

No. 16-771

In the
Supreme Court of the United States

CAPITOL RECORDS, LLC, *et al.*,

Petitioners,

– v. –

VIMEO, LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF *AMICUS CURIAE* ABKCO MUSIC
& RECORDS, INC. IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

DONALD S. ZAKARIN
Counsel of Record
ROSS M. BAGLEY
PRYOR CASHMAN LLP
Attorneys for Amicus Curiae
ABKCO Music & Records, Inc.
7 Times Square
New York, New York 10036
(212) 326-4100
dzakarin@pryorcashman.com
rbagley@pryorcashman.com

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ABKCO Music & Records, Inc. (“AMR”) respectfully submits this *Amicus Curiae* brief in support of the petition for a writ of *certiorari* (the “Petition”) of petitioners Capitol Records, LLC, Caroline Records, Inc., Virgin Records America, Inc., EMI Blackwood Music, Inc., EMI April Music, Inc., EMI Virgin Music, Inc., Colgems-EMI Music, Inc., EMI Virgin Songs, Inc., EMI Gold Horizon Music Corp., EMI Unart Catalog Inc., Stone Diamond Music Corporation, EMI U Catalog, Inc., and Jobete Music Co., Inc. (“Petitioners”) to review the judgment of the United States Court of Appeals for the Second Circuit following its June 16, 2016 opinion (the “Decision”) holding that sound recordings which are otherwise excluded from coverage under the United States Copyright Act (known as “pre-72 Recordings”) are nonetheless subject to the so-called “Safe Harbor” requirements of Section 512(c) of the Copyright Act (the “Act”).¹

INTERESTS OF THE AMICUS CURIAE

AMR, a small privately held music company, owns a valuable catalogue of sound recordings, including recordings by: The Rolling Stones; the Animals; Chubby Checker; Billy Preston; the Soul Stirrers; and Sam Cooke. These recordings are pre-1972 Recordings (i.e., “fixed” before February 15, 1972, the effective date of the Sound Recording Amendment). The value

¹ No party’s counsel authored any part of this brief. No person other than AMR or its counsel contributed money that was intended to fund the preparation or submission of this brief. AMR provided timely notice and received written letters of consent from the parties to file this *amicus* brief pursuant to Supreme Court Rule 37(2)(a).

of these recordings which are some of the most iconic recordings of the pop/rock era² has been and continues to be substantially diminished by rampant piracy by users of “Internet Service Providers.” (Pet. 21.)

Because AMR’s recordings are pre-72 Recordings, AMR has none of the rights or remedies provided to the owners of federally copyrighted sound recordings (“post-72 Recordings”). For example, when its works are illegally copied, AMR cannot, under the Act, obtain (i) an injunction, impoundment or destruction of the illegal copies; (ii) damages and profits or, in lieu thereof, statutory damages; or (iii) attorneys’ fees. Absent diversity, AMR cannot sue in Federal Court. Its rights to these recordings, and its remedies for any violations of those rights, are purely a matter of the individual common or statutory law of the fifty different states.³

² Among AMR’s pre-72 Recordings are “Satisfaction”, “Gimme Shelter”, “Sympathy for the Devil” and “You Can’t Always Get What You Want” by the Rolling Stones; The Animals’, “House of the Rising Sun”, Sam Cooke’s, “Wonderful World” and “A Change is Gonna Come” and “The Twist” by Chubby Checker.

³ While reaffirming that the state’s law protects against unlawful copying and reproduction of pre-72 Recordings, the New York State Court of Appeals has just recently determined that New York’s common law does not provide any copyright protection for the public performance of pre-72 Recordings, but that performance claims may exist under the common law of unfair competition or misappropriation theories. *See Flo & Eddie, Inc. v Sirius XM Radio, Inc.*, No. 172, 2016 N.Y. LEXIS 3811, at *27 (Dec. 20, 2016). The Decision’s focus on the supposed significance of the term “infringement” as used in Section 512 rather than “infringement” “under this title” suggests that while a claim of infringement under state common law copyright is subject to satisfaction of a federal precondition, a claim of unfair

Contrary to Congress’s explicit command in Section 301(c) of the Act that state interests in pre-72 Recordings shall not be preempted by federal copyright law, the Decision conditioned the availability of state law remedies, at least for common law copyright infringement claims, upon AMR’s compliance with the requirements of Section 512(c), effectively superimposing a federal requirement that potentially may be on all of the differing rights and remedies available under the laws of all 50 states. This judicially enacted “tiny exception” to Section 301(c) thus federalizes conditions precedent to any suits brought solely under state law for remedies provided, if at all, under state law, thereby severely limiting what owners of pre-72 Recordings can do in response to piracy without any corresponding benefit.

AMR’s potentially available state law rights and remedies, not necessarily for common law copyright infringement only, have thus been curtailed by judicial fiat in a Decision that focuses on the word “infringement” used in Section 512, overlooking that there are state common law rights that do not technically constitute “infringement” claims but which provide protection against the unauthorized use of pre-72 Recordings under different common law theories. The Decision also ignores that AMR has been subjected to this precondition to suit even as it is denied any of the rights and remedies of federal

competition or misappropriation might not be subject to the precondition. This multiplies the issues created by the Decision as the other 49 states may have differing views about whether public performance rights of pre-72 Recordings are protected under common law copyright or under other common law theories.

copyright ownership fully available to the owners of post-72 Recordings. This Court should grant *certiorari* and reverse the Decision, leaving it to Congress to decide whether to alter the careful balance it has struck between works protected by the Act and hence subject to corresponding restrictions, and those works remaining subject only to state law rights and protections.

SUMMARY OF THE ARGUMENT

Because pre-72 Recordings are not protected under the Act, AMR has had to protect its recordings under state law. Even prior to the enactment of the 1976 amendment to the Act, in *Goldstein v. California*, 412 U.S. 546 (1973), the Supreme Court held that federal law did not preempt state protection of sound recordings. Congress continued this regime in the Act, explicitly providing that state law rights in pre-72 Recordings were excluded from preemption until 2047. *See* 17 U.S.C. § 301(c) (extended under the “Sonny Bono Act” in 1998 to 2067). Currently, the statutory and/or common law of most states provide some form of protection for pre-1972 Recordings, whether under state common law copyright or under principles of unfair competition or misappropriation.⁴ The Decision ignores that there are a variety of

⁴ *See generally* S.A. Diamond, *Sound Recordings and Phonorecords: History and Current Law*, 2 U. Ill. Law Forum 337 (1979). This protection is reflected either in state statutes, *e.g.*, Cal. Civ. Code § 980(a)(2), Fla. Stat. Ann. §§ 540.11(2)(a)(1)-(2), Mich. Comp. Laws Ann. §§ 752.1052(b)-(c), N.J. Stat. Ann. §§ 2C:21-21(c)(1)-(2), 18 Pa. Cons. Stat. Ann. § 4116, Tex. Bus. & Com. Code § 641.051, Wisc. Stat. Ann. § 943.207 and/or the common law as decided by both federal and state courts. *See* 2 NIMMER ON COPYRIGHT, § 8C.03[B] at 8 (citing numerous cases).

common law rights implicated by the unauthorized exploitation of pre-72 Recordings, not merely common law copyright infringement claims.

At its root, the Petition asks this Court to fix a simple and clear error. In Section 301(c) of the Act, Congress legislated that “[w]ith respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited [by the Act] until February 15, 2067.” This unequivocal language means that, absent an express legislative exception, it is for the states alone to dictate the nature and scope of common law protection of pre-72 Recordings until 2067. Nevertheless, in the Decision, the Second Circuit carved out an exception to Section 301(c) that has neither textual nor logical support, holding that Internet Service Providers can avail themselves of the Digital Millennium Copyright Act’s Section 512(c) Safe Harbor defense in response to, at least, state law “infringement” claims by owners of pre-1972 Recordings like AMR. The Decision did not grant owners of pre-72 Recordings any concomitant benefits under the Act or find that any other provisions of the Act apply to pre-72 Recordings. This is of critical importance because state laws do not provide rights or remedies equivalent to the rights provided under the Act (such as attorney’s fees, statutory damages, impoundment, injunctive relief or, at least under New York’s common law copyright, any public performance rights in sound recordings provided in Section 114).⁵ Yet, in disregard of the explicit carve-

⁵ As noted, although New York has decided that New York’s common law copyright does not provide for infringement of public performance rights in pre-72 Recordings, the New York

out of Section 301(c), the Decision further reduces AMR's already lesser state rights by subjecting them to the same Safe Harbor requirements imposed on post-72 Recordings which have all of the protections, rights and statutory remedies not available to the owners of pre-72 Recordings that are afforded under the Act, based largely on the Second Circuit's focus on the word "infringement" as used in Section 512 without the use of three additional words "under this title."

The Petition should be granted and the Decision should be reversed because: (1) the Decision directly conflicts with New York's holdings concerning New York's own common law rights; (2) it has legislated new federal copyright law limiting rights and remedies in contravention of Section 301; and (3) it has created imbalance and inconsistency by applying a federal scheme that limits the rights of state-law copyright holders without providing any of the corresponding benefits of federal copyright protection. The Decision is unsupportable and profoundly unfair; this Court should grant Petitioners' writ of *certiorari* and reverse.

Court of Appeals expressly noted that it does not preclude claims for unfair competition or misappropriation.

ARGUMENT

I. The Decision Created A Stark Split Between Federal And State Law

As explained in the Petition, the Decision is directly at odds with the law of New York state. (Pet. 17-20.) As the Court is aware, “[i]n 1971, Congress amended the Copyright Act to grant limited copyright protection to sound recordings fixed on or after February 15, 1972, while expressly preserving state-law property rights in sound recordings fixed before that date.” *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 269 (2d Cir. 2016) citing 17 U.S.C. § 301(c).

In 2013 New York’s Appellate Division, First Department – the highest court in New York to consider the issue – unambiguously held that Section 512(c)’s “safe harbor” requirement does not apply to claims of common law infringement, explaining in a unanimous opinion that:

Initially, it is clear to us that the DMCA, if interpreted in the manner favored by defendant, would directly violate section 301(c) of the Copyright Act. Had the DMCA never been enacted, there would be no question that UMG [*i.e.*, plaintiff Universal Music Group] could sue defendant in New York state courts to enforce its copyright in the pre-1972 recordings, as soon as it learned that one of the recordings had been posted on [the Internet Service Provider defendant]. However, were the DMCA to apply as defendant believes, that right to immediately commence an action would be eliminated. Indeed, the only remedy available to UMG would be service of a takedown notice on defendant. This

is, at best, a limitation on UMG's rights, and an implicit modification of the plain language of section 301(c). The word "limit" in 301(c) is unqualified, so defendant's argument that the DMCA does not contradict that section because UMG still retains the right to exploit its copyrights, to license them and to create derivative works, is without merit. **Any material limitation, especially the elimination of the right to assert a common-law infringement claim, is violative of section 301(c) of the Copyright Act.**

UMG Recordings, Inc. v. Escape Media Grp., Inc., 107 A.D.3d 51, 57-58 (1st Dep't 2013) (emphasis supplied). Despite its own pronouncement over a decade ago in *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 478 (2d Cir. 2004) that "it is entirely up to New York to determine the scope of its common law copyright with respect to pre-1972 sound recordings," the Second Circuit disregarded this determination by an appellate New York court concerning the scope of New York's common law right.⁶

⁶ The Decision contends that "to the extent that Congress can be said to have repealed by § 512(c) an aspect of the rule it had previously exacted in § 301(c), it was not by implication but by specific statement," however the "specific statement" it identifies is "[a] service provider shall not be liable ... for infringement of copyright...." Pet. App. 25a. On the contrary, the only infringement addressed by the Act is an infringement of federal statutory copyright, not any state common law copyright, which, as Section 301(c) makes clear, is not the subject of the Act. Section 512 nowhere references Section 301 or pre-72 Recordings, but does reference other specific federal rights under the Act.

Because the issue decided by the Second Circuit interprets (actually rewrites) a federal statute to superimpose it on the exercise of state common law (and in some states, statutory) rights, certification to the New York Court of Appeals was not an available mechanism here.⁷ By way of recent example, in *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 267 (2d Cir. 2016) – a suit by the owner of a catalogue of pre-72 Recordings who also sued under state laws in Florida and California to enforce its rights⁸ – Sirius XM Radio appealed a decision from the Southern District of New York holding that New York affords a common law right of public performance. Although a federal law enacted in 1995, the Digital Performance Right in Sound Recordings Act,⁹ had accorded owners of sound recordings a right to control or authorize public performance “by means of a digital audio transmission [only]” the Second Circuit resisted creating another “tiny exception” to Section 301(c) in

⁷ Article 6 § 3(b)(9) of New York’s Constitution and § 500.27(a) of the New York Court of Appeals rules of practice provide the procedure for referring a certified question.

⁸ See *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG, 2014 U.S. Dist. LEXIS 139053 (C.D. Cal. Sept. 22, 2014); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-cv-23182, 2015 U.S. Dist. LEXIS 80535 (S.D. Fla. June 22, 2015). A parallel case brought against Pandora Media, Inc., an internet radio provider, is also currently before the Ninth Circuit. *Flo & Eddie, Inc. v. Pandora Media, Inc.*, No. CV 14-07648 PSG, 2015 U.S. Dist. LEXIS 70551 (C.D. Cal. Feb. 23, 2015), appeal filed No. 15-55287 (9th Cir. Feb. 24, 2015).

⁹ Similar to Section 501, Section 114 identifies the rights granted under certain sections of the Act, clearly signaling that state copyrights are not implicated.

Flo & Eddie.¹⁰ But it certified the question there because, unlike here, the issue of whether a public performance right in pre-72 Recordings was subject to protection under New York common law copyright (being excluded from regulation under Section 114 by virtue of Section 301) involved purely the scope of state copyright protection. *Id.* at 272.

The New York Court of Appeals found that New York's common law copyright provided no public performance right, citing favorably the U.S. Copyright Office's report on Federal Copyright Protection for Pre-1972 Sound Recordings (Dec. 2011) ("Copyright Office Report"), the same Copyright Office Report that the Second Circuit downplayed in the Decision. *See Flo & Eddie, Inc.*, 2016 N.Y. LEXIS 3811, at *27. While the New York Court of Appeals suggested that the owners of pre-72 Recordings may well find protection for performance rights under the law of unfair competition, it wisely concluded that issues of copyright law, including common law copyright law, are often better addressed by the appropriate legislative body, explaining that:

[I]t cannot be overstated that, if this Court were to recognize a right of public performance under the common law, we would be ill-equipped — or simply unable — to create a structure of rules to properly guide the application of that right. The legislative branch, on the other hand, is uniquely

¹⁰ The Second Circuit showed similar restraint in certifying the question "whether there is common-law copyright protection in New York for sound recordings made prior to 1972" in *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 544 (2005)] a question the Court of Appeals answered in the affirmative.

qualified, and imbued with the authority, to conduct the required balancing of interests and make the necessary policy choices.

Id. at *33-34.

Here, the Decision creates such an unstructured environment, imposing the restrictions of a federal statute on the exercise of purely state law rights (which exist under differing state laws of the 50 states which are not limited to common law copyright), requiring owners of pre-72 Recordings to satisfy the requirements of federal law as a precondition to enforcing their rights under state common law copyright (and potentially, under a variety of legal claims, including misappropriation, unfair competition and other property right theories that do not entail “infringement” claims). 2 NIMMER ON COPYRIGHT § 8C.03 (2015).¹¹ Just as the Decision

¹¹ See, e.g., *Flo & Eddie, Inc.*, 2016 N.Y. LEXIS 3811, at *37 (“[W]e note that sound recording copyright holders may have other causes of action, such as unfair competition, which are not directly tied to copyright law.”); *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 563 (2005) (“Copyright infringement is distinguishable from unfair competition, which in addition to unauthorized copying and distribution requires competition in the marketplace or similar actions designed for commercial benefit.”) (citations omitted); *Capitol Records, Inc. v. Mercury Record Corp.*, 109 F. Supp. 330, 345- 346 (D.N.Y. 1952), *aff’d*, 221 F.2d 657 (2d Cir. 1955) (unfair competition); *Radio Corp. of Am. v. Premier Albums, Inc.*, 19 A.D.2d 62, 63-64 (1st Dep’t 1963) (misappropriation); *Greater Recording Co. v. Stambler*, 144 U.S.P.Q. 547 (N.Y. Sup. Ct. 1965) (misappropriation); *Capitol Records, Inc. v. Greatest Records, Inc.*, 43 Misc. 2d 878, 880-82 (N.Y. Sup. Ct. 1964) (common law copyright, unfair competition); *Gieseeking v. Urania Records, Inc.*, 17 Misc. 2d 1034, 1035 (N.Y. Sup. Ct. 1956) (unfair competition); *Metropolitan Opera Ass’n Inc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 802 (N.Y.

ignores the unavailability of the remedies provided by the Act to pre-72 Recordings, so too does it ignore the variety of state law causes of action, leaving unclear as well whether compliance with Section 512(c) is also a precondition to the pursuit of state law rights other than common law copyright infringement claims (where the Decision focuses on the meaning of the word “infringement”).

The Second Circuit opted here to re-write Section 512(c) rather than allowing Congress to act, ignoring that a New York appellate court rejected the superimposition of a federal precondition for the enforcement of a state common law right. The result is that New York and federal law are now diametrically opposed on whether New York common law rights are subject to the satisfaction of a federal precondition, with no clarity as to whether the precondition is dependent on whether the claim is for “infringement” of common law copyright or invokes state unfair competition and misappropriation claims. Action by Congress, which has the authority to preempt equivalent state law rights by legislation, could have avoided opposite federal and state rules. The Decision has mistakenly engaged in a legislative function and *certiorari* should be granted so that it may be reversed.

Sup. Ct. 1950), *aff'd*, 279 A.D. 632 (1st Dep’t 1951) (unfair competition).

II. The Decision Violates Separation of Powers Principles

The Act, including Section 301, was the product of more than twenty years of hearings, testimony, reports and debate. *See* Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541; H.R. Rep. No. 94-1476, at 47-50 (1976); S. Rep. 94-473 (1975); H.R. Rep. No. 94-1733 (1976) (Conference Report). The Digital Millennium Copyright Act was enacted in 1998 after extensive hearings weighing the interests of copyright owners and Internet Service Providers, Pub. L. No. 105-304, Title I, 112 Stat. 2860 (1998); 2 NIMMER, *supra* § 8.21[C][2], and it was enacted against the backdrop of a clear Congressional statement in Section 301 that specifically excluded pre-72 Recordings from coverage under the Act. Congress struck a balance and if that balance is to be adjusted, it is a task for Congress, not the Second Circuit. *UMG Recordings, Inc.*, 107 A.D.3d at 59; *Stewart v. Abend*, 495 U.S. 207, 230 (1990) (“it is not our role to alter the delicate balance Congress has labored to achieve” in the Act); Copyright Office Report at p. 132 (“In short, it is for Congress, not the courts, to extend the Copyright Act to pre-1972 sound recordings, both with respect to the rights granted under the Act and the limitations on those rights (such as section 512) set forth in the Act.”).

In crafting that balance, Congress excluded pre-72 Recordings in Section 301 from federal preemption in the most “unequivocal language possible.” H.R. Rep. No. 94-1476, at 61. When Congress decided to afford protection to service providers through the “Safe Harbor” of Section 512, it balanced that protection against the rights and remedies it made available exclusively to works subject to federal copyright.

In saddling pre-72 Recordings – which are protected, if at all, only under state law – with compliance with the “Safe Harbor” requirements, the Decision upended that calibrated balance, imposing burdens on pre-72 Recordings without there being any corresponding benefits. In other words, the Decision invades the province of Congress in carving out an exception to that exclusion that Congress did not create. *Stewart*, at 495 U.S. at 228 (rejecting policy arguments regarding copyright law like those on pages 29-30 and 36 of the Decision because “[t]hese [policy] arguments are better addressed by Congress than the courts.”).

Even with regard to policy, the Second Circuit’s analysis is one-sided. As explained in *UMG Recordings, Inc. v. Escape Media Group, Inc.*, “[t]he statutory language at issue involves two equally clear and compelling Congressional priorities: to promote the existence of intellectual property on the Internet, **and to insulate pre-1972 sound recordings from federal regulation.**” 107 A.D.3d 51, 59 (1st Dep’t 2013) (emphasis supplied). The second interest, a state interest, was completely disregarded in the Decision. (Pet. 32.) This is after Congress itself reaffirmed the importance of this interest in 1998 when it extended the sunset date for exclusive state governance by 20 years to 2067, one day before Section 512(c) was passed. *See* Pub. L. No. 105-298, § 102(a), 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 301(c)).¹²

¹² Contrary to the Decision, it would not “defeat the purpose” of Section 512(c) to leave states to determine their own safe-harbor provisions for pre-72 sound recordings, Pet. App. 20a, 26a, which are a group of highly valuable works that were expressly

The Decision posits that after all of the drafting and research that went into the Act's provisions relating to pre-72 Recordings, Congress must have inadvertently neglected to include language stating that Section 512(c) alone applies to them. This is implausible considering that Congress commissioned the Copyright Office Report which concluded in 2011 that Section 512 did not apply to pre-72 Recordings,¹³ and that by 2013 federal district courts had split on this pure question of law.¹⁴ Nevertheless, the Decision concludes (1) that Congress's failure to respond to the report it requested or the federal split was oversight

excluded from federal preemption in both 1976 and 1998 and committed exclusively to the protection of state law.

¹³ In addition to this recommendation, in 2014 representatives introduced H. R. 4772, the Respecting Senior Performers as Essential Cultural Treasures Act, or the "RESPECT Act," to address payment of royalties to owners of pre-72 Recordings. See <http://www.project-72.org/documents/BILLS-113hr4772ih.pdf> (last visited January 12, 2017). One section of the proposed bill provides "This subparagraph does not confer copyright protection under this title upon sound recordings that were fixed before February 15, 1972. Such sound recordings are subject to the protection available under the laws of the States, and except as provided in clause (iii), are not subject to any limitation of rights or remedies, or any defense, provided under this title." Clearly this issue is, and has been, on Congress's radar but Congress has elected not to act implicitly affirming the Copyright Office Report's description of the status quo.

¹⁴ See *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627, 640 (S.D.N.Y. 2011) (finding that Section 512(c) does apply to pre-72 Recordings); *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 552 (S.D.N.Y. 2013) (reaching the opposite conclusion).

and (2) its failure to expressly state that Section 512(c) applies to pre-72 Recordings was poor drafting.

This view is unsupported by historical precedent where Congress has acted expeditiously when courts have erred in holdings relating to pre-72 Recordings. For example, when the Ninth Circuit similarly overstepped its bounds holding that public sale of a pre-72 Recording was a publication that divested the owner of state common law copyright protection in *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 952 (9th Cir. Cal. 1995), Congress responded two years later by amending section 303 of the federal Act to clarify that “[t]he distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of the musical work, dramatic work, or literary work embodied therein.” See 17 U.S.C. § 303(b). As this Court recently advised in another case from the Second Circuit “to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress.” *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) (citation omitted). The Second Circuit has short-circuited this process in favor of a policy pronouncement that places its thumb on the scale in favor of Internet Service Providers where there is no statutory basis for doing so.

III. The Decision's Reasoning Leads To Arbitrary Results

The Decision found that pre-72 Recordings were subject to Section 512(c) because that Section refers only to “infringement” rather than infringement “under this title.” Converting the absence of these three words into Congressional intent to override Section 301(c)’s exclusion from preemption reads too much into their omission. The same three words also do not appear in numerous other sections of the Act, none of which have been applied to pre-72 Recordings. *See e.g.*, Section 108 (an exclusion for reproductions by libraries); Section 109 (a rental lease and lending provision making it unlawful without permission of the owners of copyright in sound recordings); Section 112 (a limitation on ephemeral recordings); Section 114 (limitations on exclusive ownership rights in sound recordings);¹⁵ Section 204 (requirements of a writing for transfer of copyright to be valid); Section 205 (conditions for recordation of copyrights); Section 407 (deposit of copies with the Copyright Office); and Sections 408, 410 and 412 (registration of copyrights). *See also* Pet. 30. According equal significance to the absence of the three words in these other sections of the Act would largely strip Section 301(c) of any meaning and subject works protected under state law to a bewildering maze of inconsistent state and federal requirements.

¹⁵ Section 114 also provides for public performance income for sound recordings, yet owners of pre-72 Recordings have been required to rely on state law for such rights instead of the automatic grant under Section 114.

The Decision also ignores that owners of pre-72 Recordings have no entitlement to federal copyright remedies under Sections 502, 503, 504 and 505¹⁶ (despite the fact that subsections within these sections also omit the three words) and, absent diversity, cannot sue in federal court.

Section 512 itself is replete with provisions that are completely inconsistent with the notion that the Section is applicable to plaintiffs with state common law claims that are not subject to federal jurisdiction. Section 512(h) provides for the issuance of federal subpoenas to identify infringers, a provision not applicable absent federal jurisdiction. Section 512(j), providing for the issuance of injunctions, is unavailable to owners of pre-72 Recordings because such rights are not subject to federal jurisdiction.

In isolating a single subsection of the Act for application, the Decision creates a federal pre-condition for the exercise of state rights and an award of state law remedies that nowhere exists under state law. The Decision does not balance – and as a matter of law, the Second Circuit is not in a position to legislatively balance – the pre-condition it has imposed with the broader rights and remedies Congress provided for federally protected copyrights but expressly withheld from pre-72 Recordings.

¹⁶ See 17 U.S.C. § 503(a) (court may order the impoundment “of all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner” during the pendency of an action); § 504(c) (copyright owner may elect to pursue fixed award of statutory damages in lieu of actual damages; such award is enhanced if infringement is shown to be willful); § 505 (court may “award a reasonable attorney’s fee to the prevailing party as part of the costs”).

The Petition should be granted and the Decision should be reversed.

CONCLUSION

For the foregoing reasons, AMR respectfully requests that this Court grant Petitioners' writ of *certiorari* and reverse the Decision below.

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DONALD S. ZAKARIN
Counsel of Record
ROSS M. BAGLEY
PRYOR CASHMAN LLP
Attorneys for Amicus Curiae
ABKCO Music & Records, Inc.
7 Times Square
New York, New York 10036
(212) 326-4100
dzakarin@pryorcashman.com
rbagley@pryorcashman.com

CERTIFICATE OF COMPLIANCE

No. 16-771

CAPITOL RECORDS, LLC, *et al.*,

Petitioners,

— v. —

VIMEO, LLC, *et al.*,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Brief of *Amicus Curiae* contains 4,843 words, excluding the parts of the brief that are exempted by Supreme Court Rule 33.1(d),

I declare under penalty of perjury that the foregoing is true and correct.

Nikolina Gurfinkel

Sworn to on this ____ day of
_____, 20____