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20 Music

21 **UNITED STATES DISTRICT COURT**  
22 **NORTHERN DISTRICT OF CALIFORNIA**  
23 **SAN FRANCISCO DIVISION**

24 UMG RECORDINGS, INC., CAPITOL  
25 RECORDS, LLC, CONCORD BICYCLE  
26 ASSETS, LLC, CMGI RECORDED MUSIC  
27 ASSETS LLC, SONY MUSIC  
28 ENTERTAINMENT, and ARISTA MUSIC

Plaintiff(s),

vs.

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

Defendant(s).

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

) **Plaintiffs’ Memorandum of Points and**  
) **Authorities in Opposition to Defendant**  
) **Kahle/Austin Foundation’s Motion to**  
) **Dismiss**

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**Introduction**

Defendants have built a massive online storefront of classic recordings from which Defendants stream and distribute copies of hundreds of thousands of songs, including sound recordings Plaintiffs own, which Defendants have dubbed the “Great 78 Project.” The Great 78 Project is illegal. Defendants have obtained no rights from any Plaintiff to copy, distribute or publicly perform any of Plaintiffs’ iconic works, and have no rights as a matter of law.

All of the Defendants closely collaborate in a single integrated infringement scheme. Defendant Internet Archive created and operates the Great 78 Project website. Defendant Brewster Kahle (“Kahle”) is Internet Archive’s Founder, chief executive, and Chair of the Board, where he directly oversees Internet Archive’s infringement. Kahle has not only managed and evangelized the Great 78 Project, he also funds the Great 78 Project’s infringing activities with money he funnels through Defendant Kahle/Austin Foundation (the “Foundation”). Kahle is President of and the principal donor to the Foundation and controls the Foundation’s activities. The Great 78 Project website, which Kahle oversees, proudly listed the Foundation as the “Digitizing sponsor” for every webpage from which Internet Archive streams and/or distributes a sound recording in suit:

**White Christmas**  
 by Irving Berlin; Bing Crosby; Ken Darby Singers; John Scott Trotter and his Orchestra  
 Decca (18429 A)

Publication date: 1942-05-29  
 Topics: 78rpm, Christmas  
 Digitizing sponsor: Kahle/Austin Foundation  
 Contributor: Internet Archive  
 Language: English

From Paramount Picture "Holiday Inn"; Vocal with Chorus and Orchestra.  
 Digitized from a shellac record, at 78 revolutions per minute. Four stylis were used to transfer this record. They are 3.8 mil truncated conical, 2.3 mil truncated conical, 2.8 mil truncated conical, 3.3 mil truncated conical. These were recorded flat and then also equalized with NAB.  
 The preferred version suggested by an audio engineer at George Blood, L.P. is the equalized version recorded with the 3.3 mil truncated conical stylus, and has been copied to have the more friendly filename.  
 Matrix number: DLA3009B  
 Catalog number: 18429 A

15,786 Views  
 43 Favorites  
 2 Reviews

**DOWNLOAD OPTIONS**

24BIT FLAC	1 file
INTERMEDIATE ASR JSON	1 file
ITEM IMAGE	1 file
ITEM TILE	1 file

Compl. ¶¶ 11, 50, 76 (quoting *White Christmas by Bing Crosby*, INTERNET ARCHIVE, [https://archive.org/details/78\\_white-christmas\\_irving-berlin-bing-crosby-ken-darby-singers-john-scott-trotter-and\\_gbia0000275a](https://archive.org/details/78_white-christmas_irving-berlin-bing-crosby-ken-darby-singers-john-scott-trotter-and_gbia0000275a)) (arrow added for emphasis). Notably, after Plaintiffs filed their

1 Complaint, Internet Archive removed the thousands of references to the Foundation from the  
2 Great 78 Project website.

3 Plaintiffs have sufficiently pled that the Foundation is contributorily liable for copyright  
4 infringement. That claim has two elements in addition to proving direct copyright infringement:  
5 (1) that the Foundation knew or had reason to know of the direct infringements; and (2) that the  
6 Foundation induced, caused, or materially contributed to those infringements.

7 On knowledge, Plaintiffs have alleged that the Foundation, as the “digitizing sponsor” for  
8 every webpage from which Internet Archive streams and/or distributes a sound recording in suit,  
9 had knowledge of each infringement that it sponsored. Further, as the Foundation argues  
10 elsewhere, Internet Archive’s infringement was hardly a secret. Internet Archive and Kahle  
11 personally worked hard to generate publicity for their infringing activity. They evangelized their  
12 activities, giving speeches and presentations, soliciting donations, and marketing the Great 78  
13 Project storefront. The Foundation cannot claim to have had no knowledge of Internet Archive’s  
14 infringement when that infringing activity was publicly well known while the Foundation  
15 funding it. Arguing out of both sides of its mouth, the Foundation argues elsewhere that  
16 Defendants’ infringement was so obvious that Plaintiffs should reasonably have known about  
17 it—the Foundation cannot simultaneously claim it had no knowledge of that infringement. At a  
18 minimum, the public notoriety of the Internet Archive’s infringement plausibly alleges the  
19 Foundation knew or had reason to know about it, which is all that is required.

20 The Foundation also has the requisite knowledge for liability by virtue of Kahle’s  
21 dominant role in the Foundation. The Foundation directs the Court to the wrong law: for  
22 purposes of federal copyright law, controlling precedent mandates that the federal common law  
23 of agency, as reflected in the Restatement (Third) of Agency, and not Washington state law,  
24 governs whether Kahle’s knowledge of infringement can be imputed to the Foundation. Under  
25 that law, Kahle’s knowledge of infringement is imputed to the Foundation so long as that  
26 knowledge was material to his duties at the Foundation. As Kahle was the Foundation’s  
27 President and was directing the Foundation’s funds to Internet Archive, Kahle’s knowledge of  
28

1 infringement was clearly material to his duties. His knowledge of infringement must therefore  
2 be imputed to the Foundation.

3 Moreover, the Foundation’s knowledge of infringement was sufficiently specific. As the  
4 digitizing sponsor for every webpage from which Internet Archive streams and/or distributes a  
5 sound recording in suit, the Foundation knew or had reason to know about each specific  
6 infringement that it sponsored. Further, Kahle was deeply involved in overseeing and directing  
7 Internet Archive’s infringement at a detailed level, and his knowledge of specific infringing  
8 activity must be imputed to the Foundation.

9 Plaintiffs have also sufficiently pled that the Foundation materially contributed to  
10 infringement. Plaintiffs allege that the Foundation funds Internet Archive’s infringement in a  
11 single integrated scheme in which the Foundation, Kahle, and Internet Archive act in concert  
12 under Kahle’s overlapping control. That allegation establishes material contribution. While the  
13 Foundation pretends to be independent, Plaintiffs’ allegations that the Foundation is the  
14 “digitizing sponsor” of Internet Archive’s infringement completely belie the Foundation’s claims  
15 that it was not involved.

16 The Foundation’s desperate attempt to conjure up a parade of horrors that would result  
17 from being subject to liability is ill-founded. Plaintiffs’ theory of liability is well established and  
18 poses no threat to independent charities that do not collaborate with their donees to substantially  
19 assist illegal activity. The law adequately protects truly independent charities donating in good  
20 faith, which the Foundation is not. Rather, secondary liability is essential here to prevent  
21 infringers like Kahle from hiding behind a non-profit corporate form to shield their contributions  
22 to infringement from liability. Kahle chose to deeply intertwine his Foundation into his  
23 infringement schemes at Internet Archive, and the Foundation cannot escape liability now that it  
24 has been called to account for its contribution to that scheme.

25 Finally, the Foundation’s motion is untimely because the Foundation waited to file its  
26 motion until thirty-eight days after the case was transferred to this Court.

27 The Foundation’s motion should be denied.



## Background

1  
2 Plaintiffs are renowned, historic record companies, widely recognized as some of the  
3 most distinguished music labels in history. *See* Compl. ¶¶ 5, 22, 83. Plaintiffs have long served  
4 as the homeplace for iconic artists, including Frank Sinatra, Thelonious Monk, Ella Fitzgerald,  
5 Billie Holiday, Miles Davis, and Louis Armstrong, to name just a few. Compl. ¶ 2. As part of  
6 their businesses, Plaintiffs produce, manufacture, distribute, sell, license, and otherwise  
7 commercialize sound recordings in the United States and around the world. Compl. ¶¶ 7, 21.  
8 Plaintiffs own protected rights in, and/or control exclusive rights with respect to, millions of  
9 sound recordings. *Id.* Plaintiffs create, promote, and maintain a variety of different channels for  
10 customers to legitimately access their music. *Id.* ¶¶ 5, 18. Their investments and creative efforts  
11 have shaped the musical landscape as we know it. *Id.* ¶ 5.

12 Without regard for copyright law, Defendants created an online music store called the  
13 Great 78 Project, which provides anyone the ability to stream or download digital copies of  
14 hundreds of thousands of sound recordings, including Plaintiffs', for free. *Id.* ¶¶ 1–3, 8.  
15 Defendant Internet Archive created and operates the Great 78 Project, located at  
16 <https://great78.archive.org/>. *Id.* Each Defendant played an essential role in infringing Plaintiffs'  
17 protected sound recordings as part of the Great 78 Project. Kahle is Internet Archive's Founder,  
18 chief executive, and Chair of the Board, where he directly oversees Internet Archive's infringing  
19 activity. *Id.* ¶¶ 70–73. He has publicly admitted that his goal is to "poison the whole web with  
20 our 78s." *Id.* ¶ 3. Internet Archive hired Defendant George Blood ("Blood"), a professional  
21 audio engineer, and his company, Defendant George Blood L.P. ("GBLP"), to create the digital  
22 files that the Great 78 Project website provides for streaming and downloading. *Id.* ¶¶ 48-49.  
23 Internet Archive, Blood, and GBLP have willfully reproduced thousands of Plaintiffs' protected  
24 sound recordings without authorization by copying physical records into digital files. *Id.* ¶ 1.  
25 Internet Archive then willfully uploaded, distributed, and digitally transmitted those illegally  
26 copied sound recordings millions of times from Internet Archive's website. *Id.* Defendants'

1 wholesale theft of generations of music is far divorced from the limited purposes of  
2 “preservation and research.” *Id.* ¶ 3.

3 Kahle created the Foundation to be his vehicle for funding his pet projects, including  
4 Internet Archive. *Id.* ¶ 71. Kahle is the Foundation’s President and directly or indirectly  
5 contributes nearly all of its funding. *Id.* ¶¶ 31, 75. As the Foundation’s President and primary  
6 funder, Kahle controls the Foundation and its donations. *Id.* ¶ 11. At Kahle’s direction, the  
7 Foundation used funds Kahle had provided to enable Internet Archive’s infringing activity. *Id.*  
8 ¶ 76. The Foundation substantially assisted Internet Archive’s infringing activity by providing  
9 funds at Kahle’s direction that Internet Archive, also at Kahle’s direction, used, for example, to  
10 pay to digitize Plaintiffs’ works and to pay employees who uploaded recordings to Internet  
11 Archive’s website. *Id.*

12 Highlighting the Foundation’s critical role in facilitating Internet Archive’s infringement,  
13 the Foundation was the “Digitizing sponsor” for each work in suit, as shown on each webpage  
14 from which Internet Archive has streamed or distributed an infringing sound recording. Compl.  
15 ¶¶ 11, 76. After Plaintiffs filed the Complaint, it appears that Internet Archive scrubbed the  
16 references to the Foundation as the digitizing sponsor from its website, but hiding the evidence  
17 cannot rewrite history.

18 On August 11, 2023, Plaintiffs filed their Complaint alleging that Internet Archive is  
19 liable for infringement for reproducing, distributing, and publicly performing by means of a  
20 digital audio transmission Plaintiffs protected sound recordings. Compl. ¶¶ 94–120 (First,  
21 Second, and Third Causes of Action). Plaintiffs’ Complaint alleges that the Foundation is  
22 contributorily liable for those direct infringements. Compl. ¶¶ 169–178 (Eighth Cause of  
23 Action). In response, the Foundation moved to dismiss.

#### 24 **Legal Standard**

25 To withstand a motion to dismiss, a complaint need only “contain sufficient factual  
26 allegations, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Clifton v.*  
27 *Houghton Mifflin Harcourt Publ’g Co.*, 152 F. Supp. 3d 1221, 1223 (N.D. Cal. 2015) (quoting  
28

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A claim has facial plausibility when the plaintiff  
 2 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
 3 liable for the misconduct alleged.” *Id.* (quoting *Iqbal*, 556 U.S. at 678). In resolving a motion to  
 4 dismiss, “a court must accept all of the plaintiff’s allegations as true and construe them in the  
 5 light most favorable to the plaintiff.” *Burns v. City of Concord*, 99 F. Supp. 3d 1007, 1020 (N.D.  
 6 Cal. 2015); *Iqbal*, 556 U.S. at 663; see also *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338  
 7 (9th Cir. 1996).

### 8 Argument

9 “One who, with knowledge of the infringing activity, induces, causes or materially  
 10 contributes to the infringing conduct of another, may be held liable as a contributory infringer.”  
 11 *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1031 (9th Cir. 2013)  
 12 (internal quotation marks omitted). Plaintiffs have adequately pled both that the Foundation had  
 13 knowledge of or had reason to know of infringing activity and that the Foundation materially  
 14 contributed to infringement.

#### 15 **I. Plaintiffs have adequately pled that the Foundation had knowledge of** 16 **infringement.**

##### 17 **a. As the digitizing sponsor of each of Internet Archive’s infringements, the** 18 **Foundation knew about the infringements it was sponsoring..**

19 Plaintiffs’ allegations that the Foundation specifically sponsored Internet Archive’s  
 20 infringement adequately pleads that the Foundation had knowledge of infringement.

21 “Contributory liability requires that the secondary infringer know or have reason to know of  
 22 direct infringement.”<sup>1</sup> *A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001).

23  
 24  
 25 <sup>1</sup> The Ninth Circuit has observed that there is “[i]nconsistency in our case law on the ‘knowledge’ element of  
 26 contributory liability” regarding whether actual knowledge or willful blindness is required, or whether having reason  
 27 to know is sufficient. *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 832 (9th Cir. 2019) (comparing *Luvdarts, LLC v.*  
 28 *AT & T Mobility, LLC*, 710 F.3d 1068, 1072–73 (9th Cir. 2013) with *Louis Vuitton Malletier, S.A. v. Akanoc*  
*Solutions, Inc.*, 658 F.3d 936, 943 (9th Cir. 2011)). Because “[f]or purposes of this motion, the Foundation assumes  
 that a party may establish a claim for contributory infringement by alleging that the defendant has ‘reason to know’

1 Here, there can be no question that the Foundation knew about specific infringements.  
 2 According to the Great 78 Project webpage for each work at issue, the Foundation was the  
 3 “digitizing sponsor” for the infringement of every work in suit. Compl. ¶ 76. Obviously, as the  
 4 Foundation was sponsoring those infringements, there is a plausible basis to conclude it knew  
 5 about them. While the Foundation wants to dispute whether it was in fact the digitizing  
 6 sponsor—notwithstanding the admissions of such on the Great 78 Project website—it cannot do  
 7 so at the pleading stage, where all allegations must be construed against the Foundation.

8 **b. Internet Archive and Kahle actively publicized their infringing activity such**  
 9 **that the Foundation knew or had reason to know about it.**

10 As the Foundation argues elsewhere, Internet Archive’s infringement “was no secret.”  
 11 Defs. Internet Archive, Kahle, Blood, and George Blood L.P.’s Notice of Mot. and Mot. to  
 12 Dismiss and Supp. Mem. of Points and Authorities at 5, ECF No. 75 (“IA Mot.”); Def.  
 13 Kahle/Austin Foundation’s Notice of Mot. and Mot. to Dismiss; Mem. of Points and Authorities  
 14 in Supp. at 6 n.3, ECF No. 78 (“Mot.”) (stating that “the Foundation joins its co-defendants’  
 15 motion to dismiss allegations of infringement outside the statute of limitations period”). Internet  
 16 Archive and Kahle publicized the Great 78 Project’s activities in blog posts, speeches, news  
 17 articles, and on social media. Compl. ¶¶ 3, 51–54, 60–61, 71–74, 77. It is impossible for the  
 18 Foundation to have been ignorant of Internet Archive’s infringement when Kahle, the  
 19 Foundation’s President, was the one publicizing the infringing activities widely.

20 Indeed, the Foundation concurrently argues that “the Great 78 Project had been  
 21 highlighted by mainstream and industry news outlets as early as 2017” and that Internet  
 22 Archive’s infringement was so obvious that “a reasonable plaintiff ‘should have discovered’ the  
 23 alleged infringement. . . .” IA Mot. at 11 (citing online coverage of the Great 78 Project). The  
 24 Foundation cannot have it both ways. As the Foundation contends Plaintiffs should have been  
 25 aware of the infringements at that time, the same logic should apply to the Foundation. The

26 \_\_\_\_\_  
 27 infringement is occurring,” Mot. at 8, Plaintiffs do not address here which standard should apply. In any event,  
 28 Plaintiffs satisfy both standards.

1 Foundation was in a far better position to discover Internet Archive’s infringement than  
2 Plaintiffs, as the same person running Internet Archive (Kahle) was also running the Foundation.

3 **c. Under Federal common law of agency principles, Brewster Kahle’s**  
4 **knowledge of infringement must be imputed to the Foundation.**

5 Brewster Kahle is President of the Foundation and controls both the Foundation and  
6 Internet Archive. The most natural inference is that Kahle’s left hand knew what his right hand  
7 was doing and that the Foundation knew about the infringements it was sponsoring. At the least,  
8 such allegations plead that the Foundation had knowledge of infringement.

9 The Foundation is wrong that Kahle’s knowledge cannot be imputed to the Foundation.  
10 Federal common law, not Washington state law, governs whether Kahle’s knowledge can be  
11 imputed to the Foundation. Because a copyright infringement claim is a federal claim, whether a  
12 corporate officer’s knowledge can be imputed to the corporation “is a question of federal [] law,  
13 albeit one guided by (common law) agency principles.” *In re ChinaCast Educ. Corp. Sec. Litig.*,  
14 809 F.3d 471, 476 n.4 (9th Cir. 2015) (holding that, in a federal securities fraud claim, whether a  
15 corporate officer’s intent can be imputed to the corporation is a question of federal, not state,  
16 law). The Supreme Court has held that it “relie[s] on the general common law of agency, rather  
17 than on the law of any particular State, to give meaning to [the Copyright Act].” *Cnty. for*  
18 *Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989). The rationale for this rule is that  
19 “federal statutes are generally intended to have uniform nationwide application. Establishment  
20 of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate  
21 here given the Act’s express objective of creating national, uniform copyright law . . .” *Id.*

22 In analyzing the federal common law of agency, federal courts frequently rely on the  
23 Restatement of the Law of Agency. *Id.* at 752 (“In determining whether a hired party is an  
24 employee [under the Copyright Act’s work-for-hire provision] under the general common law of  
25 agency, we have traditionally looked for guidance to the Restatement of Agency.”); *ChinaCast*,  
26 809 F.3d at 476 (quoting and relying on the Restatement (Third) of Agency). As reflected in the  
27 Restatement (Third) of Agency, the rule at common law is that “notice of a fact that an agent  
28

1 knows or has reason to know is imputed to the principal if knowledge of the fact is material to  
 2 the agent’s duties to the principal . . . .” RESTATEMENT (THIRD) OF AGENCY § 5.03; *see also*  
 3 *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 939–40 (9th Cir. 2017) (adopting § 5.03’s rule  
 4 when interpreting the federal common law of agency for purposes of ERISA). Crucially,  
 5 knowledge is imputed “regardless of how the agent came to know the fact or to have reason to  
 6 know it.” RESTATEMENT (THIRD) OF AGENCY § 5.03 cmt. e. This broad rule of imputation  
 7 “reflects the fact that an individual agent’s mind cannot be divided into compartments.” *Id.*  
 8 (internal quotations omitted). Rather, “[a]n agent brings the totality of relevant information that  
 9 the agent then knows to the relationship with a particular principal.” *Id.*

10 The Restatement’s broad imputation rule thus rejects several exceptions to imputing  
 11 knowledge that the Foundation argues Washington law recognizes. Specifically, Defendants  
 12 argue that, under Washington law, knowledge cannot be imputed where “(i) the corporate  
 13 officer’s knowledge is acquired outside the scope of his powers or duties for the relevant entity,  
 14 (ii) when he does not act for or on behalf of the corporation in connection with the actions by  
 15 which he acquires such knowledge, . . . or (iv) when the officer pursues his own personal  
 16 objective rather than the purposes of the entity on whose behalf he acts as principal.” Mot. at 9–  
 17 10. The broader rule reflected in the Restatement does not recognize these exceptions, instead  
 18 providing that “notice is imputed to the principal of material facts that an agent learns casually or  
 19 through experiences in the agent’s life separate from work.”<sup>2</sup> RESTATEMENT (THIRD) OF AGENCY  
 20 § 5.03 cmt. e.; *see also, e.g., O’Riordan v. Fed. Kemper Life Assurance Co.*, 114 P.3d 753, 757  
 21 (Cal. 2005) (relying on earlier version of Restatement to impute agent’s knowledge to principal  
 22 even though agent acquired knowledge before commencement of agency relationship).

23 Applying the Restatement’s principles here, Kahle’s knowledge must be imputed to the  
 24 Foundation. Kahle is President of the Foundation, and the Foundation has donated significant  
 25

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26 <sup>2</sup> Even if Washington law governed here (and it does not), Plaintiffs’ allegations that Kahle created the Foundation to  
 27 fund his pet projects and that Kahle, Internet Archive, and the Foundation were all working together as part of a  
 28 single scheme adequately plead that none of the exceptions to imputation Washington law recognizes apply. At the  
 least, whether any of these exceptions apply would raise fact issues that cannot be resolved on a motion to dismiss.

1 sums to Internet Archive. Clearly, knowledge of Internet Archive’s infringement is material to  
2 the Foundation’s decisions to sponsor Internet Archive’s activities. It follows that Kahle’s  
3 knowledge of Internet Archive’s infringement is material to his duties as the Foundation’s  
4 President in advising and directing the Foundation to sponsor Internet Archive. Whether the  
5 Great 78 Project was Kahle’s “personal objective” rather than the Foundation’s, as the  
6 Foundation argues, Mot. at 11, does not change the fact that Kahle’s knowledge was material to  
7 his duties at the Foundation, and it is therefore irrelevant.

8 The Foundation’s reliance on *Paskenta Band of Nomlaki Indians v. Crosby* is unavailing:  
9 that case refused to impute a board member’s knowledge to the corporation where the board  
10 member was alleged to have embezzled funds, reasoning that embezzlement triggered the direct  
11 adversity exception to the general rule of imputation. No. 215-CV-00538 (MCE) (CMK), 2017  
12 WL 385922, at \*5 (E.D. Cal. Jan. 24, 2017) (holding that using the bank to embezzle funds is  
13 “directly adverse” to the bank’s interest). Nothing like those facts is present here. Kahle’s and  
14 the Foundation’s interests were aligned—Kahle founded and ran the Foundation to further his  
15 own interests—and the Foundation’s motion does not even try to invoke the adverse interest  
16 exception. At the pleading stage, where all allegations must be construed in Plaintiffs’ favor, the  
17 Foundation’s argument must fail.

18 **d. The Foundation’s knowledge of infringement was sufficiently specific.**

19 For all the reasons above, Plaintiffs plausibly plead that the Foundation had actual  
20 knowledge of or, at a minimum, was willfully blind to or had reason to know about Internet  
21 Archive’s infringing conduct. The Complaint also plausibly alleges that the Foundation’s  
22 knowledge was sufficiently specific to support a claim for contributory liability. Indeed, as the  
23 digitizing sponsor for every work at issue, the Foundation had knowledge of infringement of  
24 each work whose infringement it sponsored.

25 The Foundation also had sufficiently specific knowledge by virtue of Kahle. The  
26 Complaint alleges that Kahle “directly oversees and manages Internet Archive’s activities,  
27 including Internet Archive’s infringement of Plaintiffs’ works through the Great 78 Project.”  
28



1 Compl. ¶ 10. The Complaint further alleges that, “[a]s Internet Archive’s Founder, chief  
 2 executive, and Chair of the Board, Kahle has been intimately involved in Internet Archive’s  
 3 infringing conduct,” and that Kahle had “deep involvement” and “participated directly in the  
 4 Great 78 Project’s operations.” Compl. ¶¶ 70–72. For example, in 2021, Kahle tweeted, “More  
 5 78’s to play from our library! Uploading 9,000+ right now.” Compl. ¶ 73 (quoting Brewster  
 6 Kahle (@brewster\_kahle), TWITTER (Jun. 16, 2021 6:31 PM),  
 7 [https://twitter.com/brewster\\_kahle/status/1405292024106868740](https://twitter.com/brewster_kahle/status/1405292024106868740). Kahle—and, accordingly, the  
 8 Foundation—had more than just “generalized knowledge of the possibility of infringement,” as  
 9 the Foundation argues. Mot. at 11 (internal quotation marks omitted). To the contrary, Kahle  
 10 was well aware of Internet Archive’s specific infringements—the Great 78 Project was, after all,  
 11 his “brainchild.”<sup>3</sup> Compl. ¶ 71 (internal quotation marks omitted). As Kahle had knowledge of  
 12 specific infringements, the Foundation did as well.

13 **II. The Foundation materially contributed to infringement by acting in concert with**  
 14 **Kahle and Internet Archive to substantially assist specific infringements.**

15 **a. Allegations that the Foundation played a crucial role in an integrated**  
 16 **infringement scheme adequately plead material contribution.**

17 Plaintiffs’ allegations that (i) Kahle controls both the Foundation and Internet Archive  
 18 and (ii) the Foundation specifically sponsored Internet Archive’s infringement adequately plead  
 19 that the Foundation materially contributed to infringement. “Material contribution turns on  
 20 whether the activity in question substantially assists direct infringement.” *Louis Vuitton*  
 21 *Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 943 (9th Cir. 2011). For example,  
 22 “‘providing the site and facilities for known infringing activity is sufficient to establish  
 23 contributory liability’ where the defendant ‘actively strives to provide the environment and the  
 24  
 25

26 <sup>3</sup> The Foundation’s argument, if sound, would apply equally to Kahle to insulate him from liability. Recognizing the  
 27 futility of this argument, Kahle, who is also a defendant in this action, has not moved to dismiss the claims against  
 28 him on the ground the Foundation asserts here.



1 market for counterfeit . . . sales to thrive.” *Shelter Capital*, 718 F.3d. at 1032 (quoting  
2 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996)).

3 Plaintiffs allege that the Foundation played a critical role in enabling Internet Archive’s  
4 infringement. The Foundation “actively strove to provide the environment” for infringement by  
5 specifically sponsoring Internet Archive’s unlawful conduct. *See Louis Vuitton*, 658 F.3d at 943  
6 (“There is no question that providing direct infringers with server space satisfies [the material  
7 contribution] standard.”); *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829,  
8 846 (11th Cir. 1990) (affirming summary judgment holding defendant contributorily liable where  
9 defendant “encouraged the duplication of the [copyrighted work] by giving funds and equipment  
10 to [the direct infringers] in order to [duplicate the copyrighted work]”). As both the primary  
11 donor to and President of the Foundation and chief executive of Internet Archive, Kahle  
12 controlled both entities and steered them “in concert” to their common infringing purpose.  
13 *Shelter Capital*, 718 F.3d at 1032. While the full scope of the Foundation’s contributions to  
14 infringement as the digitizing sponsor will be adduced during discovery, the Complaint’s  
15 allegations satisfy Plaintiffs’ burden to plausibly allege material contribution.

16 That Kahle has funneled his funding of Internet Archive’s infringement through the  
17 Foundation rather than funding the infringement directly himself should not obscure how closely  
18 interwoven Kahle, Internet Archive, and the Foundation are in their common infringement  
19 scheme. Kahle chose to deeply emmesh his Foundation in that scheme, and only imposing  
20 secondary liability can prevent Kahle from exploiting the non-profit corporate form to shield  
21 from liability the full range of his contributions to infringement. *See Capitol Recs., Inc. v.*  
22 *MP3tunes, LLC*, 48 F. Supp. 3d 703, 713 (S.D.N.Y. 2014) (denying company executive’s motion  
23 for judgment as a matter of law on contributory liability where executive contributed to  
24 infringement in part by “funding the site and facilities for the infringing activity”), *aff’d in part,*  
25 *rev’d in part* on other grounds, and remanded *sub nom. EMI Christian Music Grp., Inc. v.*  
26 *MP3tunes, LLC*, 844 F.3d 79 (2d Cir. 2016); *Arista Recs. LLC v. Lime Grp. LLC*, 784 F. Supp.

1 2d 398, 438 (S.D.N.Y. 2011) (holding parent liable on summary judgment for subsidiary’s  
2 infringement where parent was “intimately involved” in subsidiary’s operations).

3 The Foundation’s attempts to minimize its connection to Internet Archive’s infringement  
4 are fruitless. While the Foundation argues that “the Complaint does not allege that the  
5 Foundation intended or directed its donations to be used [for infringement],” Mot. at 6 n.4, the  
6 Foundation strategically ignores that the Complaint alleges that Kahle was both directing the  
7 Foundation to donate to Internet Archive and directing that Internet Archive use those funds to  
8 infringe, Compl. ¶ 76: in other words, Kahle intended and directed that the Foundation’s funds  
9 be used for infringement, and ensured Internet Archive used them for that purpose. Further,  
10 because the Complaint alleges the Foundation specifically sponsored the digitization of each  
11 work in suit, the Foundation’s claim that “there are certainly no allegations that the Foundation  
12 earmarked any of its ‘general support’ to the Internet Archive for the Great 78 Project,” Mot. at 7  
13 n.4, is certainly false.

14 The Foundation’s claim that it was not aware its donations were being used for  
15 infringement, *id.* at 6. n.4, is both irrelevant to the material contribution element and implausible  
16 in light of the two entities’ overlapping management. This is especially true since, as shown  
17 above, Kahle’s knowledge must be imputed to the Foundation. It is akin to the right hand  
18 claiming that it did not know what the left hand was doing, when the same person controls both  
19 hands. In any event, at the pleading stage, the Court cannot credit the Foundation’s tendentious  
20 arguments that it had nothing to do with being listed as such. Equally far-fetched and irrelevant  
21 at this stage is the Foundation’s argument that it was not even aware Internet Archive had  
22 identified the Foundation as the digitizing sponsor. That Internet Archive identified the  
23 Foundation as the “Digitizing Sponsor” for every webpage for a work at issue, when the same  
24 person controlled both entities, belies these claims.

**b. Neither the Ninth Circuit’s holding in *Shelter Capital* nor any of the other caselaw the Foundation cites weighs in favor of dismissal.**

The Ninth Circuit’s holding in *Shelter Capital* does not require dismissal. In *Shelter Capital*, the Ninth Circuit held that investors in Veoh Networks (“Veoh”), an allegedly infringing company, could not be held liable for Veoh’s infringement because each investor on its own could not control Veoh, and there were no allegations that the investors acted in concert to control Veoh. *Shelter Capital*, 718 F.3d at 1032. Crucially, while in *Shelter Capital* the investors held board positions at Veoh, they did not hold management roles at Veoh, nor did any of Veoh’s senior management hold any management roles at the investors’ companies. *Id.* at 1032–33. Thus, the court in *Shelter Capital* did not consider facts where a funder both managed and controlled the infringer. Here, in contrast, Plaintiffs allege that Kahle manages and controls both the Foundation and Internet Archive and all three worked “in concert” together to further infringement. Compl. ¶¶ 71–76. Further, *Shelter Capital* lacked any allegations that the investors had contributed funds specifically directed to facilitating infringement; none of the allegedly infringing videos on Veoh’s website indicated they had been sponsored by the investors. Here, the Foundation specifically sponsored the infringing digitization of protected sound recordings. *Id.* ¶¶ 11, 76.

The allegations here more closely resemble those in *UMG Recordings, Inc. v. Bertelsmann AG*, which denied motions to dismiss contributory infringement claims brought against investors in Napster. 222 F.R.D. 408, 413 (N.D. Cal. 2004). In *Bertelsman*, the defendants were Napster’s “only source of available funding” *id.* at 412; here, too, the Foundation is the only “digitizing sponsor” associated with the Great 78 Project, and Kahle is the Foundation’s primary source of funding. Compl. ¶¶ 11, 31, 71–76. In *Bertelsman*, the defendants were “alleged to have specifically ordered that such [infringing] activity take place.” *Id.* at 413. Here, too, the Foundation sponsored the specific conduct Plaintiffs allege is infringing. Further, *Bertelsman* featured precisely the overlapping control of management between the funder and the infringer that exists here but that *Shelter Capital* lacked.

1 None of the other cases the Foundation cites lend it any support.<sup>4</sup> *In re Napster, Inc.*  
2 *Copyright Litigation* rejected that plaintiff’s “tertiary liability” theory, whereby the plaintiff had  
3 alleged that the defendants were contributorily liable based on their contribution to a  
4 contributory infringer rather than on their own contribution to direct infringement. No. C 00-  
5 1369 MHP, 2001 WL 36593841, at \*2 (N.D. Cal. July 9, 2001). The court held that, by pleading  
6 only tertiary liability, the plaintiff had failed to allege that the defendants “substantially  
7 contributed to a specific act of infringement.” *Id.* That case has no application here because  
8 Plaintiffs have not alleged tertiary liability; Plaintiffs have alleged that the Foundation  
9 contributed to specific direct infringements.

10 In *Elsevier Ltd. v. Chitika, Inc.*, the defendant was an independent third party with no  
11 relation to the direct infringer that had paid the direct infringer for the right to place  
12 advertisements on the direct infringer’s website. 826 F. Supp. 2d 398, 400–01 (D. Mass. 2011).  
13 There, the court held the plaintiffs had failed to plead contributory liability because the plaintiffs  
14 failed to allege how those payments substantially assisted the allegedly infringing activities. *Id.*  
15 at 406. Here, by contrast, the Foundation is not an unrelated third party and Plaintiffs have  
16 alleged that the Foundation specifically sponsored the infringements at issue.

17 The Foundation’s other cases fare no better. *Matlow v. Fandom, Inc.* dismissed a  
18 contributory infringement claim where the infringing YouTube video was created several years  
19

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20 <sup>4</sup> The Foundation’s authority for the proposition that a “mere quantitative contribution” is insufficient for  
21 contributory infringement does not support that proposition. The Foundation quotes *ITSI T.V. Prods., Inc. v.*  
22 *California Auth. Of Racing Fairs* for this phrase. Mot. at 6 (quoting *ITSI T.V. Prods., Inc. v. California Auth. Of*  
23 *Racing Fairs*, 785 F. Supp. 854, 861 (E.D. Cal. 1992)). *ITSI TV* quotes a footnote in *Gershwin Pub. Corp. v.*  
24 *Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 n.8 (2d Cir. 1971), which in turn quotes the Supreme Court case  
25 of *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396–97 (1968), where the “mere quantitative  
26 contribution” phrase appears to have originated. But *Fortnightly Corp.* had nothing to do with secondary  
27 infringement. At issue in *Fortnightly Corp.* was whether a community antenna television (“CATV”) system *directly*  
28 infringed copyrights by transmitting copyrighted television programs over its antennas. In holding that CATV  
systems did not “perform” the works they transmitted for purposes of direct infringement, the Supreme Court stated  
that “mere quantitative contribution cannot be the proper test to determine copyright [direct infringement] liability in  
the context of television broadcasting.” *Fortnightly Corp.*, 392 U.S. at 397. *Fortnightly’s* holding has since been  
largely superseded by Section 111 of the 1976 Copyright Act, which created a compulsory licensing system for  
secondary transmissions of television broadcasts by cable. 17 U.S.C. § 111; *Cap. Cities Cable, Inc. v. Crisp*, 467  
U.S. 691, 709 (1984) (recognizing that § 111 superseded *Fortnightly Corp.*).

1 before the alleged contributory infringer purchased the YouTube channel hosting the infringing  
2 video. No. CV 22-1212-FWS-SK, 2022 WL 17184982, at \*5 (C.D. Cal. July 7, 2022). *Free*  
3 *Speech Systems, LLC v. Menzel* and *Epikhin v. Game Insight North America* dismissed  
4 contributory infringement claims where the complaints failed to allege the underlying direct  
5 infringements. *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1173 (N.D. Cal. 2019)  
6 (dismissing with leave to amend to specify direct infringements); *Epikhin v. Game Insight N.*  
7 *Am.*, No. 14-CV-04383-LHK, 2015 WL 2412357, at \*4 (N.D. Cal. May 20, 2015). Here,  
8 Plaintiffs have alleged direct infringement, and the Foundation does not argue otherwise.

9 **III. The Foundation’s motion is untimely because the Foundation waited thirty-eight**  
10 **days after transfer became effective to file its motion.**

11 The Foundation’s motion should be denied as untimely because the Foundation did not  
12 file its motion until thirty-eight days after the case was transferred to this Court. Plaintiffs  
13 originally filed this case in the Southern District of New York before Judge Lorna Schofield.  
14 Compl. at 1. The Foundation was served on August 24, 2023. Affidavit of Service, ECF No. 14.  
15 The Foundation was granted an extension of time to respond to the Complaint until October 13,  
16 2023. Order, ECF No. 24. The Foundation then filed a pre-motion letter requesting leave to file  
17 motions to dismiss and to transfer venue, ECF No 37, which under Judge Schofield’s individual  
18 rules “stay[ed] the time to answer or move until further ordered by the Court.” Individual Rules  
19 and Procedures for Civil Cases for Judge Lorna G. Schofield, Rule III.C.2. Judge Schofield  
20 subsequently granted Defendants’ motion to transfer, ECF No. 59, and the transfer became  
21 effective on December 19, 2023. ECF No. 60.

22 When Judge Schofield transferred the case out of her court, Judge Schofield divested  
23 herself of jurisdiction and thereby voided her stay of the Foundation’s time to answer. With that  
24 stay no longer in effect, the Foundation’s response to the Complaint became due immediately, as  
25 its time to respond under the Federal Rules and its previous extension had already expired. *See*  
26 *Fed. R. Civ P. 12(a)(1)(A)(i)* (requiring a defendant to serve an Answer within twenty-one days  
27 of being served with the Summons and Complaint). At most, Rule 12 required the Foundation to

1 respond to the Complaint within either fourteen days (if Fed. R. Civ. P. 12(a)(4)'s fourteen-day  
2 deadline for action following resolution of a Rule 12 motion applies) or twenty-one days (if Fed.  
3 R. Civ P. 12(a)(1)(A)(i) twenty-one -day deadline to respond to a Complaint applies) of the  
4 transfer becoming effective.

5 Yet the Foundation never moved for an extension of time and waited more than six  
6 weeks after the transfer became effective to file its motion (which, per its pre-motion letter, it  
7 had been planning to file since at least October 2023). The Foundation's argument that its time  
8 to respond did not begin to run until January 9, 2024, when Plaintiffs served copies of the Initial  
9 Case Management Conference Order and the pertinent supplementary materials specified in  
10 Civil L.R. 4-2, ECF No. 70, is specious: Rule 12(a) pegs its deadlines to service of the Summons  
11 and Complaint only, and the Local Rules do not alter that rule.

### 12 Conclusion

13 For the reasons stated above, Plaintiffs respectfully request that Defendants' Motion to  
14 Dismiss be denied and Defendants be required to serve an Answer within fourteen days.

15  
16 Dated: February 16, 2024

Respectfully submitted,

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