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## SDNY in ReDigi Case Rejects "First Sale" Doctrine for Digital Music Files

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The courts are continuing to shape copyright law's "first sale doctrine" as the second of two separate, "first sale" cases was finally decided. Two weeks ago, we discussed how the US Supreme Court extended the doctrine to apply to overseas goods. And in a decision dated March 30, a Southern District of New York judge ruled that the doctrine does not apply to the sale of digital goods.

This case involved ReDigi, which enabled users to resell their digital music. ReDigi's software verified that the music file was legitimately purchased, erased it from the user's hard drive, and then uploaded it to ReDigi's servers where it was sold to another user. ReDigi argued that its "online marketplace for digital used music" was permitted under the "first sale doctrine." Capitol Records disagreed and sued ReDigi, arguing that the only way to enable the resale of a digital file is to make a copy of the file on the secondary buyer's computer or other device.

Judge Richard Sullivan acknowledged that the case involved "a fundamental clash over culture, policy and copyright law." However, focusing on what he acknowledged were "narrow, technical and purely legal issues," he rejected ReDigi's argument and found that the service infringed Capitol Records' copyrights.

In particular, Judge Sullivan focused strictly on the physical results of copying digital files. He noted that in order to resell a digital music file through ReDigi, a user must transfer the file to ReDigi's server. Even though the user no longer has access to the file, the transfer involves copying the original file, which is a violation of Capitol Records' reproduction rights. Such an unlawful reproduction could not be the basis of a lawful resale by ReDigi under the "first sale" doctrine embodied in Section 109(a), which protects only copies that are "lawfully made" under the Copyright Act. The court went on to say that the doctrine only applies with sales "by the owner of a particular copy . . . of that copy" (emphasis in original). The court followed this analysis to conclude that "the first sale defense is limited to material items that the copyright owner put into the stream of commerce."

ReDigi had argued that technological changes had rendered the literal terms of the Copyright Act ambiguous. In response, Judge Sullivan stated that while technological changes may have rendered Section 109(a) unsatisfactory to consumers and others, it did not render the statute ambiguous: "The statute plainly applies to the lawful owner's "particular" phonorecord, a phonorecord that by definition cannot be uploaded and sold on ReDigi's website." The court noted that ReDigi was effectively seeking an amendment of the Copyright Act, which was a prerogative left to Congress.

The ReDigi decision was obviously a strong rejection of a "digital first sale" doctrine. However, as we discussed last year, the European Court of Justice has effectively recognized a "digital first sale" right, at least for used licenses of downloaded software. It will be particularly interesting to see how other jurisdictions, as well as the Second Circuit Court of Appeals, which will likely hear an appeal of ReDigi, rule on this issue in the future. The DigitalHHR team will continue to monitor these developments and can answer any questions you might have.

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