July 10, 2020

Senator Thom Tillis  
Chairman, Subcommittee on Intellectual Property  
United States Senate Committee on the Judiciary  
113 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman Tillis,

Thank you for your letter of June 10th and your continued interest in the Internet Archive’s important mission and work as a library.

On June 16th, Internet Archive closed the temporary National Emergency Library and returned to the traditional controlled digital lending (CDL) model that has been in place since 2011, allowing one-reader at a time to access protected digitized books using the same technical protections that publishers use on their commercially available ebooks. Throughout the duration of the NEL and in the weeks since it closed, we have heard hundreds of stories from librarians, authors, parents, teachers, and students about how the NEL has filled an important gap supporting emergency remote teaching, research activities, independent scholarship, and intellectual stimulation during the school and library closures. We have shared some of those stories in blog posts that we hope you will take some time to read.¹

Unfortunately, despite the positive impact of our work during the COVID-19 pandemic, a group of commercial publishers has filed suit against the Internet Archive—complaining not only about the NEL, but about CDL writ large. This lawsuit stands in contrast to academic presses in your home State, Duke University Press and UNC Press, who chose to work with us “to meet the dire needs of readers” in this unprecedented

moment.²

In the wake of this lawsuit, libraries have been speaking up in support of the widespread and longstanding library practice of controlled digital lending. The Association of Research Libraries (ARL) and Scholarly Publishing and Academic Resources Coalition (SPARC) recently joined Chief Officers of State Library Agencies (COSLA), EveryLibrary, the Association of Southern Research Libraries (ASERL) and dozens of libraries, librarians and law professors in supporting CDL.³ ARL’s statement explained that “CDL is a practice rooted in the fair use right of the US Copyright Act and recent judicial interpretations of that right. During the COVID-19 pandemic, many academic and research libraries have relied on CDL (including IA’s Open Library) to ensure academic and research continuity at a time when many physical collections have been inaccessible.”⁴

While the NEL is over, the COVID-19 crisis is not. Many schools are looking to remote instruction as part of their safe reopening strategies.⁵ CDL is an important tool for schools and libraries as we all prepare for our digital fall semester. Communities around the country have urgent needs that are not being met by the market. For example, 85% of college textbooks are not for sale digitally, and even when they were, repurchasing these is prohibitively expensive.⁶ Ebooks generally make up only a small fraction of K-12 school library holdings.⁷ A generation of kids could be left behind if students do not have access to the learning materials they need, in the format they need.⁸ Controlled digital lending helps libraries to leverage the materials they have already purchased, within the library tradition and function, to meet the needs of learn-at-home students. Millions of students may be forced into this situation for the fall and possibly longer due to the pandemic.

It could take several years for this litigation to be resolved in court. The Congressional Research Service in its analysis of the ebook availability during COVID-19 suggested several ways that Congress could improve the public’s access to learning materials, from introducing a digital first sale right to providing a limited immunity for library e-book lending.⁹ We hope Congress will act. In the meantime, the Internet Archive and other libraries will continue to work towards providing equitable access to information during

³ https://controloleddigitallending.org/signatories
⁷ See e.g., https://files.eric.ed.gov/fulltext/EJ1218481.pdf
⁹ https://crsreports.congress.gov/product/pdf/LSB/LSB10453
this unprecedented crisis and beyond using the legal tools already provided by Congress.

Your letter also addressed our stewardship of historical sound recordings. As you rightly pointed out, preservation is a core purpose of our work. Our strategy for accomplishing this purpose requires both physical preservation and preservation through digitization, but we do not make all recordings available to the general public. We have focused our efforts on recordings that have been historically difficult for researchers to access. Once digitized, these recordings offer a wealth of musicological, discographic and technical information, documenting and contextualizing music and recording history from the 20th century. Our role is to ensure that these treasures of our cultural history survive for the benefit of future musicians and music lovers everywhere.

We make recordings available to the public in two ways: in-person and online. We have a Listening Room in our physical library located in San Francisco, where the public may come and listen to records that are not too fragile to be handled. The degree of online access permitted for any given recording depends on various criteria, which may include the date, format, content (e.g., oral history, novelty sounds, spoken word, musical performance and so on), condition of the physical object containing the sound recording and/or commercial availability. Depending on these and other factors, some recordings may not be put online at all, some may be accessed only as short, randomized snippets, while others may be streamed or downloaded.

The Bop Street Records Collection you mentioned in your letter will be handled in the same manner as our other sound recording collections, described above. Some may end up being made available online, although we do not know at this time whether any will.

The Music Modernization Act (MMA) helps in these efforts because it contains several provisions that broaden possibilities for access to old sound recordings. Pre-1923 works will begin to enter the public domain in 2022, and recordings made from 1923 to 1956 will enter the public domain over the next several decades. Pre-1972 recordings that are not being commercially exploited, we understand, can be digitized and distributed by libraries like the Internet Archive, and used by others for non-commercial purposes. The MMA also clarifies that other exceptions to copyright law, including fair use and library exceptions, apply to these older recordings. As you are aware, these exceptions do not depend on any authorization from rightsholders.

We are thankful for your vote in support of the MMA and making audio recordings more available from libraries like the Internet Archive.

10 http://blog.archive.org/2017/05/11/listening-to-the-78s/
11 http://blog.archive.org/2020/06/26/behind-every-78-recording-lies-a-story/
12 Our Listening Room is currently closed due to the COVID-19 pandemic.
We hope you find this letter helpful. As always, we are available for further discussion as needed.

Respectfully,

Brewster Kahle
Founder and Digital Librarian

cc: Brad Watts, Chief Counsel Senator Thom Tillis

Elliot Tomlinson, Counsel Senate Judiciary Committee, Intellectual Property Subcommittee