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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

UMG RECORDINGS, INC., CAPITOL  
RECORDS, LLC, CONCORD BICYCLE  
ASSETS, LLC, CMGI RECORDED MUSIC  
ASSETS LLC, SONY MUSIC  
ENTERTAINMENT, and ARISTA MUSIC,

*Plaintiffs,*

v.

INTERNET ARCHIVE, BREWSTER  
KAHLE, KAHLE/AUSTIN FOUNDATION,  
GEORGE BLOOD, and GEORGE BLOOD  
L.P.,

*Defendants.*

Case No. 3:23-cv-06522-MMC

**DEFENDANTS INTERNET ARCHIVE,  
KAHLE, BLOOD, AND GEORGE BLOOD  
L.P.'S NOTICE OF MOTION AND MOTION  
TO DISMISS AND SUPPORTING  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: March 22, 2024  
Time: 9:00 a.m.  
Place: Courtroom 7, 19th Floor  
Judge: Hon. Maxine M. Chesney

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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on March 22, 2024, or as soon thereafter as the matter may be heard, in the United States District Court for the Northern District of California, Courtroom of the Honorable Maxine M. Chesney, 450 Golden Gate Avenue, San Francisco, CA 94102, 19th Floor, Defendants Internet Archive, Brewster Kahle, George Blood, and George Blood L.P. (“GBLP”) will jointly move this Court for an order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing the complaint filed in this action on August 11, 2023 (ECF No. 1) (“Compl.”). The Motion is based on this Notice, the supporting Memorandum of Points and Authorities, the concurrently filed Declaration of Andrew M. Gass and Request for Judicial Notice with their accompanying materials, the complete files and records in this action, and any additional material and arguments as may be considered in connection with the hearing.

**ISSUE TO BE DECIDED**

Whether Plaintiffs’ claims premised on alleged acts of copyright infringement that occurred more than three years before the filing of the Complaint must be dismissed as time barred under the Copyright Act’s statute of limitations, 17 U.S.C. § 507(b).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The complaint in this case seeks to condemn a technological initiative to preserve a fast-  
4 disappearing part of this country’s cultural heritage: the sounds of 78 rpm records, a format for  
5 distributing recorded music widely used from the late 19th century through the 1950s. The specific  
6 quality of the sound, including the peculiar and distinct crackles and other imperfections that are  
7 a hallmark of this antiquated medium formed an indelible part of American culture for many  
8 decades. But the physical recordings themselves tend to disintegrate over time—and as the  
9 complete set of these old records gradually becomes unplayable, their unique contributions to our  
10 history is on a precipitous path to oblivion.

11 Defendant Internet Archive is a not-for-profit research library. For nearly two decades, it  
12 has worked to preserve 78 rpm records. Over six years ago, the Archive joined with a number of  
13 other libraries, universities, and related institutions to launch the Great 78 Project, an ambitious  
14 undertaking to systematically digitize the sounds of these relics—hisses, pops, and all—in order  
15 to preserve them for scholars and future generations. More than three years ago (outside the statute  
16 of limitations for challenging any digitization that had occurred as of that date) the trade  
17 association representing Plaintiff record labels sent a letter expressing its members’ disapproval of  
18 that project. Internet Archive founder Brewster Kahle promptly responded that the project would  
19 gladly exclude any digitization of the labels’ recordings that they identified to Internet Archive.  
20 The record labels never responded to that letter.

21 Out of the blue, over three years later, the record labels sued. They named as Defendants  
22 the Archive itself; Kahle; the contractor with whom the Archive collaborated on its digitization  
23 efforts, George Blood (a specialist who frequently works with record labels themselves); George  
24 Blood’s company, George Blood L.P. (“GBLP”); and, for some reason, the separate philanthropic  
25 foundation that Kahle co-founded, the Kahle/Austin Foundation. (The Foundation has no  
26 relationship whatsoever to the Great 78 Project.)

27 The complaint asserts direct, contributory, and vicarious infringement of Plaintiffs’  
28 purportedly copyrighted works related to Defendants’ alleged (a) “copying 78 rpm physical

1 records . . . into digital files,” (b) “copying those recordings to a server,” and (c) transferring or  
 2 streaming those files to the public. *See* Compl. ¶ 9. Under the Copyright Act’s statute of  
 3 limitations, Plaintiffs may not challenge any alleged infringement that occurred more than three  
 4 years before the complaint was filed (i.e., before August 11, 2020), unless they did not discover,  
 5 and a reasonable plaintiff should not have discovered, that earlier infringement. *See Media Rts.*  
 6 *Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019). But the complaint concedes  
 7 that Plaintiffs have been well aware of those activities since at least July 2020 (when they had their  
 8 trade association send the letter to Internet Archive), and that a substantial portion of Defendants’  
 9 allegedly infringing activity had already occurred before that date. Compl. ¶¶ 79-80. At a  
 10 minimum, a reasonable plaintiff in the record labels’ position would have known that a potential  
 11 cause of action for copyright infringement had accrued at that time.

12 As a result, any claims premised on allegations of infringement that pre-date August 11,  
 13 2020, are time-barred and must be dismissed. It is important that they be dismissed at the outset  
 14 of the case because, in addition to being required as a matter of law, that limitation on Plaintiffs’  
 15 claims will significantly narrow the scope of the case and materially advance the ultimate  
 16 resolution of this litigation.

17 For these reasons, Defendants Internet Archive, Kahle, Blood, and GBLP respectfully  
 18 request that the Court dismiss with prejudice any claims premised on alleged acts of infringement  
 19 that pre-date August 11, 2020, as time-barred.

## 20 **II. BACKGROUND**

### 21 **A. FACTUAL BACKGROUND**

#### 22 **1. The Internet Archive And 78 RPM Artifacts**

23 The Internet Archive is a not-for-profit research library founded by Brewster Kahle in  
 24 1996. Compl. ¶ 29, 47. The organization is perhaps best known for its “Wayback Machine,”  
 25 which has archived billions of web pages going back 26 years, and provides free access to these  
 26 historical materials for researchers, academics, and the public. *See About the Internet Archive*,  
 27 Internet Archive, <https://archive.org/about/> (last visited Jan. 25, 2024). Beyond the Wayback  
 28 Machine, the Internet Archive works to catalog, preserve, and provide public access to a wide



1 variety of other materials of significant cultural and historical importance. *Id.* One of these  
2 archival initiatives is the “Great 78 Project,” which works to collect, preserve, and digitize 78  
3 revolution-per-minute (“rpm”) music records. Compl. ¶ 48.

4 “The 78 rpm record was introduced in the 1890s, about ten years after Thomas Edison  
5 developed his phonograph machine and revolutionized the ways human beings thought about  
6 sound.” Amanda Petrusich, *Do Not Sell At Any Price* 10 (2014) (hereinafter “Petrusich”). Made  
7 out of a brittle shellac resin material, rather than the vinyl that is used for records today, “78s”  
8 became “the standard format of sound recordings” throughout “the first half of the twentieth  
9 century,” and “at least a million titles had been issued by various record companies around the  
10 world” in the 78 rpm format by the late 1950s. Pekka Gronow, *The World’s Greatest Sound*  
11 *Archive: 78 RPM Records as a Source for Musicological Research*, 43 *Traditiones* 31, 32 (2014).  
12 By the 1960s, however, 78 rpm records fell out of favor, and were “gradually replaced by” newer,  
13 lower-speed formats, like “seven-inch, two-song 45s and twelve-inch, long-playing 33<sup>1</sup>/<sub>3</sub> records.”  
14 Petrusich, *supra*, at 10.

15 Because of the materials used to produce 78 rpm records, and the technology and method  
16 used to record the music onto the records, the sound of a 78 rpm record differs significantly from  
17 the music that listeners are accustomed to hearing on digital streaming services like Spotify or  
18 Apple Music, compact discs, or even vinyl records. “Depending on the quality of the [78 rpm]  
19 recording and the condition of the disc, there’s often a high and persistent background hiss” or the  
20 sound “might be fully obscured by a staticky sizzle.” *Id.* at 17. Preserving these records as they  
21 would have been heard and experienced by listeners at the time they were made approximately  
22 one hundred years ago is a critically important part of archiving these works. By painstakingly  
23 digitizing the actual sounds produced by the physical objects—imperfections and all—one is able  
24 to “captur[e] an era.” Exhibit C.<sup>1</sup> Moreover, 78 rpm records “contain important recordings that  
25 capture the evolution of music in the early 20th century, including rare jazz and blues, old hillbilly,  
26 and some of the earliest examples of rock ‘n’ roll,” many of which were never transferred from

27 \_\_\_\_\_  
28 <sup>1</sup> “Ex. \_\_\_” is a reference to the Exhibits to the Declaration of Andrew M. Gass, filed concurrently  
with this motion.

1 78s to other media. *Id.* For example, Aileen Stanley was “one of the most popular singers of the  
2 1920s, who sold some 25 million records,” but her music “can only be found on rare 78s” today.  
3 *Id.*

4 Despite their popularity throughout the first half of the twentieth century, 78 rpm records  
5 are a uniquely “finite resource.” Petrusich, *supra*, at 4. Because of the materials used for their  
6 manufacture, they “are thick, brittle, and heavy,” *id.* at 14, and yet “are remarkably fragile,” *id.* at  
7 4. Many 78 rpm records were “produced in very limited quantities.” *Id.* For these reasons, “[t]he  
8 stakes are . . . high from a preservationist standpoint” for continued access to the unique sound of  
9 78 rpm records. Amanda Petrusich, *They’ve Got Those Old, Hard-to-Find Blues*, N.Y. Times  
10 (July 8, 2009), <https://www.nytimes.com/2009/07/12/arts/music/12petr.html>.

## 11 2. Launch Of The Great 78 Project

12 In recognition of the importance of 78 rpm records to our shared cultural heritage, the  
13 Internet Archive and its partners launched the Great 78 Project over six years ago to collect,  
14 preserve, and digitize the unique sounds embodied in 78 rpm records for the benefit of researchers,  
15 historians, members of the public, and future generations. *See* Compl. ¶¶ 48-49; *The Great 78*  
16 *Project*, Internet Archive, <https://great78.archive.org/> (last visited Jan. 25, 2024) (hereinafter “*The*  
17 *Great 78 Project*”).

18 The Internet Archive and the Great 78 Project partnered with GBLP for professional  
19 digitization of 78 rpm records donated to the Great 78 Project by collectors and libraries. *See*  
20 Compl. ¶¶ 12, 48-49. These collections include works donated, for example, by the Archive of  
21 Contemporary Music, the Boston Public Library Sound Archive, universities, and individual  
22 collectors. *See About Collections*, The Great 78 Project, <https://great78.archive.org/about/> (last  
23 visited Jan. 25, 2024). The digitization process involves an engineer using sophisticated  
24 equipment and software to transfer the source media of the 78 rpm record into a digital format that  
25 can be archived electronically and accessed and played digitally. *See Process*, George Blood L.P.,  
26 <https://www.georgeblood.com/process> (last visited Jan. 25, 2024). That digitization process  
27 includes the use of “different sizes and shapes of stylus”—the part of a record player that holds  
28 the needle that reads or plays the recorded sounds in the grooves of a record—to digitize the same

1 recordings. *The Great 78 Project*; see also Ex. C (describing how GBLP uses a “turntable with  
2 four styluses—each a different size to pick up the sound in a distinct way”). The size and shape  
3 of the stylus determines the sound generated by the record, because the stylus affects the vibrations  
4 generated in response to the variations in the record’s grooves. By capturing the differences in  
5 sound generated by different styluses, this recording process “facilitate[s] different kinds of  
6 analysis” by researchers. Ex. D (“[D]ifferent types of styluses can affect how a record sounds  
7 when played, and playback speeds were not standardized until around the late ’20s, meaning there  
8 is debate about the ‘correct speed’ at which a record should be played.”). Creating those kinds of  
9 examples of varied recording and playing styles is important to preserve these works as they would  
10 have been heard and experienced at the time they were created.

11 After the records have been painstakingly digitally archived in this way, the physical  
12 records are stored for long-term preservation, and the digital versions of the recordings are  
13 uploaded to the Great 78 Project’s website by the Internet Archive, where they can be accessed by  
14 researchers, historians, and members of the public to listen to online. See *The Great 78 Project:  
15 Preservation*, Internet Archive, <https://great78.archive.org/preservation/> (last visited Jan. 25,  
16 2024); Compl. ¶¶ 48-49.

17 The Great 78 Project was no secret. Soon after its launch, the Great 78 Project received  
18 broad press coverage within and outside of the music industry. See, e.g., Ex. D (reporting that “the  
19 Great 78 Project to date has put over 50,000 digitized 78rpm discs and cylinder recordings on the  
20 Internet Archive,” and linking to the Great 78 Project’s Twitter account “that tweets links to one  
21 of its newly digitized 78s every 10 minutes”); Ex. E (reporting that the “volunteer group simply  
22 wants to preserve old vinyl records. They believe the 78rpm vinyl records and cylinder recordings  
23 are valuable research artifacts.”); Ex. F (reporting that GBLP was digitizing roughly 50 singles per  
24 engineer per day, or 5,000 to 6,000 sides per month); Ex. G (reporting the Boston Public Library’s  
25 “substantial collection [is] being transferred to the Internet Archive [a]s part of the archive’s  
26 broader Great 78 Project, which aims to collect, catalog and digitize millions of vinyl records”);  
27 Zoë Beery, *The Great 78 Project Is Preserving Our Sonic Past*, Outline (Dec. 7, 2017),  
28 <https://theoutline.com/post/2572/great-78-project-record-archive-podcast> (interviewing George

1 Blood about GBLP and the Great 78 Project’s digitization efforts); Ex. H (reporting that “[t]he  
 2 Internet Archive and [partners] are attempting to preserve and digitize every single remaining 78-  
 3 rpm vinyl album, and they’re putting each of these recordings online, for free”); Ex. I (reporting  
 4 that Internet Archive “managed to preserve the sounds of brittle 78 rpm record discs, some of  
 5 which are so fragile, they could crumble in your hands”).<sup>2</sup> As many of these publications  
 6 highlighted, the recordings targeted by the Great 78 Project are not “commonly available” on—  
 7 indeed, “are overlooked” by—commercial streaming platforms. Ex. D.

8 The Great 78 Project has been praised by curators and historians for the ambitious scale  
 9 and importance of its work. For example, Jonathan Hiam—who served as curator of the American  
 10 Music Collection and the Rodgers and Hammerstein Archives of Recorded Sound at the New York  
 11 Public Library—commented that the Great 78 Project “demonstrate[s] what can and should be  
 12 done if any institution is really serious about preserving our collective cultural experience as  
 13 expressed in sound.” *About Collections*, The Great 78 Project, <https://great78.archive.org/about/>  
 14 (last visited Jan. 25, 2024).

## 15 B. HISTORY OF PLAINTIFFS’ DISPUTE

16 On July 22, 2020—years after the Great 78 Project had been established and generated  
 17 significant industry attention—the Recording Industry Association of America (“RIAA”), a trade  
 18 association representing record labels and other members of the recording industry, including most  
 19 of the Plaintiffs,<sup>3</sup> wrote to the Internet Archive asserting that the Great 78 Project had infringed its  
 20 members’ copyrights by digitizing and making certain works available for streaming on the  
 21 internet. Ex. A (incorporated at Compl. ¶ 80). Indeed, in detailing its infringement allegations,  
 22 the RIAA even identified specific artists such as Elvis Presley, Duke Ellington, and Billie Holiday,  
 23 among others, evidencing a thorough investigation of the Great 78 Project. *Id.* The Internet  
 24 Archive responded, offering to discuss removal of specific works with the RIAA and its members  
 25

26 \_\_\_\_\_  
 27 <sup>2</sup> A number of these publications mistakenly refer to the 78 rpm records as made of vinyl, when  
 they are actually made of the much more fragile shellac. *See* Ex. I.

28 <sup>3</sup> *See RIAA Members*, RIAA, <https://www.riaa.com/about-riaa/riaa-members/> (last visited Jan. 25,  
 2024).

1 to the extent that there are “particular recordings” that the members could identify. Ex. B  
2 (incorporated at Compl. ¶ 81). The RIAA and its members never responded.

3 More than three years later, Plaintiffs abruptly filed this lawsuit on August 11, 2023, in the  
4 Southern District of New York. *See generally* Compl. at 1. Plaintiffs are six record labels—Sony  
5 Music Entertainment, Arista Music, UMG Recordings, Capitol Records, Concord Bicycle Assets  
6 (“CBA”), and CMGI Recorded Music Assets. Compl. ¶¶ 21-27. Plaintiffs allege that they “own  
7 and/or control in whole or in part the exclusive rights in innumerable sound recordings” that have  
8 been “infringed by Defendants through the Great 78 Project.” Compl. ¶ 28. Plaintiffs do not  
9 specify exactly what rights they own as to each asserted sound recording. Given the age of most  
10 of the recordings preserved by the Great 78 Project, Plaintiffs’ claims depend on tracing the chain  
11 of title of their alleged copyrights as far back as the turn of the twentieth century (or earlier). *Cf.*  
12 ECF No. 1-1 (table of alleged sound recordings at issue). Plaintiffs assert claims for direct  
13 infringement, contributory infringement, and vicarious infringement under the Copyright Act. *See*  
14 Compl. ¶¶ 94-198.

15 The case was assigned to Judge Lorna Schofield and, consistent with Judge Schofield’s  
16 practices and procedures for civil cases, the parties submitted pre-motion letters outlining the bases  
17 for proposed motions in advance of the initial case management conference. In their pre-motion  
18 letter, Defendants explained that they intended to move to transfer the case from the Southern  
19 District of New York to the Northern District of California, or in the alternative, to dismiss the  
20 complaint against certain Defendants for lack of personal jurisdiction, and for failure to state a  
21 claim. *See* ECF No. 35 at 1-3. Defendants also proposed that the Court stage the briefing, such  
22 that any motion to transfer or dismiss for lack of personal jurisdiction could be resolved first, with  
23 any motion to dismiss for failure to state a claim to follow only in the event that a motion to transfer  
24 was denied or the Court concluded it had personal jurisdiction. *Id.* at 1, 3. Per Judge Schofield’s  
25 Individual Rules, Defendants’ pre-motion letters “stay[ed] the time to answer or move until further  
26 ordered by the Court.” *Individual Rules and Procedures for Civil Cases for Judge Lorna G.*  
27 *Schofield*, Rule III.C.2. On October 19, 2023, following the initial case conference, Judge  
28

1 Schofield ordered that Defendants file “a single transfer motion,” with any Rule 12 motions to be  
2 decided only after the motion to transfer was resolved, if necessary. ECF No. 44.

3 Judge Schofield granted Defendants’ motion to transfer to the Northern District of  
4 California on December 8, 2023. ECF No. 59. The Northern District of California acknowledged  
5 receipt of the case on December 19, 2023, and the initial case management conference was set for  
6 March 22, 2024. ECF Nos. 60 & 61. Pursuant to Local Civil Rule 16-2(c) of the Rules of this  
7 Court, Plaintiffs served Defendants with “a copy of the [Initial Case Management Conference]  
8 Order and the pertinent supplementary materials specified in Civil L.R. 4-2” on January 9, 2024.  
9 ECF No. 70.

### 10 C. PLAINTIFFS’ THEORIES OF LIABILITY

11 Plaintiffs assert the exclusive rights “in whole or in part” to over 2,700 sound recordings,  
12 all of them recorded at least 70 years ago, if not more. *See, e.g.*, Compl. ¶¶ 64-68; *see also* ECF  
13 No. 1-1. Plaintiffs advance three distinct theories of liability for copyright infringement: (1) direct  
14 infringement, (2) contributory infringement, and (3) vicarious liability for another’s infringement.  
15 But Plaintiffs’ overreaching claims and sprawling allegations are defective from the start.

16 Even assuming Plaintiffs can establish their (respective) ownership of the exclusive right  
17 allegedly infringed of the over 2,700 asserted works, Plaintiffs will not be able to excuse their  
18 delay of (at least) three years in bringing this lawsuit. As explained, Plaintiffs undeniably had  
19 knowledge of specific instances of alleged infringement associated with Internet Archive’s Great  
20 78 Project, as evidenced by the RIAA’s cease and desist letter sent on July 22, 2020. But Plaintiffs  
21 did not bring suit until August 11, 2023—outside of the Copyright Act’s three-year statute of  
22 limitations for any infringement occurring before the RIAA sent its letter. As to these instances  
23 of purported infringement occurring before August 11, 2020 (the three-year lookback period), the  
24 allegations fail to state a claim under Rule 12. And for the balance of Plaintiffs’ claims that may  
25 not be time-barred (if any), Defendants’ archiving activities at issue here fall squarely within both  
26 the text and the spirit of the Copyright Act’s fair use defense (among others). Indeed, the Great  
27 78 Project is a not-for-profit community-driven preservation project specifically designed to

28

1 safekeep the character and history of 78 rpm recordings for scholarship and research.<sup>4</sup> While this  
2 Motion will not dispense with the entirety of the case, dismissing Plaintiffs’ time-barred claims  
3 will dispense with unnecessary distraction and cost (for the parties and the Court).

### 4 **III. ARGUMENT**

#### 5 **A. LEGAL STANDARD**

6 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
7 accepted as true, to state a claim to relief that is plausible on its face.” *Great Minds v. Office*  
8 *Depot, Inc.*, 945 F.3d 1106, 1109 (9th Cir. 2019) (internal quotation marks omitted) (quoting  
9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A claim has facial plausibility when the plaintiff  
10 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
11 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. For purposes of the motion to dismiss,  
12 the court accepts well-pleaded factual allegations in the complaint as true and draws reasonable  
13 inferences in the plaintiff’s favor, but disregards “mere conclusory statements” and legal  
14 conclusions. *Teleaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (citation omitted).

15 When resolving a motion to dismiss for failure to state a claim under Federal Rule of Civil  
16 Procedure 12(b)(6), a court “must consider the complaint in its entirety, as well as other sources  
17 courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular,  
18 documents incorporated into the complaint by reference, and matters of which a court may take  
19 judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).  
20 Documents that are subject to judicial notice may be considered “without converting a motion to  
21 dismiss into a motion for summary judgment.” *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d  
22 1005, 1016 n.9 (9th Cir. 2012).

23 A statute of limitations defense may be raised by way of a motion to dismiss “if the running  
24 of the limitations period is apparent on the face of the complaint.” *Cross v. City of San Francisco*,  
25 386 F. Supp. 3d 1132, 1141 (N.D. Cal. 2019) (citation omitted); *see also Rivera v. Peri & Sons*

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27  
28 <sup>4</sup> Defendants’ fair use and other affirmative defenses and limitations of liability are not presented  
by this motion, but are referenced here to help illustrate why narrowing the case by dismissing  
facially time-barred claims will help focus the case on the relevant issues.

1 *Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) (“When an affirmative defense is obvious from the  
2 face of a complaint, . . . a defendant can raise that defense in a motion to dismiss.”).

3 **B. A SIGNIFICANT BULK OF PLAINTIFFS’ CLAIMS, PREMISED ON**  
4 **ALLEGED INFRINGEMENT THAT OCCURRED BEFORE AUGUST 11,**  
5 **2020, IS TIME-BARRED AND MUST BE DISMISSED**

6 Plaintiffs filed the complaint on August 11, 2023. The Copyright Act states: “No civil  
7 action shall be maintained under the [Act] unless it is commenced within three years after the claim  
8 accrued.” 17 U.S.C. § 507(b). As the Supreme Court has explained, the limitations provision  
9 “bars relief of any kind for conduct occurring prior to the three-year period.” *Petrella v. Metro-*  
10 *Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667 (2014). Moreover, claims for copyright infringement are  
11 subject to “the separate-accrual rule.” *Id.* at 671. Under that rule, “each infringing act starts a new  
12 limitations period.” *Id.* In other words, there is no “recovery for continuing copyright violations.”  
13 *Starz Ent., LLC v. MGM Domestic Television Distrib., LLC*, 39 F.4th 1236, 1241 (9th Cir. 2022).  
14 Thus, “an infringement is actionable within three years, and only within three years, of its  
15 occurrence,” and an “infringer is insulated from liability for earlier infringements of the same  
16 work.” *Petrella*, 572 U.S. at 671. The “limitations period generally begins to run at the point  
17 when ‘the plaintiff can file suit and obtain relief,’” *i.e.*, “when an infringing act occurs.” *Id.* at 670  
18 (citation omitted). This is known as “the incident of injury rule.” *Id.* As an alternative to the  
19 incident of injury rule, the Ninth Circuit applies the “discovery rule.” *See Starz*, 39 F.4th at 1239-  
20 40. Under that rule, “a claim for copyright infringement may accrue when the copyright owner  
21 discovers, or reasonably should have discovered, the infringement.” *Id.* at 1240.<sup>5</sup>

22 The Act’s three-year statute of limitations and the discovery rule together prohibit Plaintiffs  
23 from challenging any alleged act of copyright infringement that pre-dates August 11, 2020, *unless*  
24 Plaintiffs can demonstrate that they neither knew *nor should have known* that their copyright  
25 infringement claim had accrued before that date. *See Petrella*, 572 U.S. 669-72; *Starz*, 39 F.4th  
26 1239-42. But Plaintiffs’ own complaint makes clear that, for a substantial swath of alleged  
27 instances of direct infringement of works in suit, their claims are time barred.

28 <sup>5</sup> The Supreme Court has reserved the question whether the discovery rule applies in Copyright Act cases, or instead whether the limitations period always begins to run immediately upon the incident of injury. *See Petrella*, 572 U.S. at 670 n.4; *Starz*, 39 F.4th at 1241-42.



1 As the complaint describes, the RIAA (Plaintiffs’ trade association) sent a letter to the  
2 Internet Archive on July 22, 2020, asserting that the Great 78 Project infringed Plaintiffs’ and  
3 others’ copyrighted works. *See* Compl. ¶ 80. That letter alleged:

4 [Y]ou . . . have reproduced thousands of sound recordings in which  
5 RIAA member companies own or exclusively control copyrights,  
6 and have made those recordings available to the public for  
7 unrestricted download and streaming, all without the consent of  
8 right owners. . . . Your unauthorized reproduction, distribution and  
9 public performance of these recordings is a plain violation of the  
10 RIAA member companies’ rights . . . and constitutes nothing less  
11 than piracy on a massive scale.

12 Compl. ¶ 80 (citation omitted). In other words, the letter acknowledges plaintiffs’ belief, as of  
13 July 22, 2020, that “thousands” of recordings had already been digitized and uploaded to the Great  
14 78 Project, including those by specific named artists. *Id.*; *see also* Ex. A. And it admits that the  
15 RIAA and its members had actual knowledge of the alleged “violation of [their] rights,” and  
16 therefore knowledge that a cause of action for copyright infringement had accrued, by July 22,  
17 2020. Compl. ¶ 80; Ex. A. At that point, Plaintiffs knew that for each of those thousands of  
18 recordings, a claim for direct infringement against Defendants related to the digitization and  
19 uploading of those recordings had accrued, as had any claims for contributory or vicarious liability  
20 from the digitization and uploading that had occurred prior to that date.

21 And even if Plaintiffs did not have actual knowledge of those alleged acts of infringement,  
22 the RIAA letter at a minimum demonstrates that a reasonable plaintiff “*should have discovered*”  
23 the alleged infringement and that a cause of action for infringement had accrued as of that date.  
24 *Starz*, 39 F.4th at 1242 (emphasis added). That conclusion is only underscored by the fact that the  
25 Great 78 Project had been highlighted by mainstream and industry news outlets as early as 2017.  
26 *See, e.g.*, Ex. D (reporting in August 2017 that “the Great 78 Project to date has put over 50,000  
27 digitized 78rpm discs and cylinder recordings on the Internet Archive” and linking to the Great 78  
28 Project’s Twitter account “that tweets links to one of its newly digitized 78s every 10 minutes”);  
*see also supra* at 5-6 (discussing other news coverage). That undoubtedly provided Plaintiffs  
“enough information to warrant an investigation which, if reasonably diligent, would have led to  
discovery of the claim.” *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047-48

1 (9th Cir. 2020) (alteration and citation omitted) (concluding that Oracle’s claims were time-barred  
 2 because a reasonable plaintiff in Oracle’s position should have discovered its claim had accrued).  
 3 This is particularly true given the litigation experience and focus of the Plaintiffs here: seasoned  
 4 corporate litigators who routinely file copyright infringement suits.<sup>6</sup> *See, e.g., Minden Pictures,*  
 5 *Inc. v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019) (explaining that a “reasonable  
 6 copyright holder in Minden Pictures’ position,” i.e., “a seasoned litigator that has filed 36 lawsuits  
 7 to protect its copyrights [in the years leading up to the complaint]—should have discovered, with  
 8 the exercise of due diligence, that its copyright was being infringed within the statutory time  
 9 period”).

10 Indeed, courts regularly rely on cease-and-desist letters like the one sent by the RIAA to  
 11 conclude that a copyright infringement claim accrued under the discovery rule no later than the  
 12 date of the letter. *See, e.g., Monbo v. Nathan*, 623 F. Supp. 3d 56, 86-87 (E.D.N.Y. 2022)  
 13 (concluding that copyright claim accrued under discovery rule no later than letter to defendants  
 14 asserting infringement and holding that claims were time-barred); *Axxiom Mfg., Inc. v. McCoy*  
 15 *Invs., Inc.*, 846 F. Supp. 2d 732, 746-47 (S.D. Tex. 2012) (same); *Colo’n v. Akil*, 2012 WL  
 16 13012726, at \*1 (C.D. Cal. May 8, 2012) (similar); *Big East Ent., Inc. v. Zomba Enter., Inc.*, 453  
 17 F. Supp. 2d 788, 794-95 (S.D.N.Y. 2006) (similar); *Barksdale v. Robinson*, 211 F.R.D. 240, 244-  
 18 45 (S.D.N.Y. 2002) (similar).

19 Given that Plaintiffs’ claims for infringement from the alleged digitization and uploading  
 20 of these “thousands” of recordings, and for any claims for contributory or vicarious infringement  
 21 related to those alleged acts, accrued no later than July 22, 2020, the discovery rule provides no  
 22 \_\_\_\_\_

23 <sup>6</sup> *See, e.g., BMG Rts. Mgmt. (US) LLC v. Altice USA, Inc.*, No. 2:22-cv-00471 (E.D. Tex. Dec. 14,  
 24 2022) (copyright infringement suit by plaintiffs Capitol Records LLC, Concord Bicycle Assets  
 25 LLC, CMGI, and UMG Recordings, Inc.); *Sony Music Ent. v. Vital Pharms., Inc.*, No. 1:21-cv-  
 26 22825 (S.D. Fla. Aug. 3, 2021) (copyright infringement suit by plaintiffs Sony Music  
 27 Entertainment and Arista Music); *Sony Music Ent. v. Cox Commc’ns, Inc.*, No. 1:18-cv-00950  
 28 (E.D. Va. July 31, 2018) (copyright infringement suit by plaintiffs Sony Music Entertainment,  
 Arista Music, Capitol Records LLC, and UMG Recordings, Inc.); *Atl. Recording Corp. v.*  
*Spinrilla, LLC*, No. 1:17-cv-00431 (N.D. Ga. Feb. 3, 2017) (copyright infringement suit by  
 plaintiffs Arista Music, Sony Music Entertainment, Capitol Records LLC, and UMG Recordings,  
 Inc.); *UMG Recordings, Inc. v. Grande Commc’ns Networks LLC*, No. 1:17-cv-00365 (W.D. Tex.  
 Apr. 21, 2017) (copyright infringement suit by plaintiffs UMG Recordings, Inc., Arista Music,  
 Capitol Records LLC, and Sony Music Entertainment).

1 relief from the Copyright Act’s three-year limitations period. As a result, Plaintiffs’ claims must  
2 be limited to “retrospective relief running only three years back from the date the complaint was  
3 filed”—i.e., August 11, 2020. *Petrella*, 572 U.S. at 672. This Court should enter an order  
4 dismissing with prejudice any claims premised on allegations of infringement based on conduct  
5 by any Defendant that occurred prior to August 11, 2020.

6 While it’s true that dismissal of claims premised on alleged infringement that took place  
7 before August 11, 2020, will not resolve the case entirely, dismissal at this juncture will have a  
8 significant and beneficial narrowing effect on the scope of this case, and could materially advance  
9 the ultimate resolution of Plaintiffs’ remaining claims. Specifically, as to the at least *thousands* of  
10 recordings with respect to which Plaintiffs’ claims are time-barred, the case would be reduced to  
11 Plaintiffs’ claims for contributory or vicarious liability related to third-party patrons’ streaming or  
12 downloading of recordings on the Great 78 Project’s website (after August 11, 2020).

13 Plaintiffs face significant hurdles to establishing those claims on the merits. Claims of  
14 secondary liability must be premised on an underlying instance of direct infringement, meaning  
15 Plaintiffs will be required to prove that third party patrons’ streams infringed Plaintiffs’ copyrights,  
16 and did not constitute fair use. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 591 F. Supp.  
17 2d 1098, 1104 (N.D. Cal. 2008) (“All theories of secondary liability for copyright and trademark  
18 infringement require some underlying direct infringement by a third party.”). As Defendants will  
19 show, patrons’ streaming of archival versions of 78 rpm records is generally for education and for  
20 cultural and historical research, such as, for example, studying “the ways in which listening,  
21 performance, and the function of music have changed over time.” *History of Music (MUSIC 70*  
22 *001 – LEC 001)*, Academic Guide, Univ. of Calif. Berkeley,  
23 <https://classes.berkeley.edu/content/2024-spring-music-70-001-lec-001> (last visited Jan. 25,  
24 2024). Such use is quintessentially “fair” and non-infringing. *See, e.g., Tresóna Multimedia, LLC*  
25 *v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638, 652 (9th Cir. 2020) (concluding that  
26 nonprofit educational use of work by high school music teacher was fair use). As such, these  
27 patron streams do not constitute acts of direct infringement for which Defendants could be  
28 secondarily liable. *See, e.g., Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172-73

1 (N.D. Cal. 2019) (dismissing secondary liability claims for failure to adequately allege underlying  
2 direct infringer).

3 And even assuming Plaintiffs would be able to prove certain instances of direct  
4 infringement, they still face the hurdles of proving the remainder of the elements of contributory  
5 or vicarious infringement, including Defendants' knowledge that those downloads or streams were  
6 infringing, or that Plaintiffs' specific recordings were draws for patrons. *See generally Perfect 10,*  
7 *Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017); *Louis Vuitton*, 591 F. Supp. 2d at 1104.  
8 Accordingly, the case will proceed very differently, and much more efficiently, once the time-  
9 barred claims are dismissed from the complaint.

10 Courts routinely dismiss time-barred claims under Rule 12(b)(6) where such dismissal  
11 would not eliminate all claims, but would have a narrowing effect on the case such as it would  
12 here. *See, e.g., Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1147-48 (N.D. Cal. 2007) (dismissing  
13 copyright infringement claims prior to August 31, 2002 as time-barred and allowing claims after  
14 August 31, 2002 to survive); *Dermansky v. Young Turks, Inc.*, 2023 WL 8884364, at \*3-4 (C.D.  
15 Cal. Nov. 3, 2023) (granting partial dismissal of copyright infringement claims based on statute of  
16 limitations defense); *Good Morning to You Productions Corp. v. Warner-Chappell Music, Inc.*,  
17 2013 U.S. Dist. LEXIS 198676, \*10 (C.D. Cal. Oct. 13, 2013) (same). In fact, Plaintiff UMG  
18 Recordings secured this very type of relief when it was a defendant in *Johnson v. UMG*  
19 *Recordings, Inc.*, 2019 WL 5420278, at \*2-4 (C.D. Cal. Oct. 23, 2019) (granting defendant's  
20 motion to dismiss, in part, "as to all [copyright] claims accrued outside the relevant statute of  
21 limitations"). As UMG Recordings explained in its briefing, "[a] court may grant a motion to  
22 dismiss where the complaint reveals that the action is untimely," and "Plaintiff's Complaint plainly  
23 reveals that his action is untimely." Def.'s Mot. to Dismiss at 9, *Johnson v. UMG Recordings,*  
24 *Inc.*, No. 2:19-cv-02364 (C.D. Cal. June 3, 2019) (ECF No. 14). So too here.

25 As in *Goldberg*, *Dermansky*, *Good Morning to You*, and *Johnson*, Plaintiffs' own  
26 complaint admits that years of conduct and thousands of instances of alleged infringement are  
27 time-barred under the Copyright Act's statute of limitations. The Court should dismiss claims  
28

1 premised on those allegations with prejudice. Doing so will streamline this case and meaningfully  
2 advance the ultimate resolution of the remaining claims.

3 **CONCLUSION**

4 For the foregoing reasons, the Court should dismiss with prejudice any claims premised on  
5 alleged acts of infringement that pre-date August 11, 2020, as time-barred.

6 Dated: January 26, 2024

7 Respectfully submitted,

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