



You Say You Want a Revolution: RIAA Does Not Agree that ReDigi's "Legally Downloaded Digital Music" Marketplace Qualifies for First Sale Protection

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Guest Post by Jake Linford, Assistant Professor, Florida State University College of Law

Two potentially revolutionary "disruptive technologies" were back in the news this week. The first is [ReDigi](#), a marketplace for the sale of used "legally downloaded digital music." [For over 100 years](#), copyright law has included a first sale doctrine, which says I can transfer "lawfully made" copy* (a material object in which a copyrighted work is fixed) by sale or other means, without permission of the copyright owner. The case law is codified at [17 U.S.C. § 109](#).

[ReDigi says](#) its marketplace falls squarely within the first sale limitation on the copyright owner's right to distribute, because it verifies that copies are "from a legitimate source," and it deletes the original from all the seller's devices. The Recording Industry Association of America has objected to ReDigi's characterization of the fair use claim on two primary grounds,** as seen in this [cease and desist letter](#).

First, as ReDigi describes its technology, it makes a copy for the buyer, and deletes the original copy from the computer of the seller. The RIAA finds fault with the copying. Section 109 insulates against liability for unauthorized redistribution of a work, but not for making an unauthorized copy of a work. Second, the RIAA is unpersuaded there are ReDigi can guarantee that sellers are selling "lawfully made" digital files. ReDigi's initial response can be found [here](#).

At a first cut, ReDigi might find it difficult to ever satisfy the RIAA that it was only allowing the resale of lawfully made digital files. Whether it can satisfy a court is another matter. It might be easier for an authorized vendor, like iTunes or Kindle, to mark legitimate copies going forward, but probably not to detect prior infringement.



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Still, verifying legitimate copies may be easier than shoehorning the "copy and delete" business model into the language of § 109. Deleting the original and moving a copy seems in line with the spirit of the law, but not its letter. Should that matter? ReDigi attempts to position itself as close as technologically possible to the framework spelled out in the statute, but that's a framework designed to handle the sale of physical objects that embody copyrightable works.

This is not the only area where complying with statutory requirements can tie businesses in knots. Courts have consistently struggled with how to think about digital files. In [London-Sire Records v. Does](#), the court had to puzzle out whether a digital file can be a *material object* and thus a copy* distributed in violation of § 106(3). The policy question is easy to articulate, if reasonable minds still differ about the answer: is the sale and distribution of digital files something we want the copyright owner to control or not?

As a statutory matter, the court in *London-Sire* concluded that material didn't mean material in its sense as "a tangible object with a certain heft," but instead "as a medium in which a copyrighted work can be 'fixed.'" This definition is, of course, driven by the statute: [copyright subsists](#) once an original work of authorship is fixed in a tangible medium of expression from which it can be reproduced, and the Second Circuit has recently held in the [Cablevision case](#) that a work must also be fixed – embodied in a copy or phonorecord for a period of more than transitory duration – for infringement to occur. Policy intuitions may be clear, but fitting the solution in the statutory language sometimes is not. And a business model designed to fit existing statutory safe harbors might do things that appear otherwise nonsensical, like Cablevision's decision to keep individual copies of digital videos recorded by consumers on its servers, to avoid copyright liability.

Potentially even more disruptive is the 3D printer, prototypes of which already exist in the wild, and which I will talk more about tomorrow.

* Technically, a digital audio file is a phonorecord, and not a copy, but that's a distinction without a difference here.

** The RIAA also claims that ReDigi violates the exclusive right of public performance by playing 30 second samples of members' songs on its website, but that's not a first sale issue.

Cross-posted at [PrawfsBlawg](#).