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VIA ELECTRONIC TRANSMISSION

June 10, 2020

Mr. Brewster Kahle
Founder and Digital Librarian
Internet Archive
300 Funston Avenue
San Francisco, CA 94118

Dear Mr. Kahle:

I write to you again as Chairman of the Senate Judiciary Committee Subcommittee on Intellectual Property. In my April 8, 2020 letter, I expressed my concern that the Internet Archive's announcement of a National Emergency "Library" filled with 1.4 million books that had been digitized and made available to the public without restrictions and without the permission of copyright owners appeared to be a blatant infringement of thousands—if not more—of copyrights.¹ Indeed, the U.S. Copyright Office analyzed publicly available facts and concluded that though some works included in the National Emergency "Library" might be permitted under fair use, many would not be. The Copyright Office went on to say that "while the Internet Archive's goal of making research and educational materials publicly available may be laudable, so is respect for copyright."² I write now after learning that the Internet Archive is engaged in other initiatives that involve the unauthorized digitization and dissemination of copyright-protected creative works—in this case sound recordings.

According to a May 15, 2020 article in the *Seattle Times*, the Internet Archive has purchased Bop Street Records' full collection of 500,000 sound recordings with the "inten[t] to digitize the recordings and put them online, where they can be streamed for free."³ It is not clear from the

¹ Since then, I understand that major American book publishers—Hachette Book Group, HarperCollins Publishers, John Wiley & Sons and Penguin Random House—filed a lawsuit alleging copyright infringement and seeking to enjoin uses of their copyrighted books in the National Emergency Library or the Internet Archive's "Open Library," which had offered the same catalog of books but with some limitations, such as checkout waitlists. *See Hachette Book Grp. v. Internet Archive*, No. 1:20-cv-04160 (S.D.N.Y. filed June 1, 2020).

² Letter from Maria Strong, Acting Register of Copyrights, U.S. Copyright Office, to Sen. Tom Udall, at 21 (May 15, 2020).

³ Paul de Barros, *A Happy Ending for Seattle's Bop Street Records: A Nonprofit Buys Up the Entire Collection*, SEATTLE TIMES (May 15, 2020), <https://www.seattletimes.com/entertainment/music/a-happy-ending-for-seattles-bop-street-records-a-nonprofit-buys-up-the-entire-collection/>.

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article, or others, if you intend to digitize all of the sound recordings acquired from Bop Street. But it is clear that these sound recordings were very recently for sale in a commercial record shop and likely contain many sound recordings that retain significant commercial value. This raises serious alarms about copyright infringement.

As I understand, Bop Street Records, which the *Wall Street Journal* once deemed a top-five record shop in the country, focuses on collectible-quality vinyl records across a diverse range of musical genres. According to its website, their sound recordings include “Rock, Soul/R&B, Jazz, Blues, Classical, Country, World and many other genres from the 1920’s to 1990’s.” The overwhelming majority—if not all—of these sound recordings are protected by U.S. copyright law, and thus may not be digitized and streamed or downloaded without authorization.

In a similar vein, I am aware of the Internet Archive’s “Great 78 Project,” which has already digitized—and continues to digitize daily—a vast trove of 78 rpm recordings, many of which are also commercially valuable recordings already in the marketplace, and has made those recordings available to the public for free through unlimited streaming and download. I understand that the Internet Archive is framing this and its other sound recording projects—which include both obscure gems for music fans and hits from the likes of Elvis Presley, Chuck Berry, and Johnny Cash—as preservation, but your current practices raise numerous potential issues of copyright infringement. The Bop Street collection is likely to add to that. Among other things, your sound recording projects do not appear to comply with the relevant provisions of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (MMA), which deals only with pre-1972 sound recordings and would not allow for streaming or downloading. Moreover, there are additional copyrights, such as the musical composition and the album artwork, that are displayed on the Internet Archive website and would not be covered by an exception for preservation.

I recognize the value in preserving culture and ensuring that it is accessible by future generations, such as the Library of Congress’s Recorded Sound Collection and National Recording Registry projects. But I am concerned that the Internet Archive thinks that it—not Congress—gets to determine the scope of copyright law. With its sound recording projects, the Internet Archive does not even pretend that a national emergency like the Covid-19 pandemic creates a special need for these sound recordings to be freely streamed or downloaded. Rather, the Internet Archive seems to be daring copyright owners to sue to enforce their rights, or else effectively forfeit them—something many copyright owners, particularly individuals and smaller enterprises, cannot afford to do.

Our copyright system is designed with important limitations and exceptions that ensure that the public can make appropriate uses of copyrighted works even when the copyright owner seeks to prevent such uses—but those are the exception, and free use for those who disagree with the concept of exclusive rights is not one of them. Accordingly, I once again invite you to share with me the legal support, in copyright law or elsewhere, for reproducing and distributing copyrighted works that are owned by others. In particular, how do the Internet Archive’s sound recording digitization and streaming projects—in particular the Great 78 Project—fit within case law interpreting the fair use doctrine and within the relevant provisions of section 108 and the MMA?

Please respond by July 10, 2020. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Thom Tillis". The signature is written in a cursive style with a horizontal line underneath the name.

Thom Tillis
Chairman
Subcommittee on Intellectual Property