No. 16-771

IN THE
Supreme Court of the United States

CAPITOL RECORDS, LLC, CAROLINE RECORDS, INC., VIRGIN RECORDS AMERICA, INC., EMI BLACKWOOD 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., JOBETE MUSIC CO., INC., *Petitioners,*

v.

VIMEO LLC, CONNECTED VENTURES, LLC, DOES, 1-20 INCLUSIVE, *Respondents.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., THE AMERICAN ASSOCIATION OF INDEPENDENT MUSIC, INC., AND CONCORD MUSIC GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Section 301(c) of the Copyright Act states 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 Copyright Act] until February 15, 2067."

The question presented is whether the Second Circuit erred in holding, contrary to the considered view of the United States Copyright Office and in conflict with New York state appellate courts, that when Congress enacted the Digital Millennium Copyright Act and added section 512 to the Copyright Act, it *implicitly* limited and preempted the very state-law rights and remedies that section 301(c) says "shall not be annulled or limited."

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are the Recording Industry Association of America, Inc. ("RIAA"), the American Association of Independent Music Inc. ("A2IM"), and Concord Music Group, Inc. ("Concord").

The RIAA is a nonprofit trade organization that represents the major record companies in the United States. A2IM is a nonprofit trade organization representing a broad coalition of over 400 independently owned U.S. music labels. RIAA and A2IM's members collectively create, manufacture, and/or distribute nearly 100% of all sound recordings legitimately produced and sold in the United States. Many of their members own sound recordings that were created before February 15, 1972 ("pre-1972 sound recordings"). RIAA and A2IM's members depend on copyrights and state laws that safeguard property to protect the recorded music in which they have invested and created in collaboration with musicians, songwriters, and other artists.

Concord is one of the largest independent recorded music companies in the United States. Concord owns

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amici curiae* state that counsel were retained fewer than 10 days prior to the filing of this brief and promptly gave notice to all parties, who consented to the filing of this brief.

approximately 27,000 pre-1972 sound recordings, which Concord believes to be more than any entity other than the major recorded music companies.

As representatives of record companies that own and commercialize iconic and valuable pre-1972 sound recordings, as well as a record company that also commercializes many such recordings, *amici* have a significant interest in the question presented in this case, concerning the extent to which state laws continue to protect such recordings.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari thoroughly explains why the Second Circuit's decision in this matter is as wrong as it is important: Although Section 301(c) of the Copyright Act unambiguously provides that federal copyright law does not "annul[] or limit[]" state-law "rights or remedies" for sound recordings fixed before February 15, 1972, 17 U.S.C. § 301(c), the Second Circuit held that the safe harbor in Section 512(c) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c), can shield internet service providers against state-law copyright liability in certain circumstances. The Second Circuit reached that conclusion notwithstanding that the DMCA says *nothing* about state-law rights and remedies in pre-1972 sound recordings, and despite the fact that Congress enacted the DMCA *one day* after it expressly extended by 20 years the state-law supremacy codified in Section 301(c). In doing so, the Second Circuit—which mislabeled its ruling a "tiny" exception to section 301(c)—ignored this Court's longstanding recognition of the supremacy of state law with respect to pre-1972 sound recordings, and created a conflict with the New York appellate courts and the United States Copyright Office.

Although the Second Circuit's decision is wrong for a number of reasons, *amici* focus here on the great harm the decision will inflict on the music industry. As the Second Circuit acknowledged, some of the most culturally significant songs ever recorded were fixed before February 15, 1972. Pet. App. 20a-21a. Those recordings remain an important source of income for the

owners and recording artists who hold rights in them, as well as their families. To date, state law has protected the valuable rights of these individuals and companies without interference from federal law, including the DMCA's limitations on liability for federal copyrighted recordings. The decision below disrupts that status quo and threatens to claw back the rights these individuals and companies have under state law to protect their valuable intellectual property.

The decision below also creates a stark division between the Second Circuit and New York's appellate courts. As a result, the extent to which pre-1972 sound recordings are protected will depend on whether a suit is filed in the New York state courts, or a stone's throw away at the federal courthouse. That is particularly problematic given New York's central place in the recording industry, and the fact that a great many of the individuals who rely on pre-1972 sound recordings for their livelihoods reside in New York State.

But the damage done by the Second Circuit's opinion is not limited to these harms. The decision also upends the law on which the music industry has come to rely, making it difficult to predict where the line between federal and state control over pre-1972 sound recordings falls. By reading the DMCA as creating, *sub silentio*, an exception to section 301(c)'s plain statement that state law protects pre-1972 sound recordings, the Second Circuit's decision calls into question the centuries-long understanding that copyright law pays significant heed to federalism. Moreover, the Second Circuit's textual analysis—which hinged on the fact that section 512(c) addresses "infringement of copyright" without using the

specific words "under this title"—raises far more questions than it answers about which rights and remedies will be governed by federal law, and which will be governed by state law, in future cases. This uncertainty is precisely what Congress meant to avoid in enacting—and reenacting—section 301(c)'s plain statement that state law controls the rights and remedies respecting pre-1972 sound recordings.

For all of these reasons, as well as those given in the petition for a writ of certiorari, the petition should be granted.

ARGUMENT

I. PRE-1972 SOUND RECORDINGS REMAIN CULTURALLY AND ECONOMICALLY SIGNIFICANT AND THEIR STATE-LAW PROTECTIONS SHOULD NOT BE UNDERMINED BY AN UNWARRANTED EXPANSION OF FEDERAL LAW.

As the Second Circuit acknowledged, "[s]ome of the most popular recorded music of all time was recorded before 1972, including work of The Beatles, The Supremes, Elvis Presley, Aretha Franklin, Barbra Streisand, and Marvin Gaye." Pet. App. 20a-21a. That list merely scratches the surface: pre-1972 sound recordings also include recordings by The Jackson 5 and The Beach Boys (whose sound recordings, along with those of The Beatles and many others, were featured in videos on Vimeo's website, *see* Pet. App. 110a), as well as jazz recordings by Duke Ellington and Billie Holiday, folk and folk-rock recordings by Woody Guthrie and Simon & Garfunkel, rock recordings by The Velvet

Underground, and pop recordings by The Drifters, Carole King, Neil Diamond, and Bob Dylan, among countless others. These recordings remain highly relevant and commercially popular today. Indeed, a large percentage of today's best-selling recordings are compilations or re-issues of pre-1972 sound recordings that still have great appeal to younger music fans and connoisseurs alike.

Of course, music fans are not the only contributors to the popularity of pre-1972 sound recordings; other media keep the recording artists of the era alive in the public's consciousness. From critically acclaimed and award winning "biopics" of musicians, such as *Ray* (Ray Charles) and *Walk the Line* (Johnny Cash), to television shows like *Mad Men*, which referenced musical icons such as Chubby Checker and David Bowie to mark the passage of time, pre-1972 sound recordings remain at the forefront of public consciousness and popular culture. So too, new generations of audiences have been introduced to pre-1972 sound recordings through film soundtracks like those for Wes Anderson's movies, which "often highlight[] gems from the '60s and '70s," Jillian Mapes, *20 Old Songs Wes Anderson Gave New Life: A Playlist*, Flavorwire.com, http://flavorwire.com/443888/20-old-songs-wes-anderson-gave-new-life-a-playlist, and video games like the popular *Rock Band* series, which exposed a generation of young "gamers" to pre-1972 classics like Creedence Clearwater Revival's "Fortunate Son," The Who's "Baba O'Riley," and The Jimi Hendrix Experience's "Purple Haze." *See Rockband DB*, rbdb.online (last visited January 12, 2017). Far from

fading into history, pre-1972 works remain a popular, vibrant, and essential part of American culture.

Precisely because pre-1972 sound recordings remain so popular, *amici*'s members routinely invest substantial sums to acquire, promote, and market these recordings. For example, RIAA members' catalog divisions have hundreds of employees engaged in a full range of music label activities, including reissuing older albums, re-mastering pre-1972 sound recordings, and producing box sets and special occasion releases. The RIAA's members regularly license these pre-1972 sound recordings for a variety of uses, such as sampling and inclusion in movies, television, and video games, as well as commercials and third-party compilations.

Not only are pre-1972 sound recordings continuously in use today, they generate significant revenue. Prior to the Second Circuit's decision in this case, the owners and recording artists with rights in those recordings (as well as their families) could rely on state law to protect their rights and revenue streams, confident in the knowledge that, because of section 301(c), the federal Copyright Act did not undermine those rights. By holding that the limitations in section 512(c) apply to pre-1972 sound recordings, the decision below turns this status quo on its head.

II. THE IRRECONCILABLE SPLIT BETWEEN THE SECOND CIRCUIT AND THE STATE COURTS OF NEW YORK WILL HAVE A DESTRUCTIVE IMPACT ON THE MUSIC INDUSTRY.

The Second Circuit's decision creates a stark split of authority with the New York State appellate courts and the U.S. Copyright Office. For no good reason, the rights of the owners of pre-1972 sound recordings will vary based on the particular courthouse in which suit is filed. That is all the more problematic because New York is a major hub of the music industry, and will remain a frequent site of litigation over pre-1972 sound recordings.

A. The Decision Below Creates A Direct Conflict Between The Second Circuit On The One Hand, And The New York State Courts And The U.S. Copyright Office, On The Other.

As the petition explains (Pet. 17-20), the decision below is in direct conflict with the governing law in the New York Appellate Division, First Department, as well as with the Copyright Office's analysis in its 2011 report on pre-1972 sound recordings. *See generally* U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* 130-32 (Dec. 2011) ("Copyright Office Report").

In *UMG Recordings, Inc. v. Escape Media Group, Inc.*, 107 A.D.3d 51 (1st Dep't 2013), the First Department considered whether the safe harbor in section 512(c) of the DMCA applies to pre-1972 sound recordings—the very same question presented here.

The First Department held that it does not. Pointing to section 301(c), the court explained that "Congress explicitly, and very clearly, separated the universe of sound recordings into two categories, one for works 'fixed' after February 15, 1972, to which it granted federal copyright protection, and one for those fixed before that date, to which it did not." 107 A.D.3d at 58. The court held that the DMCA's safe harbors do not apply to the latter category of works because nothing in the statute or its legislative history suggests that Congress meant to roll back this federal-state division. "To the contrary," the court held, "reading the Copyright Act as a whole," the DMCA's references to "copyright" or "copyright infringers" "pertain[] only to those works covered by the DMCA," *i.e.*, sound recordings fixed after February 15, 1972. *Id.* at 58-59 (citation omitted). The Court emphasized that "in the same Congressional session it enacted the DMCA (indeed one day before), Congress amended section 301(c) of the Copyright Act to extend for an additional 20 years the amount of time before the Act could be used to 'annul' or 'limit' the rights inherent in pre-1972 recordings." *Id.* at 59. Congress was plainly aware of the preexisting division between federal and state control over copyrights. Had Congress intended to alter the status quo this radically, it would have done so expressly.

The Copyright Office reached the same result in its 2011 report. *See generally* Copyright Office Report at 130-32. In addition to relying on section 301(c)'s clear statement of state-law supremacy, the Copyright Office emphasized that the safe harbor in section 512(c) uses

the term "infringement of copyright." *Id.* at 131-32. Section 501(a), in turn, defines the nearly identical phrase "infringer of copyright" as "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122" of the *federal* statute. 17 U.S.C. § 501(a). In this way, the Copyright Office—like the First Department—read section 512(c) in harmony with other provisions of the Copyright Act, and concluded that the DMCA's safe harbor does not affect liability for infringement of pre-1972 sound recordings.

Instead of reading the Copyright Act as a whole, as the First Department and Copyright Office had done, the Second Circuit focused on the phrase "infringement of copyright" in isolation. It determined that, because the phrase was not paired with the words "under this title," Congress must have intended to provide a defense to *all* copyright infringement claims, whether under federal or state law, Pet. App. 18a-20a, notwithstanding the clear statement in section 301(c) that federal law cannot "annul or limit" state-law rights in pre-1972 works, and the federal-law definition of "infringer of copyright" in section 501(a). Thus, the Second Circuit's decision "insulate[s] service providers from liability for infringements [of pre-1972 works] of which they are unaware" under the safe harbor, Pet. App. 5a, while depriving the owners of pre-1972 sound recordings of the heightened benefits available to *federal* copyright owners under the DMCA and the Copyright Act more generally. *See* Pet. 21-22.

The Second Circuit's erroneous decision creates a direct split with the state courts of New York and the

U.S. Copyright Office. If not overturned, the extent of protection for rights in pre-1972 sound recordings will depend on whether a suit filed in New York proceeds in federal or state court. That would be an untenable result in any jurisdiction, but is especially troubling in light of New York's position as a major hub of the music industry.

B. The Split Is Particularly Harmful Given The Importance Of Pre-1972 Sound Recordings To New York's Music Industry.

New York is a leading center for the arts and entertainment industries in the United States and globally. Today, New Yorkers who work in the music industry as local musicians, performers, managers, and at music labels, account for nearly 10% of the nation's music professionals, and over 3,600 local music businesses make New York their home. *See* Music First, Economic Impact of the Community in the State of New York (on file with *amicus* RIAA). New York is the top sound recording center in the country, and numerous music labels are incorporated or have significant offices in New York. *See* Lois Gray & Maria Figueroa, *Empire States' Cultural Capital at Risk? Assessing Challenges to the Workforce and Educational Infrastructure of Arts and Entertainment in New* York, Cornell Univ. ILR Sch. 6 (2009). All told, more than 100,000 New Yorkers work in the music industry. *See* Press Release, RIAA, New York Is Music Coalition Applauds Passage of Empire State Music Production Tax Credit, Urges Governor Cuomo to Sign Bill Into Law (June 16, 2016), https://www.riaa.com/new-york-is-music-coalition-

applauds-passage-of-empire-state-music-production-tax-credit-urges-governor-cuomo-to-sign-bill-into-law/.

New York's status as a major hub of the music industry is nothing new: From the music of "Tin Pan Alley" at the end of the nineteenth century, through the jazz clubs of the 1920s and 1930s, and the evolution of salsa, mambo, Latin jazz, and folk in the 1930s through 1960s, New York has consistently been a major center of music and sound recordings. Indeed, in the decades immediately preceding Congress's decision to protect sound recordings in 1971, Manhattan was home to many in the pop music industry, resulting in the "Brill Building Sound" that produced such hits as The Drifters' "Save the Last Dance for Me" (1956), Neil Sedaka's "Breaking Up is Hard to Do" (1962), Little Eva's "The Loco-Motion" (1962), and The Shirelles' "Will You Love Me Tomorrow (1960). So too, both Bob Dylan and Simon & Garfunkel began their recording careers in New York, producing many canonical pre-1972 sound recordings.

New York today remains home to many of the best-known recording artists of the pre-1972 era, who rely on the royalties earned from exploitation of their work. For example, pre-1972 recording artists who call New York home include such musical entertainment legends as George Benson and Liza Minnelli, as well as such diverse artists as rock and rollers Garth Hudson (The Band), Gary Lewis (Gary Lewis & The Playboys), and Domingo "Sam" Samudio ("Wooly Bully"), pop crooner Kay Starr ("Wheel of Fortune"), R&B hit-maker Lloyd Price ("Personality," "Lawdy Miss Clawdy"), and jazz greats Lou Donaldson and Hugh Masekela.

Given New York's important ties to pre-1972 sound recordings, the artists who performed on them, and the companies that created or acquired them, it is likely that when rightsholders seek to protect their rights in pre-1972 sound recordings, they will file suit in New York State. Unless this Court intervenes, the extent to which their rights will be protected will depend on whether the case is brought in (or perhaps, removed or remanded to) federal or state court. That situation is untenable. It produces significant uncertainty for the many individuals and companies who rely on income derived from pre-1972 sound recordings, and it encourages procedural gamesmanship and forum shopping among New York's state and federal courts. Moreover, given that the Second Circuit's decisions are influential in other jurisdictions—including those that recognize rights in pre-1972 sound recordings—other courts may adopt the Second Circuit's flawed reasoning, further threatening the livelihoods of musicians and other rightsholders who depend on earnings from pre-1972 sound recordings.

III. THE DECISION BELOW UPENDS EXISTING COPYRIGHT LAW.

The deleterious effects of the Second Circuit's decision go beyond the untenable situation of having one rule control at 60 Centre Street (home of the New York Supreme Court, New York County) and another govern around the corner at 500 Pearl Street (the Southern District of New York's Daniel Patrick Moynihan United States Courthouse). The Second Circuit's decision disturbs decades of copyright law, which has long embraced federalism and, for more than 45 years,

expressly recognized that rights in pre-1972 sound recordings are governed exclusively by state law. The Second Circuit's decision also creates significant uncertainty with respect to other parts of the Copyright Act, as it contains no limiting principle that would prevent courts from interpreting other provisions of the Copyright Act to apply to pre-1972 sound recordings. This is not what Congress intended.

A. The Second Circuit's Decision Upends The Long And Well-Established History Of Federalism And Dual, Non-Overlapping Federal And State Protection For Works Of Authorship.

Throughout its history, U.S. copyright law has paid due respect to federalism. That policy is expressly embodied in section 301(c) of the Copyright Act, which makes clear that federal copyright law should not and does not affect pre-1972 sound recordings. By holding that the DMCA safe harbor *sub silentio* created an exception to section 301(c), the Second Circuit's decision upends copyright law's longstanding respect for federalism and carves a significant and unintended hole in section 301(c)'s mandate.

From the beginning of the nation, common law protected against copying unpublished works. *Holmes v. Hurst*, 174 U.S. 82, 84-85 (1899). By the time of the Constitution, 12 of the 13 states had also enacted copyright statutes. William F. Patry, *Copyright Law and Practice* 20 (1994).

The Constitution empowered Congress to enact a copyright law, U.S. Const. art. I, § 8, cl. 8, which it

quickly did. Copyright Act of 1790, ch. 15, 1 Stat. 124. But Congress's copyright power was not exclusive; to the contrary, the States maintained the "power to grant copyrights," at least where Congress had neither done so nor indicated its intent to "eschew all protection." *Goldstein v. California*, 412 U.S. 546, 558–59 (1973). Accordingly, a dual system of state and federal protection developed and has persisted over time.

Even after sound recordings became commercially important, they were not among the works protected by the federal Copyright Act. *See generally* Pet. 8. State law stepped in to fill this void, using copyright and other legal rights to protect sound recordings (along with other works of authorship). *Id.*; *see also*, *e.g.*, *Victor Talking Mach. Co. v. Armstrong*, 132 F. 711 (C.C.S.D.N.Y. 1904).

When Congress extended federal law to protect sound recordings, it made the deliberate choice to apply the federal statute only to recordings fixed on or after February 15, 1972. Federal protection specifically did not "affect[] in any way any rights with respect to sound recordings fixed before the effective date of this Act." Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392. Given Congress's decision not to "alter the legal relationships which govern" pre-1972 sound recordings, this Court in *Goldstein* upheld the validity of state-law protections for such recordings. 412 U.S. at 552, 571.

The federal Copyright Act of 1976 effected a "fundamental and significant change" by largely federalizing copyright law. H.R. Rep. No. 94-1476, at 129 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5679, 5745.

Congress expressed this change in clear statutory provisions. *See, e.g.*, 17 U.S.C. §§ 301(a), 301(b), 303(a). However, Congress chose to leave pre-1972 sound recordings to the exclusive province of state law, preserving the dual system in that instance. 17 U.S.C. § 301(c). Congress could not have been clearer that "rights or remedies under the common law or statutes of any State shall not be annulled or limited" by the federal Act. *Id.* Two decades later—and just *one day* before it enacted the DMCA—Congress reaffirmed its decision to leave pre-1972 sound recordings subject to state law, extending by twenty years the exclusive period of state-law protection under section 301(c). Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, § 102(a), 112 Stat. 2827, 2827 (1998).

In holding that, despite this history, the DMCA's safe harbors apply to pre-1972 sound recordings, the Second Circuit's decision fundamentally misconstrues Congress's intent. It ignores the fact that dual, non-overlapping systems of state and federal protection have been at the foundation of U.S. copyright law for more than two centuries; that Congress has used clear statements when it has sought to change the federal-state balance; and that Congress has repeatedly and unambiguously expressed its determination that pre-1972 sound recordings remain subject to state law only, including *the day before* it adopted Section 512. As against all this, the Second Circuit's conclusion—that, by failing to use the phrase "in this title" in Section 512, Congress abrogated two centuries of federalism in copyright—is a thoroughly implausible reading of congressional intent and, as discussed below, one that

creates significant uncertainty regarding the scope of other provisions of the Copyright Act.

B. The Second Circuit's Decision Creates Significant Uncertainty With Respect To The Applicability Of Other Provisions Of The Copyright Act To Pre-1972 Sound Recordings.

The Second Circuit's decision suggests that, despite section 301(c)'s plain statement that pre-1972 sound recordings are the province of state law, the Second Circuit (and other courts following its lead) may find that various other provisions of the federal Copyright Act apply to those works.

The current Copyright Act continues a two-century tradition of referring to "copyright" with the understanding that such references refer to federal copyright, not state protections. Because section 301(c) unambiguously confirms that federal and state regulation are independent and non-overlapping, numerous provisions of the federal Act, including section 512, refer to "copyright" without specifically distinguishing federal "copyright" from state "copyright." The decision below, however, assumes that any time Congress used with word "copyright" but omitted the rhetorical flourish "under this title," it may have intended the Copyright Act to reach state law as well. *See* Pet. App. 19a-20a.

That is not only wrong, but it opens the door to unintended consequences. This reasoning creates uncertainty as to numerous other provisions of the Copyright Act that also do not contain the "under this title" language. By way of example, under the Second

Circuit's approach, section 103(b) might determine the scope of protection for derivative works under state law; section 111(a) might determine rights in pre-1972 sound recordings when used by cable systems; the statutory licenses in sections 112(e) and 114 might apply to pre-1972 sound recordings; section 201(d)(1) might regulate transfers of state copyrights; section 504 might specify civil remedies for infringement of state copyrights; and section 506 might create federal criminal liability for such infringement. Congress surely did not mean to apply these myriad provisions to pre-1972 works without expressly saying so. But the Second Circuit's decision nonetheless invites decades of section-by-section litigation to determine what other provisions of federal copyright law might apply to pre-1972 sound recordings despite section 301(c).[2]

Further, many state-law protections for pre-1972 sound recordings take forms other than "copyright,"

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[2] For these reasons, the Second Circuit was wrong to state that "construe[ing] the safe harbor of § 512(c) as protecting Internet service providers against liability under state law for posted infringements of which they were unaware establishes a tiny exception to the general principle of § 301(c)—that state law will continue for 95 years to govern pre-1972 sound recordings, without interference from the federal statute." Pet. App. 24a. Not only is section 512(c) itself a very significant provision for the music industry, but the Second Circuit's decision opens a Pandora's Box of other, potential "tiny" exceptions to the previously clear and uniform rule of state-law governance of pre-1972 sound recordings. The cumulative effect of such "tiny" exceptions would rewrite the Copyright Act in a way Congress never intended. And, of course, it is the province of Congress, not the courts, to amend the Copyright Act.

including statutes and common law torts such as unfair competition, conversion, and right of publicity. *See* Copyright Office Report at 20–30, 35–43. The decision below thus invites further litigation to determine how the reference to "copyright" in section 512 may limit other provisions of state law, and presents the possibility that the results could vary depending on whether a State protects pre-1972 sound recordings on a copyright or non-copyright basis. This uncertainty is highly damaging to the music industry and the many individuals and companies who depend on state-law protection of pre-1972 sound recordings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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