to both owners and consumers by hindering the market for digital content. The fourth fair use factor weighs heavily against fair use.

### **CONCLUSION**

The history of the first sale defense and Congress’s continuing decision not to amend section 109(a) of the Copyright Act underscores the legal deficiencies in ReDigi’s position. In the final analysis, ReDigi and its supporters ask this Court to legislate based on purported policy concerns that have no empirical basis and that have been rejected by targeted government studies on the issues raised in this lawsuit. MPAA and RIAA respectfully urge the Court to affirm the ruling of the

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district court.

DATED: May 12, 2017

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J. Matthew Williams

By: /s/ Robert H. Rotstein

Robert H. Rotstein

*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF  
APPELLATE PROCEDURE 32(A)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,133 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
  
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DATED: May 12, 2017

By: /s/ Robert H. Rotstein  
Robert H. Rotstein



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12th day of May 2017, a true and correct copy of the foregoing *Amicus Curiae* Brief was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

DATED: May 12, 2017

/s/ Robert H. Rotstein

Robert H. Rotstein