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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GOOD MORNING TO YOU)
PRODUCTIONS, CORP.,)
)
)
 PLAINTIFF,) CV 13-4460-GHK(MRWX)
)
 V.) LOS ANGELES, CALIFORNIA
) JULY 25, 2014
)
 WARNER/CHAPPELL MUSIC, INC.,)
) (9:34 A.M. TO 10:56 A.M.)
)
 DEFENDANT.)
)
)

HEARING

BEFORE THE HONORABLE MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES: SEE NEXT PAGE

COURT REPORTER: RECORDED; COURT SMART

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APPEARANCES:
FOR THE PLAINTIFF:

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I N D E X

CV 13-4460-GHK (MRWX)

JULY 25, 2014

PROCEEDINGS: HEARING RE DISCOVERY

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1 LOS ANGELES, CALIFORNIA; FRIDAY, JULY 25, 2014; 9:34 A.M.

2 THE CLERK: MICHAEL R. WILNER, UNITED STATES
3 MAGISTRATE JUDGE, PRESIDING.

4 THE COURT: GOOD MORNING, EVERYBODY.

5 THE CLERK: CV 13-4460-GHK(MRWX), GOOD MORNING TO
6 YOU PRODUCTIONS CORPORATION VERSUS WARNER/CHAPPELL MUSIC,
7 INCORPORATED.

8 COUNSEL, PLEASE STATE YOUR APPEARANCES.

9 MR. RIFKIN: MARK RIFKIN AND BETSY MANIFOLD FOR THE
10 PLAINTIFFS, YOUR HONOR.

11 THE COURT: ALL RIGHT. MR. RIFKIN.

12 MS. LEMOINE: AND MELINDA LEMOINE AND ADAM KAPLAN
13 FOR DEFENDANT WARNER/CHAPPELL, YOUR HONOR.

14 THE COURT: AND MR. KAPLAN.

15 ALL RIGHT. AS I AM OBVIOUSLY GOING TO SAY, GOOD
16 MORNING TO YOU.

17 (LAUGHTER.)

18 MS. LEMOINE: GOOD MORNING.

19 MR. RIFKIN: GOOD MORNING.

20 THE COURT: THAT'S THE JOKE -- THAT'S THE JOKE THAT
21 NEVER STOPS BEING FUNNY.

22 ALL RIGHT. WE ARE ON FOR A DISCOVERY MOTION IN A
23 COPYRIGHT ACTION INVOLVING THE RIGHTS TO "HAPPY BIRTHDAY TO
24 YOU."

25 I WILL NOTE THAT SEVERAL OF THE EXTERNS WHO ARE

1 WORKING FOR ME THIS SUMMER ARE PRESENT IN THE COURTROOM AS IS
2 A REPORTER FROM -- WAS IT LAW 360?

3 THE REPORTER: THAT'S RIGHT.

4 THE COURT: YOU'RE WELCOME.

5 AND AS A RESULT WHAT I WANTED TO LET THE PARTIES
6 KNOW IS THAT ALTHOUGH ASPECTS OF YOUR FILINGS WERE PROPERLY
7 FILED UNDER SEAL BECAUSE THERE ARE ATTORNEY-CLIENT PRIVILEGE
8 ISSUES HERE, I THINK THAT WE CAN HAVE OUR DISCUSSION HERE
9 TODAY WITHOUT MAKING SUBSTANTIVE REFERENCE TO PRIVILEGED --
10 OR PUTATIVELY PRIVILEGED DOCUMENTS. IF WE GET INTO AN AREA
11 WHERE IT SEEMS A LITTLE MORE DODGEY, YOU KNOW, LET ME KNOW
12 AND WE'LL TALK ABOUT IT. BUT I DON'T SEE ANY REASON THAT WE
13 CAN'T HAVE OUR DISCUSSION HERE TODAY.

14 ALL RIGHT. SO, I REVIEWED A TREMENDOUS AMOUNT OF
15 MATERIAL OVER THE LAST FEW DAYS. I'M NOT GOING TO RECITE IT
16 ALL. I THINK -- I THINK I HAVE A HANDLE ON WHAT WAS FILED.
17 BUT THERE WAS THE JOINT STIPULATION THAT CAME IN A COUPLE OF
18 WEEKS AGO WITH SUPPORTING DOCUMENTATION AND SUPPORTING
19 DECLARATIONS.

20 THERE WAS A SUPPLEMENTAL BRIEF BOTH FROM WARNER AS
21 WELL AS FROM THE PLAINTIFFS WITH SOME ADDITIONAL MATERIALS.

22 I ALSO DID REVIEW, BUT JUST KIND OF LIGHTLY, THE
23 UNDERLYING COUDERT LETTERS THAT WE'RE TALKING ABOUT HERE. I
24 DON'T FEEL THAT THE SUBSTANCE OF THOSE LETTERS ARE REALLY
25 NECESSARY FOR OUR DISCUSSION PURPOSES HERE, ALTHOUGH THE

1 TRANSMITTAL LETTER FROM SUMMY -- AND WE'LL GET TO THAT -- TO
2 ASCAP'S GENERAL COUNSEL MAY BE OF RELEVANCE. THERE MAY BE A
3 POTENTIAL PRIVILEGE ISSUE THERE, BUT WE CAN SORT OF DANCE
4 AROUND.

5 MR. RIFKIN: AND, YOUR HONOR, THAT IS THE ONE AREA
6 WHERE I THINK YOUR CAVEAT MAY REQUIRE SOME CLARIFICATION.
7 BECAUSE I DO THINK IT'S --

8 THE COURT: THAT'S FINE.

9 MR. RIFKIN: -- IT IS IMPORTANT TO DISCUSS THE
10 SPECIFICS OF THAT LETTER. SO, EXCEPT FOR THE COVER LETTER,
11 AS YOU NOTED, I AGREE --

12 THE COURT: OKAY.

13 MR. RIFKIN: -- WITH YOUR HONOR THAT WE DON'T NEED
14 TO TALK ABOUT THE SUBSTANCE OF THE COUDERT LETTERS, BUT I
15 THINK MRS. SENGSTACK'S LETTER --

16 THE COURT: YES.

17 MR. RIFKIN: -- IS DIFFERENT.

18 THE COURT: I THINK IT IS, AND WE CAN DEFINITELY --
19 WE CAN DEFINITELY GET THAT.

20 I MEAN, YOU KNOW, SORT OF THE HEADLINE I WANTED TO
21 START WITH IS I THOUGHT YOU FOLKS DID A NICE JOB. I
22 UNDERSTAND SORT OF THE ISSUES GOING ON IN THE LITIGATION,
23 SOME OF THE TIME PRESSURES, EITHER COURT IMPOSED,
24 SELF-IMPOSED, WHATEVER, BUT YOU DID A LOT OF NICE WORK IN A
25 SHORT AMOUNT OF TIME. AND THAT'S ON BOTH SIDES. AND I SAY

1 THAT NOT ALWAYS SEEING THAT IN FEDERAL COURT.

2 THIS IS A DISCOVERY MOTION. RULE 37 REQUIRES THE
3 COURT TO AWARD FEES TO THE WINNING PARTY IN DISCOVERY,
4 UNLESS I MAKE AN AFFIRMATIVE FINDING THAT BOTH SIDES -- OR
5 THAT THE LOSING SIDE WAS SUBSTANTIALLY JUSTIFIED IN THE
6 POSITION THAT THEY TOOK. AND I CAN FRANKLY SAY THAT BOTH
7 SIDES WERE SUBSTANTIALLY JUSTIFIED, AND I DON'T SEE THAT I'M
8 GOING TO BE AWARDING FEES HERE.

9 WHAT I'D LIKE TO DO IS GIVE YOU MY TENTATIVE
10 THOUGHTS. OKAY. I'VE GOT YOUR -- I'VE GOT YOUR PAPERS. I
11 READ THEM. I SPENT A LOT OF TIME WITH THEM.

12 YOU CAN HAVE A SEAT.

13 MR. RIFKIN: THANK YOU.

14 MS. LEMOINE: THANK YOU, YOUR HONOR.

15 THE COURT: AND WHEN THE TIME COMES TO HEAR FROM
16 YOU YOU CAN GO TO THE LECTERN.

17 AND I HAVE SOME PRETTY STRONG THOUGHTS HERE AS A
18 RESULT OF WHAT YOU PUT IN FRONT OF ME, THE FACTS THAT YOU'VE
19 BEEN ABLE TO DEVELOP, THE LAW THAT YOU HAVE REFERRED ME TO.

20 AND, SO, LET ME GIVE YOU, YOU KNOW, A PRETTY
21 THOUGHT-OUT TENTATIVE. I'M HAPPY TO HEAR FROM YOU. IT MAY
22 MAKE SENSE FOR MAYBE US TO TAKE A BREAK SO YOU CAN ORGANIZE
23 YOUR THOUGHTS AND I CAN GET A DRINK OF WATER.

24 BUT I WANT TO DEAL WITH THIS. I THINK THAT I WILL
25 BE ABLE TO GET A WRITTEN DECISION TO YOU TODAY OR TOMORROW.

1 IF THERE IS GOING TO BE A DESIRE TO APPEAL MY
2 DECISION, WE CAN TALK ABOUT THE MECHANICS OF IT. IF YOU
3 THINK THAT I AM CLEARLY WRONG ON THE FACTS OR THE LAW, OR
4 WHATEVER THE GOVERNING STANDARD IS, YOU ARE ABSOLUTELY
5 ENTITLED TO AND INVITED TO APPEAL THIS MATTER TO CHIEF JUDGE
6 KING WHO IS YOUR DISTRICT JUDGE IN THIS MATTER.

7 YOU WILL BE ABLE TO VERY PROMPTLY GET THIS
8 TRANSCRIPT. I HOPE I'LL BE ABLE TO GET YOU A WRITTEN
9 DECISION. HOWEVER, THE REASON I WANTED TO EXPEDITE THIS
10 HEARING, EVEN THOUGH YOU FOLKS HAD ALREADY WANTED TO EXPEDITE
11 IT, BUT EVEN FURTHER BECAUSE I'M OUT OF TOWN BEGINNING THIS
12 WEEKEND AND THEN THROUGH NEXT WEEK.

13 I DON'T WANT MY PERSONAL SCHEDULE TO HANDICAP THE
14 PARTIES IN IMPORTANT LITIGATION. BUT I THINK YOU'LL HAVE THE
15 ABILITY TO TAKE ME UP -- IF YOU WANT TO. IF YOU CAN LIVE
16 WITH THIS, YOU CAN LIVE WITH THIS. I'M NOT DEMANDING YOU
17 APPEAL ME. I DON'T THINK I EVER DO THAT. BUT, YOU KNOW, I
18 RECOGNIZE THAT YOU HAVE THE RIGHT TO DO THAT, AND I WANT TO
19 TALK ABOUT THE MECHANICS, IF NECESSARY. BUT LET'S SEE WHERE
20 WE GO.

21 BUT LET ME GIVE YOU A RECITATION OF WHAT I
22 UNDERSTAND TO BE THE RELEVANT FACTS HERE. YOU FOLKS SPENT A
23 FAIR AMOUNT OF TIME ON SOME ISSUES THAT I DON'T THINK ARE
24 REALLY, REALLY GERMANE TO THE DISPUTE. I KNOW THAT LAWYERS
25 IN LITIGATION LIKE TO KNOCK ABOUT HE SAID, SHE SAID, THIS

1 HAPPENED, THAT HAPPENED. THAT'S FANTASTIC. A LOT OF TIMES
2 FROM THE JUDGE'S PERSPECTIVE IT'S JUST BUZZ, BUZZ, BUZZ.

3 BUT I THINK -- I THINK I WAS ABLE TO PULL OUT THE
4 KEY COMPONENTS OF WHAT'S GOING ON HERE. AND THIS IS, AS I
5 SAID, A COPYRIGHT CASE INVOLVING THE OWNERSHIP OF A COPYRIGHT
6 OR COPYRIGHTS TO THE "HAPPY BIRTHDAY TO YOU" SONG.

7 AT SOME POINT IN TIME THOSE RIGHTS WERE OWNED BY A
8 COMPANY CALLED SUMMY-BIRCHARD, S-U-M-M-Y, DASH,
9 B-I-R-C-H-A-R-D. AND THE SUMMY COMPANY, AS I'LL CALL IT, AT
10 SOME POINT IN 1976 AND 1978 RECEIVED COMMUNICATIONS FROM A
11 LAWYER AT COUDERT BROTHERS, C-O-U-D-E-R-T, A NEW YORK CITY
12 LAW FIRM. AND THOSE ARE THE LETTERS AT EXHIBITS B AND C TO
13 MR. RIFKIN'S DECLARATION.

14 AND I THINK IT'S PRETTY CLEAR THAT THE PARTIES
15 AGREED -- I BELIEVE MS. MANIFOLD ACKNOWLEDGED IN OUR PREVIOUS
16 DISCUSSION -- DON'T WORRY, I'M NOT GOING TO SANDBAG YOU WITH
17 THIS -- BUT THAT WHEN THE COUDERT LAW FIRM PROVIDED
18 INFORMATION TO SUMMY IN CONNECTION WITH THE COPYRIGHT OR
19 COPYRIGHTS AT ISSUE HERE, I DON'T THINK THERE'S ANY DISPUTE
20 THAT THAT COMMUNICATION WAS PROTECTED BY THE ATTORNEY-CLIENT
21 PRIVILEGE. IT WAS A COMMUNICATION BETWEEN A LAWYER AND A
22 CLIENT IN A PRIVILEGED OR CONFIDENTIAL CONTEXT. IT RELATED
23 TO LEGAL ADVICE. AND I THINK AT THE OUTSET WE HAD AN
24 ACKNOWLEDGMENT THAT THE 1976 AND 1978 LETTERS FROM THE LAW
25 FIRM TO SUMMY ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

1 MR. RIFKIN IS SORT OF SHAKING HIS HEAD SIDE TO
2 SIDE. WE'LL COME BACK TO THAT.

3 THERE IS ALSO NO DISPUTE THAT SUMMY SENT THOSE
4 COUDERT LETTERS TO AN INDIVIDUAL WHO I UNDERSTAND TO BE THE
5 GENERAL COUNSEL AT THE TIME OF ASCAP, THE AMERICAN SOCIETY OF
6 -- AND I NEVER GET IT RIGHT -- COMPOSERS AND SOME OTHER
7 PEOPLE. BUT THE ACRONYM IS ASCAP. THAT WAS A LETTER SENT IN
8 1979 FROM SUMMY TO ASCAP TRANSMITTING THE COUDERT LETTERS.

9 AND THERE IS A VERY BRIEF COVER LETTER FROM AN
10 EXECUTIVE AT SUMMY BASICALLY EXPLAINING -- AND I DON'T WANT
11 TO CAUSE A PRIVILEGE ISSUE HERE, BUT JUST SAYING, HERE'S
12 MATERIAL HAVING TO DO WITH THE CLAIM OF RIGHTS REGARDING THE
13 SONG. OKAY. AND IT DOESN'T SAY TOO MUCH MORE BEYOND THAT AS
14 WE PREVIOUSLY DISCUSSED. AND THAT'S ABOUT IT.

15 WE GET FAST FORWARDED TO 2014 AND WE GET TO THE
16 ISSUE OF HOW THIS CAME UP. I KNOW THERE'S A LOT OF
17 PROCEDURAL ISSUES HERE. I KNOW THE PARTIES WENT BACK AND
18 FORTH ON SOME OF THESE ISSUES.

19 THE PLAINTIFFS SERVED A SUBPOENA ON ASCAP. ASCAP
20 PRODUCED THE COUDERT LETTERS AND, I PRESUME, THE SUMMY LETTER
21 TO THE PLAINTIFFS IN RESPONSE TO A SUBPOENA. IT'S MY
22 ASSUMPTION THAT WAS WITHOUT CONSULTING WARNER, WHO IS THE
23 SUCCESSOR TO SUMMY. WARNER FOUND OUT ABOUT IT -- I WAS GOING
24 TO SAY SOMETHING A LITTLE FLIPPANT, BUT I'M NOW NOT GOING TO
25 BECAUSE WE'RE ON THE RECORD HERE -- ASSERTED ITS PRIVILEGE

1 AND REQUESTED ESSENTIALLY A CLAW-BACK.

2 AND WHETHER IT WAS UNDER RULE 26(B)(5) OR FEDERAL
3 RULE OF EVIDENCE 502, WARNER CONTENDED THAT THE MATERIALS
4 SHOULD NOT HAVE BEEN PRODUCED BECAUSE OF THE CLAIM OF
5 PRIVILEGE. AND PLAINTIFFS -- AND I WOULD -- I'M PREPARED TO
6 FIND THAT THE REQUESTS FROM WARNER SUBSTANTIALLY COMPLIED
7 WITH THE RULES. I'M ALSO PREPARED TO FIND THAT PLAINTIFF'S
8 ACTIONS TO SEQUESTER THE MATERIALS AND BRING THIS ISSUE
9 BEFORE THE COURT SUBSTANTIALLY COMPLIED WITH 26(B)(5) AS
10 WELL.

11 I KNOW YOU HAVE ISSUES ABOUT TIMING AND HOW LONG IT
12 TOOK ONE SIDE TO DO SOMETHING AND ONE SIDE TO DO THE OTHER.
13 FRANKLY, GIVEN WHAT'S BEEN GOING ON, I FIND THAT BOTH PARTIES
14 ACTED REASONABLY AND SUBSTANTIALLY COMPLIED WITH THE RULE.

15 I ALSO AM PREPARED AS WE HAD DISCUSSED PREVIOUSLY
16 -- I'M PREPARED TO CONCLUDE THAT THE ISSUE IS NOT REALLY
17 WHETHER ASCAP'S PRODUCTION -- AND I BELIEVE IT WAS
18 INADVERTENT OR MAYBE NOT FULLY INFORMED -- DOESN'T SERVE TO
19 HAVE WAIVED WHATEVER PRIVILEGE IS IN EXISTENCE HERE. THAT
20 IS, I DON'T THINK I HAVE A BASIS TO SAY THAT THE 2014
21 PRODUCTION BY ASCAP IS SUFFICIENT TO HAVE CAUSED A WAIVER OF
22 WHATEVER PRIVILEGE IS HERE.

23 I THINK THE ISSUE IS WHETHER THE PRIVILEGE HAD BEEN
24 WAIVED BACK IN 1979 WHEN THE MATERIALS GOT INTO ASCAP'S
25 FILES. I FIND THAT IF SOMEONE RUMMAGES THROUGH THE FILES IN

1 2014 AND TURNS SOMETHING OVER, YOU KNOW, THERE'S PROBLEMS,
2 THERE'S ISSUES. BUT, YOU KNOW, PRIVILEGE ISSUES ARE
3 SIGNIFICANT.

4 AND, SO, WE HAD SPENT TIME ON PREVIOUS PHONE CALLS
5 TALKING ABOUT WHAT I NEED TO KNOW IN ORDER TO MAKE A
6 DETERMINATION ABOUT WHAT I TAKE TO BE THE ISSUE, THIS 1979
7 TRANSFER FROM SUMMY TO ASCAP.

8 AND I THINK THAT THERE ARE TWO ISSUES OF REAL
9 INTEREST TO ME THAT I THINK ARE DISPOSITIVE OF THE ISSUE OF
10 WHETHER THERE WAS A PRIVILEGE OR WHETHER THAT PRIVILEGE WAS
11 WAIVED. AND THAT HAS TO DO WITH THE NATURE OF THE
12 RELATIONSHIP BETWEEN SUMMY, SLASH, WARNER ON THE ONE SIDE AND
13 ASCAP ON THE OTHER AND THE PURPOSE FOR SUMMY TRANSMITTING THE
14 COUDERT MATERIALS TO ASCAP.

15 AND I WILL SAY THAT I THINK I HAVE A PRETTY GOOD
16 HANDLE ON THE RELATIONSHIP BETWEEN WARNER OR SUMMY AS THE
17 PUTATIVE RIGHTHOLDER AND ASCAP. I THINK I KNOW WHAT THAT
18 RELATIONSHIP IS. IT'S PRETTY CLEAR. IT'S ALMOST COMMON
19 KNOWLEDGE.

20 I DON'T THINK THAT THERE IS QUITE AS MUCH DIRECT
21 EVIDENCE ABOUT THE PURPOSE OF TRANSMITTING THE COUDERT
22 MATERIALS TO ASCAP. AND, YOU KNOW, PART OF THAT IS JUST THE
23 MIST OF TIME. IT'S SOMETHING THAT OCCURRED 30-SOME-ODD YEARS
24 AGO. AND I DON'T HAVE ANY DIRECT MATERIAL FROM EITHER MS.
25 SENGSTRACK --

1 MR. RIFKIN: SENGSTACK -- S-E-N-G- --

2 THE COURT: -- SENGSTACK, S-E-N-G-S-T-A-C-K, AND THE
3 PERSON AT ASCAP. THAT'S JUST 30-SOME-ODD YEARS AGO.

4 BUT I HAVE THE LETTER ITSELF, AND I THINK -- I
5 THINK WE CAN INTUITIVELY FIGURE OUT WHAT'S GOING ON HERE.

6 AND LET ME BE CLEAR. IT IS WARNER'S BURDEN TO
7 ESTABLISH THAT THE ATTORNEY-CLIENT PRIVILEGE EXISTS AND
8 APPLIES, AND THAT IT HASN'T BEEN WAIVED. THAT IS THE BURDEN
9 OF THE PARTY ASSERTING THE PRIVILEGE.

10 AND I AM OBLIGED TO CONSIDER A PRIVILEGE CLAIM
11 CLOSELY AND NARROWLY BECAUSE THE ATTORNEY-CLIENT PRIVILEGE,
12 AS WITH ANY OTHER PRIVILEGE, PREVENTS THE FULL AND FAIR
13 DISCLOSURE OF INFORMATION. IT'S A WAY TO RESIST DISCOVERY.
14 AND THE FEDERAL SYSTEM FAVORS DISCOVERY, FAVORS PRETRIAL OF
15 CASES AND DISCLOSURE OF INFORMATION. AND, SO, A CLAIM OF
16 PRIVILEGE OBSTRUCTS THAT AND MAY OBSTRUCT IT PROPERLY, BUT ON
17 THAT BASIS IT HAS TO BE DONE NARROWLY AND WITH
18 SUBSTANTIATION.

19 SO, MY TWO BIG ISSUES ARE THE NATURE OF THE
20 RELATIONSHIP BETWEEN THE RIGHTHOLDER AND ASCAP AND THEN THE
21 PURPOSE OF TRANSMITTING THIS MATERIAL TO ASCAP.

22 SO, MY FIRST AREA OF INQUIRY IS WHAT IS ASCAP. AND
23 I FOUND CONSIDERABLE INFORMATION IN THE MATERIALS, PRIMARILY
24 MR. REIMER'S DECLARATION WHICH WAS -- MR. REIMER IS A LAWYER
25 AT ASCAP, AND HE SUBMITTED A DECLARATION. AS I UNDERSTAND

1 IT, IT WAS IN CONNECTION WITH THE PROCEEDINGS IN NEW YORK TO
2 QUASH SOME DEPOSITIONS.

3 AGAIN, YOU ALL WENT CRAZY ON SOME OF THIS STUFF.
4 THAT'S FINE. I'M NOT CRITICAL. DOING YOUR STUFF. DOING IT
5 AT A VERY HIGH LEVEL.

6 MR. REIMER GAVE A DECLARATION. HE'S AN IN-HOUSE
7 LAWYER AT ASCAP, AND HE GAVE A BRIEF DESCRIPTION OF WHAT
8 ASCAP IS.

9 THERE WAS ALSO INFORMATION IN THE DEPOSITION OF MR.
10 BLEITZ, B-L-E-I-T-Z, WHO I UNDERSTAND TO BE EXECUTIVE AT
11 WARNER WHO HAS INTERACTION WITH ASCAP.

12 AND, THEN, THERE WERE SOME OTHER MATERIALS PROVIDED
13 BY THE DEFENSE. THERE'S AN AGREEMENT BETWEEN WARNER AND
14 ASCAP THAT SETS OUT WHAT ASCAP DOES.

15 AND MY UNDERSTANDING IS THAT ASCAP IS A MEMBERSHIP
16 ASSOCIATION OF SONG WRITERS AND OTHERS WHO OWN MUSICAL
17 COPYRIGHTS. AND AT THE REQUEST OF THOSE MEMBERS, ASCAP CAN
18 LICENSE THE PUBLIC PERFORMANCE COMPONENT OF THE COPYRIGHT FOR
19 SONGS, FOR THINGS SUCH AS RADIO BROADCASTS AND LIVE
20 PERFORMANCES.

21 WHAT ASCAP DOES IS IT COLLECTS FEES FROM
22 PERFORMANCES OR PERFORMERS WHERE THERE'S A LICENSE TO PERFORM
23 COPYRIGHTED MATERIAL AND DISTRIBUTES THOSE FEES TO THE RIGHTS
24 HOLDERS.

25 ASCAP MAKES CLEAR IN MR. REIMER'S DECLARATION THAT

1 IT DOES NOT OWN COPYRIGHTS ON BEHALF OF ITS MEMBERS. AND IT
2 DOES NOT KEEP THE FEES THAT ARE DERIVED FROM THE PUBLIC
3 PERFORMANCES -- ALTHOUGH IT IS COMPENSATED. AND I KNOW THERE
4 WAS AN AMBIGUITY IN MR. REIMER'S DECLARATION, AND I TAKE IT
5 TO BE AN AMBIGUITY BECAUSE HE SAYS WE DON'T GET PAID FROM THE
6 FEE. BUT THEN HE SAYS WE GET PAID ESSENTIALLY FROM THE FEE.
7 AND I THINK -- I THINK THERE'S AN AMBIGUITY HERE. AND I
8 UNDERSTAND WHY BOTH PARTIES READ IT VERY CLOSELY. BUT MY
9 UNDERSTANDING FROM OTHER ASPECTS OF THE DECLARATION IS THAT
10 ASCAP GETS PAID ITS EXPENSES OR SOME PREDETERMINED FEE OR
11 PERCENTAGE FROM THE LICENSES -- FROM THE FEES IT DERIVES FROM
12 LICENSES. AND I KNOW THAT THERE'S AN UNBELIEVABLY COMPLEX
13 STRUCTURE WHERE THEY TAKE IN MONEY FROM BROAD LICENSES AND
14 PAY IT OUT TO HUNDREDS OF THOUSANDS OF PERFORMERS. I HAVE
15 FRIENDS WHO ARE PERFORMERS. I'M NOT GOING TO INJECT MY
16 PERSONAL STUFF, BUT THERE'S ALL KINDS OF STUFF ABOUT
17 RESIDUALS, ROYALTIES, LICENSES. BUT THAT'S WHAT ASCAP DOES.

18 ASCAP ISSUES LICENSES TO BARS AND RADIO STATIONS
19 AND COLLECTS MONEY AS A PERFORMING RIGHTS ORGANIZATION ON
20 BEHALF OF ITS MEMBERS. IT'S OWNED BY ITS MEMBERS. AND ONE
21 OF THE OTHER THINGS THAT IT DOES IS IT POLICES RIGHTS FOR ITS
22 MEMBERS. THE STRUCTURE OF COLLECTING FEES HAS TO DO WITH
23 WHERE'S THERE'S BEEN A LICENSE NEGOTIATED WITH A BAR OR A
24 RADIO STATION. BUT IF THERE IS A PUBLIC PERFORMANCE OF A
25 COPYRIGHTED WORK THAT DOES NOT -- WHERE THE PERFORMER DOES

1 NOT HAVE PERMISSION AND THERE'S A CLAIM OF INFRINGEMENT,
2 ASCAP IS ENTITLED AND HAS BEEN HIRED TO PURSUE THOSE
3 INFRINGERS ON BEHALF OF THE RIGHTS OWNER.

4 AND THAT'S WHAT MR. BLIETZ TESTIFIED ABOUT. HE
5 SAID THAT ASCAP AS HE UNDERSTOOD IT -- AND HE WAS VAGUE ABOUT
6 IT -- NOT ALL THE WAY TO BRIGHT ON IT. BUT HE UNDERSTOOD
7 THAT ASCAP CAN SUE PEOPLE ON BEHALF OF WARNER FOR
8 INFRINGEMENT OF WARNER'S RIGHTS.

9 AND THAT'S CERTAINLY CLEAR FROM THE WRITTEN
10 AGREEMENT THAT I REVIEWED, WHICH WAS EXHIBIT D TO MR. KLAUS'S
11 DECLARATION, THAT ASCAP HAS THE RIGHT TO SUE IN A COPYRIGHT
12 ACTION ON BEHALF OF ITS RIGHTS OWNER. AND THAT'S -- THAT --
13 THAT MAKES SENSE TO ME BECAUSE THAT'S WHAT COPYRIGHT IS.

14 COPYRIGHT IS A PROTECTION OF INTELLECTUAL PROPERTY.
15 AND INTELLECTUAL PROPERTY GETS USED THROUGH LICENSES. AND IT
16 GETS EXPLOITED BY PEOPLE WHO OWN THOSE RIGHTS. AND THOSE
17 RIGHTS REGULARLY GET WIELDED AGAINST PEOPLE WHO USE PROTECTED
18 MATERIAL WITHOUT PERMISSION BECAUSE THEY DON'T OWN THE
19 RIGHT. COPYRIGHT IS A PRECONDITION TO LITIGATION. AND
20 THAT'S WHY IT WAS IN OUR CONSTITUTION IN 1787. I'M TALKING
21 TO COPYRIGHT LAWYERS LIKE THEY DON'T KNOW THAT. OF COURSE
22 THEY KNOW THAT.

23 AND WHERE THAT LEADS IS THAT IN ORDER TO ASSERT A
24 COPYRIGHT CLAIM ONE MUST DEMONSTRATE OWNERSHIP. THAT'S AN
25 ELEMENT OF A CLAIM OF INFRINGEMENT. I AM THE PARTY

1 PLAINTIFF. I OWN THIS RIGHT. YOU, THE INFRINGING DEFENDANT,
2 DO NOT. YOU DON'T OWN IT OR YOU DON'T HAVE PERMISSION TO USE
3 MY RIGHT.

4 AND, SO, NOW, WE GET TO THE ISSUE OF THE
5 COMMUNICATION BETWEEN SUMMY AND ASCAP. ASCAP WAS HIRED TO
6 ADMINISTER SUMMY'S RIGHTS. I PRESUME -- ALTHOUGH, CERTAINLY,
7 WARNER WAS DOWN THE ROAD. AND ASSUMING THAT RELATIONSHIP,
8 ASCAP WAS ENTITLED TO AND REQUESTED TO POLICE THE RIGHTS FOR
9 SUMMY'S COPYRIGHTED MATERIAL.

10 AND, SO, WE GET TO THE ISSUE AS TO -- ABOUT SUMMY
11 SENDING THE COUDERT MATERIALS TO ASCAP. AND THE TRANSMITTAL
12 LETTER AND THE SUPPORTING MATERIALS NOT ENTIRELY CLEAR -- NOT
13 ENTIRELY CLEAR. BUT I THINK CIRCUMSTANTIALLY IT'S PRETTY
14 APPARENT TO ME THAT IF ASCAP WERE TO NEGOTIATE LICENSES OR
15 SUE ALLEGED INFRINGERS ON BEHALF OF SUMMY BASED ON SUMMY'S
16 COPYRIGHT IN THE "HAPPY BIRTHDAY" SONG, IF ASCAP WERE TO DO
17 THOSE THINGS AS PART OF ITS AGREEMENT, THEN, ASCAP WAS
18 ENTITLED TO KNOW, AND WOULD BE REQUIRED TO PROVE IN A COURT,
19 THAT ITS RIGHTS AND THE RIGHTS IT DERIVED FROM SUMMY WERE
20 LEGITIMATE.

21 AND IT MAKES SENSE TO ME THAT IF SUMMY HAD
22 INFORMATION, AND IF IT WAS PRIVILEGED INFORMATION, REGARDING
23 ITS OWN OWNERSHIP IN THE "HAPPY BIRTHDAY" SONGS, THAT
24 PROVIDING THAT INFORMATION TO ITS LICENSING AGENT IN ADVANCE
25 OF SOME DISPUTE, THAT MAKES SENSE TO ME.

1 NOW, I WILL NOTE THAT SUMMY DID NOT HAVE TO PROVIDE
2 PRIVILEGED INFORMATION IN ORDER TO DO THAT. SUMMY COULD HAVE
3 CHOSEN TO DO SOMETHING THAT REGULARLY OCCURS IN THE
4 SECURITIES CONTEXT. I DON'T KNOW IF IT OCCURS IN THE
5 COPYRIGHT CONTEXT, BUT I KNOW IT OCCURS IN THE SECURITIES
6 CONTEXT, WHICH IS SOMETHING ALONG THE LINES OF A 10(B)(5)
7 LETTER OR A COMFORT LETTER.

8 SUMMY COULD HAVE SAID, OR SUMMY COULD HAVE HAD ITS
9 COUDERT BROTHERS LAWYERS, JUST SAY WE OWN THIS COPYRIGHT.
10 WE'LL BACK YOU UP. WE'LL PROVIDE INFORMATION AT A LATER
11 DATE, OR YOU'RE ENTITLED TO RELY ON OUR CLAIM TO AVOID
12 MALICIOUS PROSECUTION CLAIMS OR CLAIMS OF -- THAT WE'RE
13 ACTING ULTRA VIRES.

14 IT HAPPENS EVERY DAY OF THE WEEK IN THE SECURITIES
15 CONTEXT. A BOND ISSUER OR THE BOND ISSUER'S LAWYER WILL
16 ISSUE A LETTER TO AN UNDERWRITER SAYING THESE BONDS ARE
17 PROPER. THEY WERE LAWFULLY ISSUED. WE'RE NOT GIVING YOU
18 PRIVILEGED INFORMATION, BUT WE'RE GIVING YOU AN OPINION THAT
19 YOU CAN RELY ON.

20 BUT THAT DIDN'T HAPPEN HERE. AND SUMMY CHOSE TO
21 GIVE PRIVILEGED INFORMATION RECEIVED FROM THE COUDERT FOLKS
22 ABOUT -- ABOUT THE NATURE OF ITS OWNERSHIP AND ITS CLAIMS AND
23 THE STATUS OF THINGS.

24 AND, SO, ONE OF THE ARGUMENTS THAT WARNER ASSERTS
25 HERE IS THAT ASCAP IS ACTUALLY WITHIN THE PRIVILEGE

1 RELATIONSHIP -- THAT THE RELATIONSHIP THAT SUMMY HAD WITH ITS
2 LAWYER AT COUDERT WAS IN A SENSE EXTENDED TO THE LAWYER AT
3 ASCAP.

4 WE THEN ALSO GET INTO ISSUES OF THE COMMON INTEREST
5 EXCEPTION TO THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE.
6 AND I WILL TELL YOU THAT I'VE SORT OF STRUGGLED IN WHAT MY
7 APPROPRIATE FRAMEWORK IS HERE BECAUSE I KIND OF SEE TWO
8 CLAIMS FROM WARNER.

9 I SEE WARNER SAYING THAT THE DISCLOSURE TO -- TO
10 ASCAP IN 1979 WAS NOT A WAIVER OF THE PRIVILEGE AT ALL. AND
11 THERE IS A RELIANCE ON THE SCHWARTZ CASE AND THE UNITED
12 STATES VERSUS ASCAP CASE, BOTH DISTRICT COURT OPINIONS FROM
13 THE FEDERAL COURT IN NEW YORK, WHICH HAS REAL FAMILIARITY
14 WITH ASCAP. AND THERE WAS A REFERENCE TO THE FACT THAT A LOT
15 OF ASCAP LITIGATION BY VIRTUE OF CONSENT DECREES, I THINK --

16 YES, I READ YOUR PAPERS, FOLKS. I READ -- I READ
17 -- I READ YOUR PAPERS, FOLKS.

18 -- THAT THE NEW YORK COURTS HAVE REAL FAMILIARITY
19 WITH ASCAP.

20 AND THERE IS -- THERE ARE SOME PRETTY CLEAR
21 STATEMENTS IN THOSE DECISIONS THAT AN UNINCORPORATED
22 ASSOCIATION LIKE ASCAP AND THE ASSOCIATION'S LAWYER DOES HAVE
23 AN ATTORNEY-CLIENT RELATIONSHIP WITH ITS MEMBERS. NOW, THAT
24 LAW HAS EVOLVED AND CHANGED OVER THE YEARS. BUT WHERE THERE
25 IS A SHOWING THAT A MEMBER OF THE ASSOCIATION IS SEEKING

1 LEGAL ADVICE FROM THE LAWYER FOR THE ASSOCIATION, THAT THE
2 PRIVILEGE EXTENDS TO THAT RELATIONSHIP. THAT'S KIND ONE OF
3 THE ARGUMENTS THAT I HEARD FROM -- FROM WARNER.

4 AND THEN IN THE ALTERNATIVE -- AND I DON'T THINK
5 THAT THEY'RE EXCLUSIVE -- THE ARGUMENT IS THAT, WELL, IF THE
6 TRANSMITTAL OF THIS INFORMATION TO ASCAP OR ASCAP'S GENERAL
7 COUNSEL WAS BASICALLY BRINGING IN A THIRD PARTY TO THE
8 RELATIONSHIP, SOMEONE OUTSIDE OF THE DIRECT ATTORNEY-CLIENT
9 RELATIONSHIP, THAT COULD BE A WAIVER. BUT THERE IS AN
10 EXCEPTION TO THE WAIVER. AND THAT'S THE COMMON INTEREST
11 CLAIM.

12 AND THE LAW IS CLEAR. AND I READ WITH GREAT
13 INTEREST THE NIDEC CASE, N-I-D-E-C, AS WELL AS THE POTATO
14 CASE. I'M JUST GOING TO CALL IT THE POTATO CASE AS WELL AS
15 -- I THINK IT WAS THE LOVE CASE FROM JUDGE RYU UP IN THE
16 NORTHERN DISTRICT, WHICH IS THAT WHERE THERE IS A
17 COMMUNICATION MADE TO ANOTHER PARTY IN THE COURSE OF A MATTER
18 OF COMMON INTEREST, AND THE COMMUNICATION IS DESIGNED TO
19 FURTHER THAT EFFORT, THAT WILL NOT BE A WAIVER OF THE
20 PRIVILEGE.

21 AND THERE'S SOME REAL FACTUAL ANALYSIS THAT HAS TO
22 OCCUR HERE BECAUSE THE DOCTRINE DOES NOT EXTEND TO
23 COMMUNICATIONS THAT ARE BUSINESS ORIENTED OR HAVING TO DO
24 WITH BUSINESS STRATEGY. PARTIES HAVE TO DEMONSTRATE AS JUDGE
25 RYU WROTE, "COOPERATION INFORMING A COMMON LEGAL STRATEGY."

1 AND THE COMMUNICATION HAS TO ADVANCE THAT LEGAL STRATEGY.

2 SO, IN THE CASE OF THE POTATO LITIGATION THERE WAS
3 SOME COOPERATIVE POTATO MARKETING GROUP. AND THERE WERE
4 DISCUSSIONS ABOUT COMPLIANCE WITH FEDERAL LAW SO THAT
5 SOMETHING INVOLVING POTATOES DOESN'T BREAK THE LAW.

6 AND THE DISTRICT COURT IN THE POTATO CASE -- HEY,
7 NOT COINCIDENTALLY, UP IN IDAHO -- CONCLUDED THAT THE
8 TRANSACTIONS THERE WERE JUST STRAIGHT BUSINESS DEALS. THIS
9 HAD TO DO WITH MARKETING POTATOES, AND THAT WHATEVER LEGAL
10 ISSUES WERE DISCUSSED WERE REALLY TANGENTIAL TO THE
11 COMMUNICATIONS.

12 SO, WHERE I AM IS THIS. I THINK I NEED TO KNOW --
13 AND I NEED TO DETERMINE AS BEST I CAN WHAT WAS THE
14 RELATIONSHIP BETWEEN SUMMY AND ASCAP AND WHY WAS THIS
15 MATERIAL CONVEYED FROM SUMMY TO ASCAP.

16 AND I THINK IT'S FAIR TO SAY AFTER SORT OF BRIEFLY
17 REVIEWING THE UNDERLYING COUDERT MATERIALS -- LIKE I SAID, I
18 DIDN'T GO LINE BY LINE BECAUSE I DON'T THINK IT'S RELEVANT,
19 ESPECIALLY SINCE THERE'S AN ACKNOWLEDGMENT THAT THE PRIVILEGE
20 APPLIES THERE. BUT THE ISSUE IS WHY WOULD SUMMY WANT TO
21 TRANSMIT THAT INFORMATION TO ASCAP. WHAT'S THE POINT.

22 AND I THINK -- I THINK IT IS FAIR TO CONCLUDE THAT
23 THE POINT WAS BECAUSE DOWN THE ROAD ASCAP MIGHT BE LITIGATING
24 THOSE COPYRIGHTS -- LICENSING OR LITIGATING THOSE COPYRIGHTS
25 ON BEHALF OF SUMMY. AND I DON'T THINK THAT'S MAGIC. I DON'T

1 THINK THAT'S UNANTICIPATED. THAT'S WHAT ASCAP DOES. THAT'S
2 WHY PEOPLE HIRE ASCAP TO ADMINISTER THESE RIGHTS BECAUSE AN
3 INDIVIDUAL COMPANY CAN'T GO TO EVERY RADIO STATION AND EVERY
4 BAR AND POLICE THE RIGHTS.

5 AND GIVEN THAT THERE MAY HAVE BEEN SOME MURKINESS
6 REGARDING THE STATUS OF THE COPYRIGHT TO THE "HAPPY BIRTHDAY"
7 SONGS, BACK THEN AND TODAY, THAT'S WHY YOU FOLKS ARE HERE IN
8 2014. BECAUSE THERE ARE LEGITIMATE DISPUTES AS SET FORTH IN
9 THE COMPLAINT ABOUT THE LEGITIMACY OF THE RIGHTS AND WHETHER
10 THEY WERE EXPIRED, WHETHER THE SONG IS IN THE PUBLIC DOMAIN.
11 PROBABLY EVEN MORE.

12 I THINK IT'S FAIR TO SAY THAT SOME OF THOSE ISSUES
13 EXISTED IN 1976, 1978 AND IN 1979 WHEN THIS INFORMATION WAS
14 TRANSMITTED TO THE GENERAL COUNSEL OF ASCAP -- NOT IN
15 ANTICIPATION OF OR IN RESPONSE TO A SPECIFICALLY IDENTIFIED
16 LAWSUIT. I DON'T THINK THE RECORD SHOWS THAT AT ALL. BUT
17 COULD IT HAVE BEEN COMING DOWN THE PIKE. AND WAS THERE A
18 NEED TO FORMULATE A COMMON LEGAL STRATEGY, WHICH IS THE
19 LANGUAGE IN THE POTATO CASE.

20 THE EVIDENCE IS THIN BECAUSE WE'RE TALKING ABOUT
21 SOMETHING HISTORICAL, BUT I THINK IT'S A FAIR INFERENCE. I
22 THINK IT'S A FAIR INFERENCE.

23 I WAS -- I WAS TRYING TO READ THIS VERY NARROWLY.
24 THAT'S MY OBLIGATION AND IT'S -- THE PLAINTIFFS HAVE QUITE
25 PROPERLY SOUGHT TO PURSUE A CLAIM THAT THIS PRIVILEGE WAS

1 WAIVED AND THAT THE COMMON INTEREST DOCTRINE DOES NOT APPLY.
2 AND I READ EVERYTHING CLOSELY AND NARROWLY AS I'M OBLIGED TO
3 DO.

4 ONE THING THAT I COULD NOT GET ON BOARD WITH,
5 THOUGH, WAS --

6 AND I'M HAPPY TO HEAR FROM YOU ON THIS. I HAVEN'T
7 -- THIS IS A TENTATIVE, AND I WANT TO HEAR FROM YOU FOLKS.
8 BECAUSE IF I DON'T HAVE IT RIGHT, I DON'T WANT TO DO IT.

9 BUT WHEN YOU FOLKS SAID ON THE PLAINTIFF'S SIDE
10 THAT MS. STENGSTACK -- SENGSTACK GRATUITOUSLY TURNED OVER
11 THIS MATERIAL TO ASCAP, GRATUITOUSLY, IMPLYING NO PURPOSE,
12 IMPLYING THAT IT WAS SORT OF A RANDOM EVENT, IMPLYING THAT
13 THERE WAS NO -- NO MERIT OR NO LEGAL SIGNIFICANCE TO THIS, I
14 JUST RESPECTFULLY WASN'T CONVINCED.

15 I THINK THE FACT THAT A PUBLISHING HOUSE THAT HAD
16 GONE OUT TO WHAT AT THE TIME WAS, YOU KNOW, ONE OF AMERICA'S
17 PREMIER LAW FIRMS TO GET SOME PRETTY DETAILED ANALYSIS OF THE
18 EXISTENCE AND STATUS OF ITS COPYRIGHT CLAIM, AND THEN
19 PROVIDED THAT TO NOT A FUNCTIONARY AT ASCAP, NOT SOME
20 LOW-LEVEL EXECUTIVE OR OFFICE MANAGER OR ANYTHING, BUT THE
21 GENERAL COUNSEL OF AMERICA'S BIGGEST -- OR SECOND BUSINESS.
22 THEY CAN FIGHT ABOUT THAT -- YOU KNOW, A MAJOR LICENSING
23 FIRM, THAT FELT LIKE IT WASN'T GRATUITOUS. THAT FELT LIKE
24 THERE WAS A REAL ISSUE ON WHICH ONE OR BOTH PARTIES NEEDED
25 GUIDANCE, AND THIS COMMUNICATION SEEMED TO HAVE BEEN DONE

1 WITH THE INTENTION OF ADVANCING A COMMON LEGAL STRATEGY,
2 EXPLOITATION OF THIS RIGHT, AND BEING DONE AT QUITE A HIGH
3 LEVEL.

4 SO, WHERE I AM IS THIS. I HAVE TO DEAL WITH -- AND
5 I'M PREPARED TO ACCEPT THE SCHWARTZ AND ASCAP CASES'
6 STATEMENT THAT BY VIRTUE OF THE NATURE OF WHAT ASCAP IS, THIS
7 ASSOCIATION, THAT IS OWNED BY AND OPERATES ON BEHALF OF ITS
8 MEMBERS. I THINK WARNER OWNS ONE-FIVE HUNDRED THOUSANDTH OF
9 WHATEVER THIS SAYS -- YOU KNOW, THERE'S PRETTY COMPELLING LAW
10 THAT SAYS THAT COMMUNICATIONS BETWEEN THE MEMBERS AND THAT
11 ORGANIZATION'S LAWYER CAN BE PRIVILEGED, ASSUMING THEY
12 DEMONSTRATE THESE ADDITIONAL FACTS THAT IT WAS FOR OBTAINING
13 LEGAL ADVICE. AND THAT'S WHERE I THINK THE MORE RECENT ASCAP
14 CASE DID NARROW THE ORIGINAL SCHWARTZ STATEMENT, AND I'M
15 PREPARED TO GO WITH THE MORE NARROW FORMULATION IN THE
16 U.S. VERSUS ASCAP DECISION.

17 I THINK -- I THINK THEY'RE THERE. I THINK THIS IS
18 A PROTECTED COMMUNICATION WITHIN THE SCOPE OF THE PRIVILEGE.

19 AS TO THE ALTERNATIVE ARGUMENT THAT IF THE
20 COMMUNICATION, IF THE TRANSMITTAL WAIVED THE PRIVILEGE, BUT
21 TO RESCUE THE PRIVILEGE, WE'D EXAMINE THE COMMON INTEREST
22 EXCEPTION, WHICH ALSO HAS TO BE CONSTRUED NARROWLY.

23 AND BOTH SIDES DID A NICE JOB RESEARCHING THIS, AND
24 I KNOW THAT THERE ARE CASES ON BOTH SIDES OF THIS ISSUE. AND
25 THE POTATO CASE AND THE NIDEC CASE AND THERE'S A FEDERAL

1 CIRCUIT CASE HAVING TO DO WITH PATENT LAW. I LOOKED AT THEM.
2 I JUST FIND THAT THE NATURE OF COPYRIGHT IS AN INTELLECTUAL
3 PROPERTY RIGHT. AND THE NATURE OF WHAT ASCAP WAS HERE TO DO,
4 NOT TO DEVELOP THE PRODUCT. THERE WASN'T A MERGER OF TWO
5 COMPETING BUSINESSES. THERE WASN'T AN EVALUATION OF THE
6 VALIDITY OF THE "HAPPY BIRTHDAY" COPYRIGHT IN ORDER TO VALUE
7 SUMMY FOR SOME TRANSACTION, WHICH IS WHAT I UNDERSTAND SOME
8 OF THE CASES HAVE GONE OFF ON.

9 MY TAKE WAS THAT THIS WAS SUMMY HIRING AN OUTSIDE
10 PARTY FOR PURPOSES OF ASSERTING SUMMY'S OWN RIGHTS. AND IN
11 ORDER TO EFFECTIVELY DO THAT, CHOSE TO CONVEY PRIVILEGED
12 INFORMATION WITH THE UNSTATED, BUT PRETTY APPARENT,
13 EXPECTATION THAT THE MATERIAL WOULD STAY WITHIN THE
14 PRIVILEGE. AND THAT THERE WAS AN INTENDED -- THERE WAS
15 LITIGATION ANTICIPATED BECAUSE PEOPLE FIGHT IN FEDERAL COURT
16 ALL THE TIME ABOUT COPYRIGHT.

17 AND THE SPECIFIC TRANSACTION AT ISSUE HERE, THE
18 SPECIFIC COMMUNICATION AND THE UNDERLYING MATERIAL RELATING
19 TO THE VALIDITY OF THE RIGHT OF THE COPYRIGHT I THINK DOES
20 FALL WITHIN THE COMMON INTEREST EXCEPTION TO THE WAIVER OF
21 THE ATTORNEY-CLIENT PRIVILEGE AS SET FORTH IN THE CASES CITED
22 TO ME.

23 SO, THAT'S TENTATIVELY WHERE I AM BASED ON A VERY
24 THOROUGH REVIEW OF SOME VERY GOOD PAPERS FROM BOTH SIDES.
25 I'M NOT JUST COMPLIMENTING YOU BECAUSE I LIKE TO DISARM. I'M

1 COMPLIMENTING YOU BECAUSE YOU DID A GOOD JOB. AND BOTH SIDES
2 KNOW THIS STUFF VERY, VERY WELL.

3 BUT I THINK THAT BASED ON WHAT I HAVE HERE I DO NOT
4 HAVE A BASIS FOR OVERRULING THE CLAIM OF PRIVILEGE AS
5 REQUESTED BY PLAINTIFFS.

6 I KNOW YOU'VE ASKED FOR OTHER RELIEF, AND I'M NOT
7 ENTIRELY SURE I SEE HOW IT PLAYS IN.

8 SO, WHAT MAY MAKE SENSE TO DO IS EITHER HEAR FROM
9 YOU RIGHT NOW IF YOU WANT CLARIFICATION OF MY THOUGHTS. IF
10 YOU WANT TO TAKE A FEW MINUTES AND TALK TO YOUR COLLEAGUES
11 AND FIGURE OUT WHAT YOU WANT TO DO SO WE CAN DO THIS IN AN
12 ORDERLY WAY, I'M FINE WITH THAT AS WELL.

13 GOT A PREFERENCE? MR. RIFKIN LEAPING TO HIS FEET.

14 MR. RIFKIN: WELL, YOUR HONOR, IT MAKES NO
15 DIFFERENCE TO ME. I'M PREPARED TO TRY TO ADDRESS SOME OF
16 YOUR CONCERNS NOW. IT'S OUR MOTION. ALTHOUGH IT IS THE
17 DEFENDANT'S BURDEN, IT'S OUR MOTION. SO, I WOULD EXPECT THAT
18 WE WOULD ADDRESS YOUR HONOR FIRST IN ANY EVENT. BUT IN LIGHT
19 OF YOUR HONOR'S TENTATIVE IT CERTAINLY MAKES SENSE FOR US --

20 THE COURT: THAT'S RIGHT.

21 MR. RIFKIN: -- TO DO THAT. AND I'M PREPARED TO
22 PROCEED NOW.

23 BUT YOU SAID ORIGINALLY THAT YOU THOUGHT MAYBE YOU
24 MIGHT WANT TO TAKE A BREAK. SO, BEFORE I JUMP RIGHT IN --

25 THE COURT: OH, NO, I'M READY. I'M READY.

1 MR. RIFKIN: YOU'RE READY TO GO?

2 THE COURT: -- CLEAR YOUR CALENDARS. CANCEL YOUR
3 DINNER PLANS.

4 (LAUGHTER.)

5 MR. RIFKIN: OKAY. NOT TO -- NOT TO -- NOT TO MAKE
6 A JOKE ABOUT ONE OF THE CASES WE BRIEFED, BUT THIS IS THE BIG
7 LEAGUES.

8 THE COURT: AND YOU'VE GOT YOUR MLB STUFF AS WELL.

9 MR. RIFKIN: THERE YOU GO. THERE YOU GO.

10 THE COURT: BUT YOU SUCCESSFULLY CONVINCED ME IT
11 WAS SUCH A BRIEF DECISION THAT IT --

12 MR. RIFKIN: YES.

13 THE COURT: IT DIDN'T WARRANT THE HIGHEST RELIANCE.

14 BUT GO AHEAD. YOU HAVE THE FIELD IN FRONT OF YOU.

15 MR. RIFKIN: AND, YOUR HONOR, I DO -- I SINCERELY
16 APPRECIATE THE TENTATIVE RULING. I DON'T GET TO PRACTICE
17 HERE ALL THAT FREQUENTLY AND WHEN I DO I LIKE HOW SOME OF THE
18 COURTS IN THIS DISTRICT ADOPT THE STATE COURT PRACTICE OF
19 ISSUING TENTATIVE DECISIONS. IT MAKES -- IT MAKES IT MUCH
20 EASIER FOR US TO FOCUS IN ON THE ISSUES THAT ARE REALLY
21 GERMANE, WHICH IS WHAT I'D LIKE TO TRY TO DO NOW.

22 THE COURT: I THINK YOU'LL HEAR THE FEDERAL JUDGES
23 SAY THAT THE STATE COURTS HAVE ADOPTED OURS.

24 MR. RIFKIN: OKAY. IT MAY VERY WELL BE THAT WAY.

25 (LAUGHTER.)

1 MR. RIFKIN: IT MAY VERY WELL BE THAT WAY.

2 THE COURT: THE SUPREMACY CLAUSE OF THE
3 CONSTITUTION IS ONE OF OUR FAVORITES.

4 MR. RIFKIN: FAIR ENOUGH. FAIR ENOUGH.

5 THE COURT: GO AHEAD.

6 MR. RIFKIN: SO, I THINK YOUR HONOR HAS CORRECTLY
7 SUMMARIZED THE ISSUES. AND I DO WANT TO MAKE A COUPLE OF
8 VERY BRIEF INTRODUCTORY REMARKS.

9 AND, FIRST, WE DID NOT INTEND TO ARGUE -- AND IF WE
10 DIDN'T MAKE IT CLEAR ENOUGH, LET ME TRY TO DO THAT NOW. WE
11 DID NOT INTEND TO ARGUE THAT WHEN MR. REIMER PRODUCED THE
12 DOCUMENTS TO US IN 2014 THAT THAT WAS A WAIVER.

13 INSTEAD WHAT WE THOUGHT WE TRIED TO EXPLAIN -- AND
14 I'LL TRY TO EMPHASIZE THIS A LITTLE BIT MORE NOW -- IS THAT
15 WHEN HE DID THAT, THAT SHOWED HOW ASCAP REGARDED THOSE
16 DOCUMENTS.

17 THE COURT: THEY DID NOT REGARD IT AS CONFIDENTIAL.

18 MR. RIFKIN: AS PRIVILEGED. THEY DIDN'T BELIEVE --
19 IN OTHER WORDS -- AND I WILL TELL YOU, AND THIS IS ON THE
20 RECORD IN MR. REIMER'S DEPOSITION. MR. REIMER CALLED ME --

21 THE COURT: DO I HAVE THAT?

22 MR. RIFKIN: YOU DO. YOU HAVE BOTH TRANSCRIPTS.
23 THERE WAS A -- AND THEY WERE SUBMITTED. THE FIRST ONE WAS
24 SUBMITTED WITH OUR JOINT STIPULATION. THAT'S A TRANSCRIPT OF
25 MR. REIMER'S DEPOSITION TAKEN ON JULY 11TH. THAT WAS THE

1 SUBJECT OF ASCAP'S MOTION TO QUASH.

2 THE COURT: WHERE?

3 MR. RIFKIN: THEY DIDN'T WANT MR. REIMER TO
4 TESTIFY.

5 THE COURT: WHERE?

6 (PLAINTIFF'S COUNSEL CONFERRING.)

7 THE COURT: BECAUSE I FOUND BLEITZ --

8 (PLAINTIFF'S COUNSEL CONFERRING.)

9 THE COURT: I FOUND BLEITZ AND I FOUND MARCOTUILLO.

10 MR. RIFKIN: YES, THERE'S TWO TRANSCRIPTS. AND,
11 YOUR HONOR, THEY WERE DONE AT TWO DIFFERENT TIMES. SO,
12 THAT'S WHY THEY WERE SUBMITTED SEPARATELY.

13 THE SECOND ONE -- MS. MANIFOLD JUST HANDED ME THE
14 SECOND ONE. MR. REIMER WAS DEPOSED ON JULY 11.

15 WHAT HAPPENED WAS THIS. ASCAP ORIGINALLY --

16 THE COURT: WELL, HANG ON.

17 WHAT IS THE DOCUMENT NUMBER?

18 MR. RIFKIN: OKAY.

19 THE COURT: BECAUSE I'M NOT SURE I HAVE IT.

20 MS. MANIFOLD: HERE'S THE SUPPLEMENTAL ONE.

21 MR. RIFKIN: OKAY. I'M REFERRING NOW TO DOCUMENT
22 126-1. AND IT'S EXHIBIT 14 OF THAT. THAT'S THE SUPPLEMENTAL
23 DECLARATION THAT MS. MANIFOLD SUBMITTED TOGETHER WITH OUR
24 SUPPLEMENTAL BRIEF ON THE 22ND. AND THAT'S THE RESUMPTION OF
25 MR. REIMER'S DEPOSITION ON JULY 21ST.

1 THE COURT: ALL RIGHT. WHAT HAPPENED WAS I
2 RECEIVED AN EXHIBIT 17 --

3 MR. RIFKIN: NO.

4 THE COURT: -- WHICH SHOWED UP SUPPLEMENTALLY.

5 (PLAINTIFF'S COUNSEL CONFERRING.)

6 THE COURT: ALL RIGHT. I NEED TO TAKE A LOOK AT
7 THAT BECAUSE, YOU KNOW, YOU RUN A RISK WHEN YOU ASK FOR
8 UNDER-SEAL FILING OF THINGS BECAUSE IT DOESN'T COME THROUGH
9 THE COURT'S NORMAL PRACTICES. AND I DON'T KNOW THAT YOU
10 FOLKS --

11 MS. MANIFOLD: MR. REIMER'S DEPOSITION WAS NOT
12 FILED UNDER SEAL, I DON'T BELIEVE.

13 MR. RIFKIN: NO.

14 MS. MANIFOLD: IT WAS -- IT WAS --

15 MR. RIFKIN: IT HASN'T BEEN DESIGNATED
16 CONFIDENTIAL. AND THERE WAS NO REQUEST ON THE RECORD THAT
17 THEY BE GIVEN TIME TO DO THAT. SO, PURSUANT TO OUR
18 STIPULATED CONFIDENTIALITY ORDER, THAT'S A PUBLIC DOCUMENT.

19 AND THERE'S TWO -- THERE'S TWO TRANSCRIPTS. HE WAS
20 -- HE WAS -- WHAT HAPPENED WAS AFTER WE SUBPOENAED ASCAP TO
21 PROVIDE --

22 THE COURT: CAN YOU STAND BY FOR ONE SECOND.

23 MR. RIFKIN: SURE.

24 (PAUSE IN PROCEEDINGS.)

25 THE COURT: WELL, 126 IS BOTH A SEALED AND

1 UNDER-SEAL DOCUMENT BECAUSE IT WAS REDACTED. AND, SO --
2 OKAY. I SEE WHAT HAPPENED.

3 ALL RIGHT. I WILL TAKE A LOOK AT IT BEFORE --

4 MR. RIFKIN: OKAY. AND THIS IS -- THIS IS DOCUMENT
5 NUMBER 126-3. IT'S EXHIBIT 14 TO THAT SUPPLEMENTAL
6 DECLARATION. AND IT'S THE TRANSCRIPT FROM THE SECOND DAY OF
7 MR. REIMER'S DEPOSITION.

8 YOUR HONOR MAY RECALL WHAT HAPPENED WAS ASCAP
9 ORIGINALLY --

10 THE COURT: RESISTED --

11 MR. RIFKIN: -- MOVED TO QUASH THE DEPOSITION --

12 THE COURT: RESISTED.

13 MR. RIFKIN: THEY -- THEY CONSENTED TO THE
14 DEPOSITION. AND AFTER 39 MINUTES OF DEPOSITION THE FIRST
15 TIME, THEY REPEATEDLY INSTRUCTED MR. REIMER NOT TO ANSWER
16 QUESTIONS. WE FILED A MOTION TO COMPEL. THEY AGAIN
17 ULTIMATELY CONSENTED TO ALLOW HIM TO COME BACK. HE CAME BACK
18 ON THE 25TH OF JULY. AND THAT'S EXHIBIT 14, WHICH IS DOCKET
19 NUMBER 126-3.

20 THE COURT: IT'S ON MY MONITOR RIGHT NOW.

21 MR. RIFKIN: OKAY. AND IF YOU TURN TO PAGE 84 OF
22 THE TRANSCRIPT, WHICH I THINK IS PAGE 21 OF 25 OF THE EXHIBIT
23 --

24 THE COURT: GOT IT.

25 MR. RIFKIN: -- HE WAS ASKED IF -- HE, IN FACT, TOLD

1 ME BEFORE HE PRODUCED THE DOCUMENTS. HE CALLED ME. HE SAID
2 WE'RE PRODUCING ABOUT 500 PAGES OF DOCUMENTS. AND HE SAID
3 YOU WILL FIND AMONG THEM THE TWO DOCUMENTS YOU WILL FIND
4 EXTREMELY INTERESTING.

5 THE COURT: OKAY. SO, HE --

6 MR. RIFKIN: THEY'RE A DETAILED ANALYSIS OF THE
7 COPYRIGHT.

8 THE COURT: WE'VE GOT SOME GOOD STUFF FOR YOU.

9 MR. RIFKIN: THAT'S EXACTLY WHAT HE SAID.

10 THE COURT: YES.

11 MR. RIFKIN: AND, SO, WHAT -- WHAT WE WANTED THE
12 COURT TO UNDERSTAND IS MR. REIMER WAS COMPLETELY AWARE OF
13 WHAT HE WAS PRODUCING. HE KNEW IT WAS IN THE DOCUMENTS. HE
14 PRODUCED THEM DELIBERATELY. AND IT'S OUR VIEW THAT THAT
15 REFLECTS HIS JUDGMENT THAT THEY WERE NOT PRIVILEGED. IF HE
16 THOUGHT THEY WERE PRIVILEGED, HE WOULD NOT HAVE PRODUCED THEM
17 TO US. THERE WASN'T ANYTHING ACCIDENTAL ABOUT HIS
18 PRODUCTION. HE MAY NOW REGRET HAVING PRODUCED THEM BECAUSE
19 WARNER HAS SAID THAT THEY REGARD THEM AS PRIVILEGED.

20 THE COURT: RIGHT.

21 MR. RIFKIN: BUT WE THINK THAT ASCAP'S
22 UNDERSTANDING OF THOSE DOCUMENTS IS PERHAPS AS IMPORTANT AS
23 WHAT WE'RE NOW TRYING TO SURMISE FROM THE TRANSMITTAL.

24 AND IT JUST SO HAPPENS THAT MR. REIMER IS THE ONLY
25 PERSON WHO WAS AROUND AT THE TIME. HE'S BEEN AN EMPLOYEE OF

1 ASCAP IN THEIR LEGAL DEPARTMENT SINCE 1971. HE WAS ACTUALLY
2 THERE WHEN THESE DOCUMENTS WERE SENT BY SUMMY-BIRCHARD, BY
3 MRS. SENGSTACK TO BERNIE CORMAN, WHO WAS GENERAL COUNSEL --

4 THE COURT: UH-HUM.

5 MR. RIFKIN: -- OF ASCAP.

6 NOW, HE DIDN'T SAY HE WAS AWARE OF THE DOCUMENTS AT
7 THE TIME. BUT HE WAS CERTAINLY AWARE OF THEM IN 2014. AND
8 HE CERTAINLY --

9 THE COURT: BECAUSE HE PRODUCED THEM IN RESPONSE --

10 MR. RIFKIN: -- DIDN'T REGARD THEM --

11 THE COURT: -- TO YOUR SUBPOENA.

12 MR. RIFKIN: CORRECT.

13 THE COURT: GOT IT.

14 MR. RIFKIN: AND HE CERTAINLY DIDN'T REGARD THEM AS
15 PRIVILEGED WHEN HE PRODUCED THEM IN 2014.

16 AND WE THINK THAT SHOULD BEAR ON THE COURT'S
17 ATTEMPT TO TRY TO RECONSTRUCT THE PURPOSE FOR THE
18 COMMUNICATION FROM MRS. SENGSTACK IN 1979. AND THAT IS, YOUR
19 HONOR -- WE THINK THAT IS THE NUB OF THE ISSUE. BECAUSE WHEN
20 YOU DO STRIP IT ALL AWAY, WE DO AGREE WITH MOST OF WHAT THE
21 COURT HAS SAID, THAT REALLY THIS RELATES TO THE PURPOSE FOR
22 THE COMMUNICATION. EVEN THE SCHWARTZ CASE THAT THE
23 DEFENDANT'S CITE FOR THE PRINCIPLE THAT THE IN-HOUSE COUNSEL
24 FOR A TRADE ASSOCIATION THAT REPRESENTS A HALF A MILLION
25 MEMBERS NOW AND OVER A HUNDRED THOUSAND MEMBERS AT THE TIME

1 IS ALSO THE LAWYER FOR EVERY ONE OF THEM. EVEN THAT CASE
2 SAYS THAT IT ONLY SERVES AS A MEMBER TO THE EXTENT THAT --
3 IT'S ONLY SERVES AS COUNSEL FOR THE MEMBER TO THE EXTENT THAT
4 THE MEMBER IS SEEKING LEGAL ADVICE.

5 THE COURT: UH-HUH.

6 MR. RIFKIN: SO, WHETHER YOU -- WHETHER YOU LOOK AT
7 THIS UNDER THE RUBRIC OF DID BERNIE CORMAN, ASCAP'S GENERAL
8 COUNSEL, REPRESENT SUMMY IN 1979, THE QUESTION IS WAS SUMMY
9 ASKING FOR MR. CORMAN'S LEGAL ADVICE.

10 AND WE SUBMIT THAT THE DEFENDANTS CAN'T POSSIBLY
11 SUSTAIN THAT BURDEN IN LIGHT OF THE UNDISPUTED FACTS. AND
12 THE PRINCIPAL UNDISPUTED FACTS ARE AS FOLLOWS:

13 NUMBER ONE, THE LETTER THAT MRS. SENGSTACK WROTE TO
14 MR. CORMAN IN 1979 DIDN'T ASK FOR LEGAL ADVICE, DIDN'T
15 SOLICIT LEGAL ADVICE, DIDN'T IDENTIFY THE COUDERT LETTERS AS
16 PRIVILEGED, DIDN'T ASSERT THAT THEY WERE TO BE PRIVILEGED,
17 DIDN'T REFER TO ANY ACTUAL, CONTEMPLATED, ANTICIPATED OR ANY
18 OTHER LITIGATION, DIDN'T MENTION ANY COMMON LEGAL ENTERPRISE
19 BETWEEN THEM.

20 AND AS IMPORTANT, THERE IS NO RESPONSE, ZERO, NONE,
21 FROM ASCAP THAT ASCAP EVER PROVIDED LEGAL ADVICE, EVER
22 RENDERED LEGAL ADVICE TO SUMMY-BIRCHARD, EVER USED THOSE
23 DOCUMENTS IN ANY WAY TO FURTHER THE INTERESTS OF
24 SUMMY-BIRCHARD. ZERO. NOTHING. NOT A SINGLE THING.

25 ASCAP HAS NOT EVER SOUGHT TO ENFORCE A COPYRIGHT TO

1 "HAPPY BIRTHDAY," NOT IN THE 40 YEARS SINCE THAT LETTER WAS
2 SENT AND NOT IN THE 40 YEARS BEFORE IT WAS SENT. IT HAS
3 NEVER HAPPENED.

4 THE COURT: HOW IS THAT RELEVANT?

5 MR. RIFKIN: BECAUSE I THINK THE SUGGESTION THAT
6 WHAT HAPPENED IN 1979 WAS PERHAPS BECAUSE THERE MIGHT BE A
7 TIME WHEN ASCAP MIGHT BE CALLED UPON TO ENFORCE A COPYRIGHT
8 TO "HAPPY BIRTHDAY" -- MAYBE -- I THINK JUST FLIES IN THE
9 FACE OF NOT ONLY THE PARTICULAR FACTS OF THE LETTER, THAT IS,
10 MRS. SENGSTACK'S LETTER TO MR. CORMAN, BUT ALSO THE 80-YEAR
11 HISTORY SINCE THE TIME THE SONG WAS -- AND I'LL LOOSELY SAY
12 THIS -- COPYRIGHTED IN 1935 --

13 THE COURT: YOU'RE NOT WAIVING ANYTHING BY --

14 MR. RIFKIN: -- TO TODAY.

15 THE COURT: DON'T WORRY ABOUT THAT.

16 MR. RIFKIN: AND WE DO DISAGREE WITH WHETHER THERE
17 WAS A COPYRIGHT OR NOT.

18 YOUR HONOR, INTERESTINGLY YOU SAID, AND I MADE A
19 NOTE OF THIS, YOUR HONOR SAID, AT THE TIME IN 1979 MRS.
20 SENGSTACK OR SUMMY-BIRCHARD COULD HAVE SENT, FOR EXAMPLE, A
21 COMFORT LETTER -- MAYBE FROM COUDERT OR FROM SOMEBODY ELSE,
22 MAYBE FROM THEIR OWN IN-HOUSE COUNSEL IF THEY HAD SOMEONE
23 LIKE THAT -- ASSERTING THAT THE COPYRIGHT WAS PROTECTED.

24 AND YOUR HONOR KNOWS FROM SOME OF THE CASES THAT
25 WE'VE CITED TO YOU THAT THERE ARE INSTANCES WHERE ASCAP GETS

1 INTO A DISPUTE BETWEEN MEMBERS. AND IN THAT CASE ASCAP SAYS,
2 LOOK, WE DON'T KNOW WHO HAS THE RIGHT TO WHAT SONG. WE
3 REALLY DON'T KNOW. WE CAN'T DECIDE THAT. WHAT WE WANT TO DO
4 IS WE WANT YOU TO INDEMNIFY US IN THE EVENT IT TURNS OUT THAT
5 YOU'RE WRONG. AND ASCAP CERTAINLY COULD HAVE SOUGHT THAT
6 INDEMNIFICATION FROM SUMMY.

7 BUT ONE OF THE THINGS THAT I WROTE DOWN THAT I
8 THOUGHT WAS REALLY VERY INTERESTING IS ASCAP COULD HAVE --
9 I'M SORRY, SUMMY COULD HAVE SENT A COPY OF THE COPYRIGHT. I
10 MEAN, WHAT BETTER PROOF WOULD THERE BE OF THE EXISTENCE OF A
11 COPYRIGHT IN A SONG THAN THE COPYRIGHT.

12 THEY DIDN'T DO THAT. WE THINK THAT'S RELEVANT. IT
13 CERTAINLY SUGGESTS TO US -- AND, AGAIN, PUT IN THE CONTEXT OF
14 THE FACT THAT MRS. SENGSTACK WROTE TO MR. CORMAN THREE YEARS
15 AFTER SHE GOT THE DETAIL ANALYSIS. THE LONG, LENGTHY LETTER
16 FROM COUDERT WAS 1976. THE SUBSEQUENT LETTER, THE 1978
17 LETTER WAS A FOLLOW-UP LETTER.

18 BUT THERE'S NO INDICATION THAT IN THAT INTERVENING
19 THREE-YEAR PERIOD OF TIME ASCAP WAS INVOLVED AT ALL IN THE
20 DISPUTE OVER THE COPYRIGHT TO "HAPPY BIRTHDAY." THIS IS A
21 DISPUTE THAT HAS BEEN SIMMERING FOR YEARS.

22 THE COURT: BUT THERE WAS -- THERE IS --

23 MR. RIFKIN: COUDERT'S LETTER DIDN'T COME OUT OF
24 THE BLUE.

25 THE COURT: EXCUSE ME. THERE IS A REFERENCE IN MS.

1 SENGSTACK'S -- STENGSTACK'S, SORRY.

2 MR. RIFKIN: SENGSTACK.

3 THE COURT: SENGSTACK.

4 THERE IS A REFERENCE IN HER LETTER TO A PRIOR
5 DISCUSSION WITH THE LAWYER.

6 SO, YOU ENTIRELY HAVE ME ON SORT OF THE PROFORMA
7 NATURE OF WHAT THE TRANSMITTAL LETTER SAYS. YOU'RE
8 ABSOLUTELY RIGHT. IT DOES NOT HAVE THINGS THAT WOULD PERHAPS
9 MORE CONCLUSIVELY DEMONSTRATE AN INTENTION TO ASSERT A
10 PRIVILEGE OR A REQUEST FOR A PROTECTIVE. YOU'RE ABSOLUTELY
11 RIGHT.

12 MR. RIFKIN: SURE.

13 THE COURT: AND THAT DOES WEIGH -- THAT DOES WEIGH
14 AGAINST WARNER. I AM COMPLETELY ON BOARD.

15 I'M A LITTLE -- AND I DON'T MEAN TO CUT YOU OFF,
16 BUT I THINK, AGAIN, IT'S KIND OF FAIR TO HAVE A DIALOGUE.
17 I'M NOT PARTICULARLY SWAYED BY THE FACT THAT THERE WAS NO
18 LITIGATION AFTERWARDS. I GO TO MY LAWYER TODAY. AND I SAY I
19 THINK I'M GOING TO BE SUED, AND THE LAWYER SAYS LET'S TALK.
20 AND WE HAVE A DISCUSSION. AND THEN AFTERWARDS I'M NOT SUED.
21 THAT DOESN'T MEAN YEARS FROM NOW SOMEONE IS GOING TO SAY,
22 WELL, BACK WHEN YOU TALKED WITH YOUR LAWYER YOUR PRIVILEGE
23 DOESN'T APPLY. THE QUESTION IS AT THE TIME DID I HAVE A
24 REASON TO BELIEVE THAT I NEEDED ADVICE.

25 AND I'M A LITTLE -- I'M A LITTLE TROUBLED BY

1 EX-POST EXPLANATION OF THE CIRCUMSTANCES.

2 MR. RIFKIN: I UNDERSTAND THAT. AND I DON'T -- I
3 DON'T -- I DON'T THINK IN THIS CASE -- I DON'T THINK YOU
4 WOULD -- YOU WOULD NEED TO LOOK ONLY AT THE FUTURE. IN OTHER
5 WORDS, ONLY LOOK FROM 1979 TO THE PRESENT, THOSE 40 YEARS.
6 BUT I THINK YOU NEED TO PUT THOSE 40 YEARS IN THE SCALE WHEN
7 YOU LOOK BACK AT THE 40 YEARS BEFORE IT. BECAUSE IN THE 40
8 YEARS BEFORE IT, THERE WAS NEVER A LAWSUIT FILED UNDER THE
9 COPYRIGHT -- NEVER, EVER, EVER.

10 THERE'S NEVER BEEN -- I JUST WANT THE COURT TO
11 UNDERSTAND. IN THE 80 YEARS SINCE THE SONG "HAPPY BIRTHDAY
12 TO YOU" WAS PURPORTEDLY COPYRIGHTED, NOT A SINGLE OWNER --
13 AND IT HAS PASSED THROUGH MANY HANDS -- NOT A SINGLE OWNER
14 HAS EVER SUED ANYONE FOR INFRINGING ANY COPYRIGHT TO THE SONG
15 "HAPPY BIRTHDAY TO YOU."

16 IN THE FIVE INSTANCES -- AND THIS IS I THINK
17 IMPORTANT -- IN THE FIVE INSTANCES WHEN THERE HAVE BEEN
18 INFRINGEMENT LAWSUITS OVER PUBLIC PERFORMANCES OF THE SONG
19 "HAPPY BIRTHDAY TO YOU" WITHOUT THE PERMISSION OF THE
20 SO-CALLED OWNER, IN EACH AND EVERY ONE OF THOSE INSTANCES THE
21 ONLY COPYRIGHT THAT WAS EVER ASSERTED WAS THE 1893 COPYRIGHT
22 TO A PREDECESSOR SONG "GOOD MORNING TO ALL." ALL FIVE OF
23 THOSE CASES WERE -- I'M SORRY, FOUR OF THOSE FIVE CASES WERE
24 COMMENCED AFTER THE OWNER PURPORTEDLY FILED A COPYRIGHT TO
25 "HAPPY BIRTHDAY TO YOU."

1 AND IN ALL FOUR OF THOSE CASES FILED AFTER THE
2 COPYRIGHT WAS FILED THEY DID NOT RELY ON THE COPYRIGHT TO
3 "HAPPY BIRTHDAY TO YOU" AS ONE MIGHT SUSPECT, BUT THEY
4 RELIED ON THE COPYRIGHT TO A -- A THEN 60-YEAR-OLD SONG,
5 "GOOD MORNING TO ALL." I THINK THAT'S INCREDIBLY
6 INFORMATIVE. AND I THINK IT SHOULD EXPLAIN TO THE COURT THAT
7 THERE HAS NEVER BEEN AN INSTANCE WHEN ANYONE WAS EVER GOING
8 TO SUE UNDER THIS COPYRIGHT. IT HASN'T HAPPENED EVER. NOT
9 ONCE EVER HAS ANYONE EVER SUED ANYONE FOR INFRINGING THE
10 COPYRIGHT TO THE SONG "HAPPY BIRTHDAY TO YOU," WHICH AS YOUR
11 HONOR KNOWS IS THE SUBJECT OF THE COUDERT LETTERS.

12 SO, I THINK TO SURMISE AS THE DEFENDANTS REALLY
13 HAVE TO -- I THINK TO SURMISE THAT THERE WAS SOME RISK THAT
14 THERE MIGHT BE SOME DAY SOME LITIGATION THAT ASCAP MIGHT BE
15 ASKED TO BRING ON BEHALF OF SUMMY-BIRCHARD IN 1979 REALLY
16 STRETCHES THE TRUTH. AND I DON'T MEAN THAT THE DEFENDANTS
17 ARE STRETCHING THE TRUTH. WHAT I MEAN IS IT STRETCHES WHAT
18 WE KNOW THE FACTS TO BE.

19 THE COURT: OKAY.

20 MR. RIFKIN: I'M NOT SUGGESTING THAT THEY'RE
21 DISTORTING THE FACTS AT ALL. FAR BE IT FROM ME TO SAY THAT.
22 WHAT I AM SAYING, THOUGH, IS THEY ARE ASKING YOU TO MAKE AN
23 ENORMOUS LEAP FROM WHAT WE ALL KNOW THE REAL HARD FACTS ARE
24 TO CONCLUDE FROM A COVER LETTER THAT DOESN'T ASK FOR LEGAL
25 ADVICE, DOESN'T SOLICIT LEGAL ADVICE, ISN'T IN RESPONSE TO A

1 COMMUNICATION REQUESTING INFORMATION FOR THE PROVISION OF
2 LEGAL ADVICE, ISN'T MET WITH LEGAL ADVICE, DOESN'T RESULT IN
3 ANY LEGAL ACTION OR ANY LEGAL ADVICE BEING TAKEN. I THINK
4 THAT'S PRETTY POWERFUL EVIDENCE THAT THERE REALLY WASN'T MUCH
5 OF A RISK HERE.

6 BUT IN ADDITION TO THAT, EVEN IF WE WERE GOING TO
7 PUT ALL THOSE FACTS ASIDE, WE HAVE A CASE LIKE THE TERRA NOVA
8 CASE THAT WE DISCUSSED IN OUR BRIEF WHERE THE COURT SAYS IN
9 THE BANK OF AMERICA VERSUS TERRA NOVA CASE IT'S NOT ENOUGH
10 THAT YOU'RE TRYING TO STRUCTURE A COMMERCIAL RELATIONSHIP IN
11 A WAY THAT AVOIDS SOME FUTURE LITIGATION. AND MAYBE YOU
12 MIGHT SAY HERE THAT ASCAP HAD AN INTEREST IN KNOWING THAT IF
13 ASCAP WAS COLLECTING FEES ON THE COPYRIGHT TO "HAPPY
14 BIRTHDAY," ASCAP MIGHT HAVE AN INTEREST IN THAT.

15 BUT THE MERE FACT THAT THE PARTIES ARE TRYING TO
16 STRUCTURE A BUSINESS RELATIONSHIP IN A, QUOTE, LEGAL WAY IS
17 NOT THE KIND OF LEGAL INTEREST THAT WE'RE TALKING ABOUT WHEN
18 WE LOOK AT THIS QUESTION OF THE COMMON INTEREST. AND WE
19 CITED THAT CASE. WE DISCUSSED IT AT LENGTH IN OUR BRIEF.
20 IT'S THE BANK OF AMERICA VERSUS TERRA NOVA FROM THE SOUTHERN
21 DISTRICT OF NEW YORK IN 2002.

22 I THINK THE ANSWER IS REALLY LOOK AT WHAT -- LOOK
23 AT WHAT ASCAP HAS SAID OVER THE YEARS. MR. REIMER SAYS THEY
24 DON'T HAVE ANY INTEREST IN THE COPYRIGHT. MR. REIMER SAYS
25 THEY DON'T HAVE ANY INTEREST IN THE ROYALTIES. THEY DO

1 COLLECT A FEE FOR THE SERVICE THEY PROVIDE, BUT IT'S -- IT'S
2 NOT AN INTEREST IN EITHER OF THE PROPERTY -- THAT IS, THE
3 COPYRIGHTS OR THE ROYALTIES DERIVED FROM THEM. IT'S JUST A
4 FEE FOR THE SERVICES THEY RENDER. WHEN -- AND WE'VE CITED A
5 COUPLE OF CASES.

6 WE CITE -- I CALL IT THE SPRINGSTEIN CASE BECAUSE I
7 CAN'T REMEMBER THE PERFORMER -- OCASEK. HE MAY BE MORE
8 FAMOUS THAN I'M GIVING HIM CREDIT FOR. BUT SPRINGSTEIN WAS
9 ONE OF THE PLAINTIFFS IN THAT CASE. THEY SUED A BAR OWNER
10 FOR PERFORMING THEIR RIGHTS. AND THE BAR OWNER TRIED TO JOIN
11 ASCAP IN THE LITIGATION. AND ASCAP MOVED TO BE DISMISSED.
12 THEY MOVED TO HAVE THE THIRD-PARTY COMPLAINT DISMISSED.

13 AND THEIR ARGUMENT THERE WAS WE DON'T HAVE ANY
14 INTEREST IN THESE COPYRIGHTS. WE DON'T WANT TO BE A PARTY TO
15 THIS LITIGATION. WE DON'T NEED TO BE A PARTY TO THIS
16 LITIGATION. YOU SHOULDN'T JOIN US. YOU DON'T HAVE A CLAIM
17 AGAINST US, A CLAIM AGAINST US. WE ARE STRANGERS TO THIS.
18 AND, SO, THAT'S WHAT THE COURT DID. THE COURT LET ASCAP OUT
19 ON ASCAP'S MOTION.

20 AND I THINK THAT THOSE CASES -- THERE WAS ANOTHER
21 CASE, THE DOORS CASE -- ALMOST EXACTLY THE SAME FACTS, ONE
22 DECIDED IN 1987 AND THE OTHER DECIDED IN 1992.

23 THE COURT: ALL RIGHT. WELL, DON'T SHORT FORM
24 THEM.

25 THE SPRINGSTEIN CASE WAS WHICH ONE?

1 MR. RIFKIN: I'M SORRY. THE SPRINGSTEIN CASE IS --
2 IS OCASEK, O-C-A-S-E-K. IT'S THE WYOMING CASE THAT'S DECIDED
3 IN 1987. AND IT WAS A -- IT WAS AN ACTION --

4 THE COURT: WHERE IS THAT -- WHERE IS THAT CITED IN
5 YOUR BRIEF?

6 MR. RIFKIN: YOUR HONOR, IT'S IN THE REPLY.

7 THE COURT: AHH.

8 MR. RIFKIN: OKAY. THAT WAS RECENTLY FILED.
9 OBVIOUSLY, YOU PROBABLY HAVEN'T HAD A CHANCE TO READ THE
10 SUPPLEMENTAL BRIEF THAT WE FILED --

11 THE COURT: OH, I DID.

12 MR. RIFKIN: -- ON THE 22ND.

13 THE COURT: I DID. I DID. I DID. I READ
14 EVERYTHING.

15 MR. RIFKIN: UH-HUM.

16 IT'S -- IT APPEARS ON PAGE 9 OF OUR BRIEF, YOUR
17 HONOR, OF OUR SUPPLEMENTAL BRIEF. IT'S OCASEK VERSUS
18 HEGGLUND.

19 THE COURT: YES.

20 MR. RIFKIN: HEGGLUND WAS A BAR OWNER. AND --

21 THE COURT: GOT IT. GOT IT.

22 MR. RIFKIN: -- WHAT THE COURT SAID --
23 INTERESTINGLY, THERE WAS TWO THINGS. IT SAYS, FIRST OF ALL,
24 ASCAP IS NOT -- IN THE STRICTEST SENSE, IT IS NOT A LICENSING
25 AGENT OF ANY OF THE MEMBERS BECAUSE -- AND I THOUGHT THIS WAS

1 VERY INTERESTING -- BECAUSE THE LICENSES THAT ASCAP ISSUES
2 ARE LICENSES IN ASCAP'S OWN NAME TO THE USERS OF THE MUSIC.
3 SO, IN THIS CASE IT WAS A BAR. BUT IT COULD BE A RADIO
4 STATION. IT COULD BE A HOTEL LOBBY. IT COULD BE AN AIRPORT,
5 WHATEVER.

6 SO, THE COURT SAYS IT'S NOT REALLY AN AGENT BECAUSE
7 IT DOESN'T ISSUE LICENSES IN THE NAME OF THE PRINCIPAL, THAT
8 IS, THE OWNERS OF THE MUSIC. AND IT SAYS EVEN IF IT WAS AN
9 AGENT, IT STILL HAS NO INTEREST IN THE COPYRIGHTS OR THE
10 VALIDITY OF THE COPYRIGHTS.

11 AGAIN, MR. REIMER TESTIFIED ON THE 22ND OF JULY.

12 THE COURT: UH-HUM.

13 MR. RIFKIN: I ASKED HIM IF ASCAP HAS EVER BEEN
14 INVOLVED IN ANY LITIGATION REGARDING THE VALIDITY OF ANY
15 COPYRIGHT. AND HE LOOKED AT ME. AND HE SAID, WELL, NO, OF
16 COURSE NOT. WHY WOULD WE BE. WE HAVE NO INTEREST IN THAT.
17 THAT'S FOR THE -- THAT'S FOR THE MEMBERS TO WORRY ABOUT.

18 SO, WHEN WE HAVE ALL OF THE RELEVANT FACTS I THINK
19 IN THE BASKET IN FRONT OF US, AND WE LOOK AND WE SAY, WELL,
20 WHAT IS THERE ABOUT THIS LETTER FROM MRS. SENGSTACK THAT
21 MAKES US THINK THAT SHE WAS REQUESTING LEGAL ADVICE OR
22 THOUGHT THAT BERNIE CORMAN WAS HER LAWYER.

23 AND WE LOOK AT SOME OF THE FACTORS THE COURTS HAVE
24 CONSIDERED RELEVANT. IT JUST -- THERE'S NOT ENOUGH HERE FOR
25 THE DEFENDANTS TO MEET THEIR BURDEN IN LIGHT OF WHAT ARE

1 REALLY OVERWHELMING HISTORICAL FACTS THAT ASCAP HASN'T HAD
2 ANYTHING TO DO WITH THE "HAPPY BIRTHDAY" COPYRIGHT. I THINK
3 THE FAR MORE PLAUSIBLE CONCLUSION FROM THIS IS THAT MRS.
4 SENGSTACK HAD A CASUAL CONVERSATION WITH BERNIE CORMAN AND
5 MENTIONED THAT SHE HAD THIS ANALYSIS DONE.

6 AS YOUR HONOR KNOWS, THE "HAPPY BIRTHDAY" COPYRIGHT
7 HAS BEEN SOMETHING OF A DISPUTE IN THE MUSIC BUSINESS --

8 THE COURT: WELL, I THOUGHT YOU WERE GOING TO USE A
9 BETTER WORD THAN THAT. OKAY.

10 MR. RIFKIN: NO. I'VE REFRAINED FROM DOING SO,
11 YOUR HONOR. BUT YOU CAN IMAGINE A MORE COLORFUL WORD FOR
12 DISPUTE.

13 THE COURT: HAVE --

14 MR. RIFKIN: IT'S BEEN SOMETHING OF A DISPUTE --

15 THE COURT: HAVE AT IT.

16 MR. RIFKIN: -- IN THE MUSIC BUSINESS FOR DECADES.

17 AND I THINK IT'S FAR MORE PLAUSIBLE THAT MRS.
18 SENGSTACK SIMPLY SENT IT TO MR. CORMAN AS A COURTESY.

19 THERE'S NOTHING -- AND, AGAIN, THIS IS -- AS YOUR HONOR SAID
20 AT THE VERY BEGINNING, THIS IS THE DEFENDANT'S BURDEN TO
21 CONVINCING THE COURT THAT SUMMY-BIRCHARD REGARDED ASCAP AS ITS
22 LAWYER OR WAS COMMUNICATING INVOLVING A COMMON LEGAL
23 ENTERPRISE.

24 AND WHEN YOU LOOK AT THE TOTALITY OF THE FACTS THAT
25 WE REALLY KNOW EXISTED, AND YOU COMPARE IT TO THE PAUCITY OF

1 EVIDENCE THAT SUGGESTS THE CONTRARY -- UNLIKE ALL THE OTHER
2 CASES WHERE -- AND I AGREE THAT THEY'RE MORE TEMPORALLY
3 RELATED TO THE TIME IN QUESTION -- WHERE THERE ARE AFFIDAVITS
4 OR DECLARATIONS OR EVEN TESTIMONY FROM PARTICIPANTS IN THE
5 MEETINGS WHO SAY, YES, ALL THE LAWYERS WERE THERE; YES, WE
6 TALKED WITH ONE ANOTHER; YES, THERE WERE MANY CLIENTS THERE
7 FROM DIFFERENT COMPANIES.

8 THE CIRCUMSTANCES OBVIOUSLY SUGGEST SOME EITHER
9 ATTORNEY-CLIENT RELATIONSHIP OR SOME EXPECTATION THAT THERE
10 WAS THIS COMMON LEGAL ENTERPRISE THAT THE PARTIES SHARED EVEN
11 THOUGH THEY'RE STRANGERS TO ONE ANOTHER OTHERWISE.

12 BUT -- BUT THAT JUST DOESN'T EXIST HERE GIVEN THE
13 RELATIONSHIP THAT ASCAP HAS DESCRIBED FOR ITSELF. AND, SO,
14 FOR EXAMPLE, WHEN ASCAP IN THE -- ONE OF THE RATE PROCEEDINGS
15 IN THE SECOND CIRCUIT IN THE PANDORA MATTER, WHEN ASCAP SAYS
16 THAT THE PRODUCERS -- THAT ASCAP HAS SOME INTEREST IN THE
17 SONGS, THE PRODUCERS JUMP IN. AND THEY WRITE A LETTER TO THE
18 COURT. AND THEY SAY, TO BE CLEAR, OUR CLIENTS, THE MUSIC
19 PRODUCERS, NOT ASCAP, ARE THE COPYRIGHT OWNERS OF THE SONGS
20 IN QUESTION, POSSESSED OF EXCLUSIVE RIGHTS UNDER SECTION 106
21 OF THE COPYRIGHT ACT WHICH INCLUDE THE EXCLUSIVE RIGHT TO
22 PUBLICLY PERFORM THE SONGS OR TO AUTHORIZE OTHERS TO DO SO.

23 THIS WAS -- AND I'M NOW QUOTING FROM THE IN RE
24 PANDORA MEDIA CASE. THIS IS THE --

25 THE COURT: AND YOU HAVE THE SAME STATEMENT IN HIS

1 DECLARATION IN --

2 MR. RIFKIN: THE EXACT SAME STATEMENT --

3 THE COURT: YES.

4 MR. RIFKIN: -- IN THE DECLARATION. AND, FRANKLY,
5 IN HIS DEPOSITION TESTIMONY ON JULY 22ND.

6 YOU KNOW, I -- WE ARE STRUGGLING BECAUSE WE ARE
7 LOOKING BACK 40-SOME-ODD YEARS. AND WE'RE TRYING TO FIGURE
8 OUT WHAT MRS. SENGSTACK THOUGHT WHEN SHE DID WHAT SHE DID.
9 AND I THINK HERE --

10 THE COURT: AND I PRESUME SHE'S NOT IN A POSITION
11 TO TESTIFY.

12 MR. RIFKIN: I -- NOT THAT I'M AWARE OF, YOUR
13 HONOR.

14 THE COURT: OKAY. THAT'S FINE.

15 MR. RIFKIN: I DON'T BELIEVE THAT IS THE CASE AT
16 ALL.

17 THE COURT: OKAY.

18 MR. RIFKIN: WHAT -- WHEN WE LOOK AT WHAT SHE DID,
19 WHICH IS TO SEND A LETTER THREE YEARS LATER THAT WAS DONE BY
20 HER OWN COUNSEL TO AN ORGANIZATION THAT HAS AT BEST A
21 CONTRACTUAL RELATIONSHIP WITH ITS MEMBERS, AND WE LOOK AT
22 WHAT HAPPENED IN THE 40 YEARS BEFORE THAT AND THE 40 YEARS
23 AFTER THAT, AND WE LOOK AT WHAT ASCAP SAYS IS THE LIMITED
24 ROLE IT HAS AND WHETHER IT HAS ANY INTEREST IN THE
25 COPYRIGHTS, WHETHER IT HAS PARTICIPATED IN ANY OTHER --

1 FORGET "HAPPY BIRTHDAY" -- WHETHER IT HAS PARTICIPATED IN ANY
2 OTHER LITIGATION INVOLVING THE VALIDITY OF ANY OTHER
3 COPYRIGHTS.

4 I THINK IT'S A STRETCH TO SAY THAT -- THAT ASCAP
5 AND SUMMY-BIRCHARD SHARED A COMMON LEGAL INTEREST OR WERE
6 INVOLVED IN A COMMON LEGAL ENTERPRISE CONCERNING "HAPPY
7 BIRTHDAY TO YOU." WHAT THEY WERE WERE BUSINESS PARTNERS.

8 AND YOUR HONOR IS CORRECT. WE'VE CITED A NUMBER OF
9 CASES, INCLUDING THE NIDEC CASE, THAT SAYS A BUSINESS
10 INTEREST ISN'T SUFFICIENT. IT HAS TO BE AN INTEREST IN A
11 LEGAL MATTER.

12 AND THE MERE POSSIBILITY -- THE REMOTE POSSIBILITY
13 THAT SOMEHOW HISTORY WOULD CHANGE ITSELF AFTER 40 YEARS. AND
14 ALL OF A SUDDEN ASCAP WOULD FOR SOME STRANGE REASON FIND
15 ITSELF IN LITIGATION INVOLVING THE VALIDITY OF THE COPYRIGHT
16 TO "HAPPY BIRTHDAY TO YOU" WHEN IT HAS NEVER LITIGATED THE
17 VALIDITY OF A COPYRIGHT TO ANY OTHER INDIVIDUAL SONG EVER --
18 NOT BEFORE. NOT SINCE. I THINK THAT'S JUST -- GOES TOO FAR
19 GIVEN THE FACT THAT THE BURDEN IS ON THE DEFENDANTS.

20 IF THE BURDEN WERE OURS, WE WOULD HAVE A MUCH
21 DIFFERENT ARGUMENT AND FRANKLY A MUCH MORE DIFFICULT
22 ARGUMENT. WE WOULD BE IN A POSITION THAT THE DEFENDANTS ARE
23 IN NOW.

24 BUT SINCE THE BURDEN IS ON THEM, THEY NEED TO COME
25 FORWARD WITH SOMETHING MORE THAN JUST SUPPOSITION OR A MERE

1 POSSIBILITY, WHICH IS REALLY ALL THEY CAN OFFER THAT FRANKLY
2 FLIES IN THE FACE OF WHAT WE ALL KNOW TO BE THE HISTORICAL
3 FACTS.

4 THE COURT: OKAY.

5 MR. RIFKIN: SO, FOR THOSE REASONS, I THINK IN
6 LIGHT OF EVERYTHING YOUR HONOR SAID, I WOULD URGE YOU TO
7 CONSIDER ALL THOSE FACTS IN THE CONTEXT OF THE LEGAL
8 FRAMEWORK THAT I THINK YOUR HONOR DOES UNDERSTAND.

9 MRS. SENGSTACK HAD TO THINK THAT MR. CORMAN WAS HER
10 LAWYER, EVEN THOUGH THERE'S NO INDICATION THAT HE WAS EVER
11 HER LAWYER BEFORE. THERE'S NO INDICATION THAT SHE SOUGHT
12 LEGAL ADVICE FROM HIM. THERE'S NO INDICATION HE PROVIDED
13 LEGAL ADVICE TO HER -- AND BY HER I MEAN OBVIOUSLY
14 SUMMY-BIRCHARD.

15 THE COURT: I'M WITH YOU. I'M WITH YOU.

16 MR. RIFKIN: SUMMY-BIRCHARD HAD ITS OWN COUNSEL,
17 COUDERT BROTHERS.

18 THE COURT: YEP.

19 MR. RIFKIN: WHICH OVER THE COURSE OF TWO YEARS
20 RENDERED EXHAUSTIVE LEGAL ADVICE ON THE ISSUE. THERE'S NO --
21 THERE'S NOTHING IN THE RECORD THAT SAYS THAT MRS. SENGSTACK
22 TOLD MR. CORMAN KEEP THIS CONFIDENTIAL. IN 2014 MR. REIMER
23 PRODUCED THE DOCUMENT --

24 THE COURT: SO, DO YOU -- DO YOU HAVE -- OKAY. SO,
25 YOU MAKE A VERY WELL-ARTICULATED EXPLANATION AS TO WHY THOSE

1 THINGS DID NOT OCCUR.

2 MR. RIFKIN: RIGHT.

3 THE COURT: DO YOU WANT TO GIVE ME SOMETHING TO
4 HANG ON TO AS TO WHY SHE DID PROVIDE INFORMATION THAT SHE
5 PAID A HECK OF A LOT OF MONEY FOR FROM COUDERT, WHY SHE WOULD
6 HAVE BEEN IN THE POSITION TO GIVE THIS TO ASCAP. WHY?

7 MR. RIFKIN: I THINK THEY HAPPENED TO BUMP INTO
8 EACH OTHER. AND I THINK THEY PROBABLY TALKED ABOUT THE SONG
9 BECAUSE PEOPLE IN THE MUSIC BUSINESS TALK ABOUT THE SONG A
10 LOT. IT IS -- AS I'VE TRIED TO BE KIND TO SAY IT IS A MATTER
11 OF SOME NOTORIETY --

12 THE COURT: I'VE SUNG IT MYSELF.

13 (LAUGHTER.)

14 MR. RIFKIN: WITHIN THE MUSIC BUSINESS, IT IS --
15 YOUR HONOR, YOU KNOW, NOT A MONTH GOES BY THAT I DON'T HEAR
16 SOME HUMOROUS REFERENCE TO IT. I THINK THE LAST TIME I SAW
17 IT WAS NOT A FEW WEEKS AGO ON THE COLBERT SHOW WHEN HE SANG
18 "HAPPY BIRTHDAY" TO HAPPY BIRTHDAY ON HAPPY BIRTHDAY'S HAPPY
19 BIRTHDAY. AND HE COULDN'T SING THE SONG.

20 IT IS -- IT IS TRULY A MATTER OF SOME ATTENTION IN
21 THE INDUSTRY.

22 THE COURT: OKAY.

23 MR. RIFKIN: I THINK IT IS --

24 THE COURT: OKAY. SO --

25 MR. RIFKIN: IT IS -- IT WAS SUMMY'S BIGGEST

1 PROPERTY BY FAR. IF CORMAN HAPPENED TO BUMP INTO ARLENE
2 SENGSTACK ANYWHERE -- AND SINCE THEY WERE BOTH IN THE MUSIC
3 BUSINESS, IT'S LIKELY THAT THEY DID -- IT'S ALSO LIKELY THAT
4 THE TOPIC OF "HAPPY BIRTHDAY" CAME UP. IT'S LIKE THE OLD
5 JOKE ABOUT TWO FLIES. IF YOU SEE TWO FLIES FLYING AROUND
6 TOGETHER YOU KNOW WHAT THEY'RE TALKING ABOUT. MAYBE THAT'S A
7 FARM JOKE, BUT YOU'LL FORGIVE ME. MY WIFE IS A HORSE RIDER.
8 SO, I SPEND SOME TIMES ON HORSE FARMS.

9 (LAUGHTER.)

10 MR. RIFKIN: I THINK IF THEY BUMPED INTO ONE
11 ANOTHER --

12 THE COURT: OKAY. I MEAN, YOU KNOW, YOU SAID IT
13 WAS GRATUITOUS. I COULDN'T --

14 MR. RIFKIN: I THINK IT WAS GRATUITOUS.

15 THE COURT: I COULDN'T PLAUSIBLY IMAGINE HOW
16 SOMEONE WOULD GRATUITOUSLY SAY, HEY, WOULD YOU LIKE TO SEE
17 WHAT MY LAWYER SAYS ABOUT THIS SONG. AND YOU'VE GIVEN ME --

18 MR. RIFKIN: I --

19 THE COURT: LOOK, IT'S SPECULATION. I GOT IT.

20 MR. RIFKIN: IT DIDN'T COME OUT OF THE BLUE.

21 THE COURT: OKAY.

22 MR. RIFKIN: I THINK --

23 THE COURT: OKAY.

24 MR. RIFKIN: I THINK THERE'S A CONTEXT TO IT. I
25 THINK THE CONTEXT IS -- AGAIN, AS I SAY, ALL THE HISTORICAL

1 SIGNIFICANCE. AND LET'S NOT FORGET WHAT WE'RE TALKING ABOUT.

2 WE'RE TALKING ABOUT A UNIQUE SONG. I MEAN, IT IS "HAPPY
3 BIRTHDAY." AND IT WAS SUMMY'S BIGGEST PROPERTY. AND I THINK
4 IT'S ENTIRELY LIKELY THAT CORMAN SAID SOMETHING TO SENGSTACK
5 ABOUT IT. AND SENGSTACK SAYS, YOU KNOW, HERE'S A COUPLE OF
6 LETTERS WE GOT FROM -- FROM OUR LAWYER THREE YEARS AGO.

7 THE COURT: GOT IT.

8 MR. RIFKIN: THERE'S NOTHING IN THE RECORD TO
9 SUBSTANTIATE ANYTHING ELSE OTHER THAN THAT. AND I THINK
10 THAT'S FAR MORE CONSISTENT WITH THE HISTORICAL FACTS THAN ANY
11 CONTRARY SUPPOSITION.

12 THE COURT: AND THAT IS ORAL ADVOCACY. I GOT IT.

13 MR. RIFKIN: OKAY.

14 THE COURT: WELL DONE --

15 MR. RIFKIN: THANK YOU, YOUR HONOR.

16 THE COURT: WELL DONE. THANK YOU.

17 MR. RIFKIN: THANK YOU.

18 THE COURT: OKAY.

19 MS. LEMOINE:

20 MS. LEMOINE: YES, YOUR HONOR. THANK YOU.

21 SO, YOUR HONOR, I WANT TO JUST START BY ADDRESSING
22 THE POINT ABOUT THAT MR. RIFKIN MADE, THE POINT ABOUT THIS
23 NOTION THAT ASCAP HAS NEVER BEEN INVOLVED IN THE VALIDITY OF
24 THE COPYRIGHT HERE.

25 THE COURT: MICROPHONE DOWN --

1 MS. LEMOINE: OF COURSE.

2 THE COURT: -- SO WE CAN HEAR WHAT YOU SAY.

3 MS. LEMOINE: AS YOUR HONOR POINTED OUT, ASCAP IS
4 CHARGED WITH ENFORCING OUR PUBLIC PERFORMANCE RIGHTS, SUMMY'S
5 PUBLIC PERFORMANCE RIGHTS. IT HAS, AS MR. REIMER TESTIFIED,
6 FILED THOUSANDS OF INFRINGEMENT ACTIONS. ALL RIGHT. HE
7 COULDN'T SAY WHETHER ANY INVOLVED "HAPPY BIRTHDAY," BUT HE
8 SAID THEY FILED THOUSANDS OF INFRINGEMENT ACTIONS.

9 AS YOUR HONOR POINTED OUT, AN ESSENTIAL COMPONENT
10 --

11 THE COURT: AND THAT'S -- AND THAT'S DISTINCT FROM
12 ACTIONS REGARDING THE VALIDITY OF A COPYRIGHT.

13 MS. LEMOINE: WELL, AS YOUR HONOR POINTED OUT, IN
14 ORDER TO FILE THOSE ACTIONS YOU'D HAVE TO OWN THE COPYRIGHT.
15 AND YOU'D HAVE TO HAVE A VALID COPYRIGHT IN ORDER TO OWN IT.
16 SO, WE SAY IT'S SUBSUMED WITHIN THE QUESTION OF OWNERSHIP.

17 THE VALIDITY -- WHEN HE TESTIFIED AS TO THE
18 VALIDITY OF THE COPYRIGHT, I THINK WHAT HE HAD IN MIND WAS AN
19 ACTION LIKE THIS ONE IN WHICH PLAINTIFFS ARE SEEKING A
20 DECLARATORY RELIEF CLAIM ABOUT WHETHER IT'S VALID OR NOT. I
21 THINK HE HAD THIS ONE IN MIND, BUT I DON'T KNOW. WE'D HAVE
22 TO ASK MR. REIMER.

23 BUT HE DID SAY THAT THEY MAKE -- I MEAN, WE
24 UNDERSTAND, AND YOUR HONOR ARTICULATED IT VERY CLEARLY, THE
25 NATURE OF THE RELATIONSHIP BETWEEN ASCAP AND SUMMY. ASCAP

1 EXISTS TO ENFORCE PUBLIC PERFORMANCE RIGHTS. THE UNITED
2 STATES SUPREME COURT SAID THAT. THAT'S HOW IT WAS FORMED IN
3 1914.

4 THE COURT: DO I HAVE A COPY OF THE CONTRACT
5 BETWEEN SUMMY AND ASCAP? I KNOW I HAVE THE WARNER AGREEMENT.

6 MS. LEMOINE: I CAN SUBMIT THAT. I THINK THAT WE
7 SUBMITTED IT.

8 MR. KAPLAN: YES.

9 MS. LEMOINE: MR. KAPLAN WILL HELP ME AND TELL ME
10 WHAT EXHIBIT IT IS.

11 THE COURT: YES, HE WILL.

12 MS. LEMOINE: WE DID SUBMIT THAT, YOUR HONOR, FROM
13 1975.

14 MR. KAPLAN: EXHIBIT C OF THE KLAUS DECLARATION.

15 MS. LEMOINE: IT'S EXHIBIT C TO MR. KLAUS'S
16 DECLARATION, YOUR HONOR.

17 THE COURT: STAND BY.

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: OH, OKAY. I HAD SPENT TIME WITH
20 EXHIBIT D, WHICH WAS THE WARNER.

21 C IS THE?

22 MS. LEMOINE: THEY'RE THE SAME, YOUR HONOR.

23 THE COURT: OH, I SEE. OKAY.

24 MS. LEMOINE: SO --

25 THE COURT: THERE ARE JUST SO MANY COPIES OF

1 DEPOSITION NOTICES AND LAWYER SNITAGRAMS THAT FRANKLY I WENT
2 BUZZING PAST, BUT --

3 BY THE WAY, JUST TO BE VERY CLEAR, THE ADDITIONAL
4 CASES THAT YOU REFERENCE, WHICH I'M FAMILIAR WITH, AND I WANT
5 TO GO BACK AND TAKE A LOOK AT AS WELL AS THE FULL DEPOSITION
6 THAT I MAY HAVE NOT TAKEN A LOOK AT. I WILL SEE ALL OF IT.
7 AND I ASSURE YOU I'LL TAKE IT UNDER CONSIDERATION BEFORE I
8 MAKE A DECISION.

9 MS. LEMOINE: WELL, LET ME JUST -- A LITTLE BIT
10 ABOUT THOSE TWO CASES, YOUR HONOR, SINCE YOU BROUGHT THEM UP.

11 I MEAN, IN THOSE CASES, WHICH ARE WITHIN THE
12 SOUTHERN DISTRICT OF NEW YORK, AS YOUR HONOR RECOGNIZED, IS A
13 COURT THAT'S VERY FAMILIAR WITH ASCAP. THE QUESTION WAS
14 WHETHER THE DEFENDANT BAR OWNER COULD IMPLEAD ASCAP AS A
15 NECESSARY PARTY. IT WAS NOT ABOUT WHETHER ASCAP WAS A
16 LICENSING AGENT. IT WAS ABOUT WHETHER ASCAP WAS A NECESSARY
17 PARTY. BOTH OF THOSE CASES WHICH BOTH INVOLVED -- ONE IS
18 SPRINGSTEIN; THE OTHER IS OCASEK, DOORS MUSIC, I THINK. NO.
19 I THINK THAT'S THE -- SPRINGSTEIN OCASEK IS THE CASE THAT MR.
20 RIFKIN CITED.

21 THE COURT: WHICH IS CONFUSING BECAUSE RICK OCASEK
22 WAS THE LEAD SINGER FOR THE CARS.

23 MS. LEMOINE: YOU'RE RIGHT. YOU'RE RIGHT. THAT'S
24 REALLY EMBARRASSING. WE NEED TO --

25 SO --

1 THE COURT: IS HE A CLIENT?

2 MS. LEMOINE: OF MINE?

3 THE COURT: YES.

4 MS. LEMOINE: NO.

5 THE COURT: OH, OKAY.

6 MS. LEMOINE: SO --

7 THE COURT: ALL RIGHT. SO, I MEAN -- SO, YOU'RE
8 GOING TO DISTINGUISH THESE CASES BECAUSE THEY DON'T DEAL WITH
9 THE EXISTENCE OF --

10 MS. LEMOINE: NO.

11 THE COURT: -- ATTORNEY-CLIENT RELATIONSHIP.

12 MS. LEMOINE: THEY DO NOT. THEY DEAL WITH THE --
13 SORT OF A QUESTION OF FEDERAL CIVIL PROCEDURE, WHETHER
14 THEY'RE A NECESSARY PARTY AND HAVE TO BE INVOLVED IN ANY
15 INFRINGEMENT ACTION.

16 THE COURT: OKAY.

17 MS. LEMOINE: I WANT TO TALK BRIEFLY ABOUT -- YOU
18 KNOW, MR. RIFKIN SAID A FEW TIMES THAT IT'S OUR BURDEN. AND
19 THAT'S TRUE. IT'S OUR BURDEN. BUT I THINK YOUR HONOR HAS IT
20 EXACTLY RIGHT WHEN YOU LOOK AT WHAT IS THE MORE PROBABLE
21 CONCLUSION TO DRAW BASED ON THE PARTIES' RELATIONSHIP. AND
22 THAT'S FRANKLY THE STANDARD. YOU KNOW, IS IT MORE LIKELY
23 THAT MS. SENGSTACK JUST BUMPED INTO MR. CORMAN AND THOUGHT,
24 HEY, LET ME SEND YOU THIS OR THAT SHE SENT IT GRATUITOUSLY.
25 OR IS IT MORE LIKELY THAT BECAUSE OF THEIR RELATIONSHIP -- IS

1 THE INFERENCE THAT YOUR HONOR HAS DRAWN MORE CONSISTENT WITH
2 WHAT WE UNDERSTAND ABOUT THEIR RELATIONSHIP, WITH WHAT THE --
3 THE FACT THAT HE IS THE GENERAL COUNSEL OF ASCAP, THE FACT
4 THAT SHE SAYS HERE'S THE ANALYSIS --

5 THE COURT: WAIT. WAIT.

6 MS. LEMOINE: -- ABOUT OUR CLAIM.

7 THE COURT: WOULDN'T THE PROPER FORMULATION BE
8 WHETHER WARNER HAS ESTABLISHED BY A PREPONDERANCE OF THE
9 EVIDENCE THAT IT'S MORE LIKELY THAN NOT --

10 MS. LEMOINE: CORRECT.

11 THE COURT: -- THAT THAT RELATIONSHIP OCCURRED.

12 MS. LEMOINE: THAT IS -- THAT IS CORRECT.

13 THE COURT: OKAY.

14 MS. LEMOINE: AND IN LIGHT OF THE RECORD EVIDENCE
15 THAT -- ABOUT THE RELATIONSHIP BETWEEN ASCAP AND SUMMY,
16 ASCAP'S RESPONSIBILITY AS THE LICENSING AGENT, ASCAP'S ROLE
17 IN INFRINGEMENT ACTIONS, IN ENFORCING, IN POLICING THE
18 COPYRIGHT, IT'S MUCH MORE PLAUSIBLE -- WE THINK THE ONLY
19 PLAUSIBLE CONCLUSION, FRANKLY, IS THAT SHE SENT THIS FOR ONE
20 OF THOSE PURPOSES, FOR SOME PURPOSE OTHER THAN JUST AN FYI.

21 AND I THINK, YOU KNOW, PLAINTIFF'S CONTENTION THAT
22 IT WAS GRATUITOUS, YOU KNOW, NOW IS JUST -- IT CAN'T BE
23 SUSTAINED.

24 NOW, WHETHER SHE DID THIS TO OBTAIN LEGAL ADVICE,
25 WHICH I THINK IS A FAIR INFERENCE, AND WHETHER SHE DID IT

1 BECAUSE THEY HAD A COMMON INTEREST IN THE LEGAL QUESTION,
2 WHICH I THINK THE EVIDENCE SHOWS THAT THEY DID, EITHER ARE A
3 BASIS FOR YOUR HONOR TO UPHOLD THE PRIVILEGE IN THIS
4 INSTANCE.

5 THE COURT: AND WHAT'S -- WHAT'S THE EVIDENCE
6 SUPPORTING THE CONCLUSION THAT MS. SENGSTACK -- HEY, I
7 FINALLY GOT IT -- WAS SEEKING LEGAL ADVICE --

8 MS. LEMOINE: WELL, I THINK THE --

9 THE COURT: -- AS OPPOSED TO PROVIDING INFORMATION
10 IN ANTICIPATION OF COMMON LITIGATION. LET'S DISTINGUISH THE
11 TWO, IF POSSIBLE.

12 MS. LEMOINE: SURE. I THINK WE LOOK AT THE
13 TRANSMITTAL LETTER.

14 THE COURT: OKAY.

15 MS. LEMOINE: EITHER -- EITHER INTERPRETATION I
16 THINK IS POSSIBLE, THAT SHE SENT IT FOR THE PURPOSE OF
17 OBTAINING HER OWN ASSOCIATION-RELATED LEGAL ADVICE. DID SHE
18 HAVE SOME QUESTION FOR HIM ABOUT WHETHER ASCAP COULD LICENSE
19 THE WORK, OR DID SHE SEND IT BECAUSE ASCAP ITSELF HAD A
20 QUESTION AND ASCAP HAD A CONCERN AND ANTICIPATED FUTURE
21 CLAIMS LIKE THE ONE THAT MR. RIFKIN HAS BROUGHT HERE. THAT
22 IS VERY POSSIBLE. BOTH ARE EQUALLY PLAUSIBLE AND MORE
23 PLAUSIBLE WE SAY THAN THE CONTENTION THAT IT WAS JUST BECAUSE
24 THEY BUMPED INTO EACH OTHER ON THE STREET.

25 YOU KNOW, IF YOU LOOK AT THE TRANSMITTAL LETTER

1 ITSELF, FIRST YOU LOOK AT THE AGREEMENT BETWEEN SUMMY AND
2 ASCAP WHERE YOU SEE THAT THEIR ROLE IS AS FIRST IN 1(A) IS TO
3 ENFORCE --

4 THE COURT: UH-HUM.

5 MS. LEMOINE: -- THE COPYRIGHT. IF YOU UNDERSTAND
6 WHAT THE BASIS OF THE RELATIONSHIP IS, IF YOU LOOK AT THE
7 ARTICLES OF THE ASSOCIATION FOR ASCAP, THEIR PURPOSE IS. IF
8 YOU LOOK AT THE TRANSMITTAL LETTER SHE SAYS, HERE'S AN
9 ANALYSIS ABOUT OUR CLAIM, THE RIGHTS AND THE WORK AS
10 DISCUSSED. THEY HAD A PREVIOUS CONVERSATION. THE ONLY REAL
11 LOGICAL CONCLUSION IS THAT SHE DID THAT FOR ONE OF THE
12 PURPOSES THAT ASCAP SERVES AS A BUSINESS. SHE SENT IT TO THE
13 GENERAL COUNSEL FOR A REASON.

14 THE COURT: OKAY.

15 MS. LEMOINE: AND, YOUR HONOR --

16 THE COURT: I GOT IT.

17 MS. LEMOINE: OKAY. IF -- DOES YOUR HONOR HAVE ANY
18 FURTHER QUESTIONS FOR THE PARTIES?

19 THE COURT: I WOULD ASK -- NOT OF YOU.

20 I WOULD ASK -- WELL, I GUESS MY QUESTION FOR THE
21 PLAINTIFFS IS YOU WERE FORMALLY ASKING THE COURT TO OVERRULE
22 THE CLAIM OF PRIVILEGE. AND THEN YOU WANTED SOMETHING ELSE.

23 MR. RIFKIN: WELL --

24 THE COURT: AND I WASN'T ENTIRELY SURE WHAT ELSE
25 YOU WANTED.

1 MR. RIFKIN: -- WE DID. ALTHOUGH, I THINK IT BECAME
2 MOOT.

3 THE COURT: OKAY.

4 MR. RIFKIN: WHAT WE HAD ASKED FOR WAS SOME
5 ADDITIONAL DISCOVERY, BUT THEN IN THE INTERIM ASCAP AGREED TO
6 ALLOW MR. -- ASCAP AGREED TO ALLOW MR. REIMER TO COME BACK
7 AND ANSWER SOME MORE QUESTIONS. HE DID. AND THE DEFENDANTS
8 AGREED TO PRODUCE ANOTHER WITNESS. THEY DID. SO, OUR
9 REQUEST FOR ADDITIONAL DISCOVERY REALLY BECAME MOOT.

10 I THINK THE RECORD --

11 THE COURT: OKAY.

12 MR. RIFKIN: -- FACTUALLY IS AS COMPLETE AS IT'S
13 EVER GOING TO BE.

14 THE COURT: OKAY. OH, NO, AND THAT CLARIFICATION
15 HELPS. BECAUSE WE HAD A VERY HURRIED CALL A COUPLE OF WEEKS
16 AGO WHEN I WAS IN A HOTEL LOBBY. AND --

17 MR. RIFKIN: I RECALL IT.

18 THE COURT: -- I DIDN'T MEAN TO BE CURT WITH YOU
19 ALL, BUT THINGS WERE GOING. AND I WAS OUT OF TOWN. AND --
20 OKAY.

21 SO, THAT -- THAT MAKES SENSE. THE GIST OF THE
22 REQUESTED RELIEF IS TO DEAL WITH THE ASSERTION OF PRIVILEGE.
23 GOT IT.

24 MR. RIFKIN: AT THIS POINT THAT'S CORRECT.

25 THE COURT: OKAY.

1 MS. LEMOINE: IF I COULD JUST -- ONE MORE POINT IF
2 I COULD MAKE, YOUR HONOR.

3 MR. RIFKIN IS MUCH TALLER THAN I AM.

4 THE COURT: HE IS.

5 MS. LEMOINE: MR. REIMER'S TRANSCRIPT IS ATTACHED
6 -- PORTIONS OF IT ARE ATTACHED TO EXHIBIT A TO THE
7 DECLARATION I SUBMITTED WITH OUR SUPPLEMENTAL BRIEF.

8 HE TESTIFIED CONSISTENT WITH YOUR UNDERSTANDING OF
9 WHAT ASCAP'S ROLE IS.

10 HE -- I JUST WANT TO ADDRESS JUST BRIEFLY THIS
11 NOTION THAT THIS LETTER HAD TO CONTAIN AN EXPLICIT REFERENCE
12 TO LEGAL ADVICE AND THINK ABOUT -- YOU KNOW, THE PASSAGE OF
13 TIME AND THE NATURE OF COPYRIGHT AS YOUR HONOR POINTED OUT,
14 AND THAT, YOU KNOW, WHAT WE'RE TRYING TO DO HERE IS MAKE
15 ASSUMPTIONS ABOUT THIS ENCOUNTER ON THE STREET.

16 BUT HAVING AN EXPLICIT REQUIREMENT THAT THERE BE
17 SOMETHING SAYING I AM ASKING FOR LEGAL ADVICE, OR I AM
18 SENDING THIS TO YOU AND PURSUANT TO OUR COMMON INTEREST
19 DOCTRINE WOULD JUST BE CONTRARY TO THE POLICY UNDERLYING THE
20 COPYRIGHT ACT, WHICH GRANTS THESE COPYRIGHTS FOR A PERIOD OF
21 TERMS OF SEVERAL DECADES. SO, I WOULD ALSO SUBMIT THAT TO
22 YOUR HONOR.

23 THE COURT: OKAY.

24 MS. LEMOINE: ALL RIGHT.

25 MR. RIFKIN: YOUR HONOR, THE ONLY OTHER THING I'LL

1 ADD IS WHILE WE HAVE THE LETTER FROM MRS. SENGSTACK --

2 THE COURT: YES.

3 MR. RIFKIN: -- OPEN, SHE SAYS AT THE VERY BOTTOM
4 WHEN SHE SENDS -- SHE REFERS TO BOTH THE LONG ANALYSIS, THE
5 1976 ANALYSIS AND THEN THE SHORT --

6 THE COURT: UH-HUM.

7 MR. RIFKIN: -- 1978 ANALYSIS. AND IN REFERRING TO
8 THE FOLLOW-UP LETTER SHE SAYS --

9 THE COURT: "IT MIGHT BE OF INTEREST."

10 MR. RIFKIN: -- "IT MIGHT BE OF INTEREST."

11 SHE DOESN'T SAY IT MIGHT BE HELPFUL. SHE DOESN'T
12 SAY IT MIGHT BE USEFUL. YOU MIGHT BE ABLE TO MAKE USE OF IT.
13 SHE SAYS IT MIGHT BE OF INTEREST.

14 THE COURT: YOU KNOW, THIS IS -- THIS IS -- THIS IS
15 LIKE THE BEST PART OF IT. IT'S SMART PEOPLE TRYING TO FIGURE
16 OUT WHAT SMART PEOPLE WERE DOING. I MEAN, THERE'S THINGS
17 HERE FOR BOTH SIDES. AND YOU'VE BOTH DONE A FINE JOB. I
18 MEAN, WE COULD TALK ABOUT HOW IT'S ON THE FIRM'S LETTERHEAD
19 AS OPPOSED TO A PERSONAL STATIONARY. WE COULD TALK ABOUT HOW
20 SHE ADDRESSES HIM BY HIS FIRST NAME --

21 MR. RIFKIN: BERNIE --

22 THE COURT: -- RATHER THAN HIS FORMAL TITLE. YOU
23 KNOW, THERE'S -- THERE'S STUFF FOR BOTH HERE.

24 MR. RIFKIN: THERE'S GRIST FOR BOTH MILLS. AND YOU
25 ULTIMATELY HAVE TO DECIDE WHETHER THEY HAVE GROUND UP ENOUGH

1 TO --

2 THE COURT: THE JOKE IS THAT'S WHY I GET THE BIG
3 BUCKS.

4 MR. RIFKIN: -- TO --

5 THE COURT: ALL RIGHT. HERE'S WHAT'S GOING TO
6 HAPPEN. I AM GOING TO CLEAR MY AFTERNOON BECAUSE OF THE
7 SIGNIFICANCE OF THIS ISSUE FOR BOTH PARTIES. I AM GOING TO
8 TAKE AN ADDITIONAL LOOK AT YOUR MATERIALS, PARTICULARLY THE
9 ONES THAT WERE HIGHLIGHTED HERE TODAY, WHICH IS HELPFUL IN
10 FOCUSING ON WHAT I NEED TO DO.

11 I WILL TRY AND GET OUT A DECISION. YOU MAY FEEL
12 CONFIDENT THAT TO THE EXTENT THAT MY -- I'M NOT GOING TO MAKE
13 UP MY FINAL MIND. BUT IF I -- IF I -- IF I STICK WITH WHAT
14 MY TENTATIVE IS GOING TO BE, YOU CAN APPROPRIATELY REFER TO
15 BOTH THE STATEMENTS YOU HEARD HERE TODAY AS WELL AS THE
16 WRITTEN DECISION, WHICH IS KIND OF MY CUSTOM. IT WON'T BE --
17 IT WON'T BE A ONE-PAGER, BUT, YOU KNOW, I'M GOING TO MAYBE
18 SHORTHAND SOME OF THE THINGS THAT I'VE SAID HERE.

19 IF THERE IS A DESIRE TO TAKE THIS TO CHIEF JUDGE
20 KING ON APPEAL, NO PROBLEM WITH ME. BUT HE IS GOING TO DEFER
21 TO SOME OF THESE FACTUAL CONCLUSIONS.

22 BUT BOTH SIDES WOULD BE WELL SERVED IF THERE IS
23 GOING TO BE ADDITIONAL PROCEEDINGS HERE TO FOCUS ON THOSE
24 ISSUES AS OPPOSED TO SOME OF THE OTHER THINGS THAT CAUSE THIS
25 STACK OF PAPER TO BE SEVERAL INCHES HIGH. BUT I WILL TRY AND

1 GET THAT OUT TODAY.

2 MS. LEMOINE: COULD I GIVE YOU ONE CITE, YOUR
3 HONOR, BEFORE WE WALK OUT OF THE ROOM.

4 THE COURT: HEY, WHY NOT.

5 MS. LEMOINE: SO, MR. KAPLAN JUST POINTED THIS OUT
6 TO ME. IN THE DISTRICT OF THE DISTRICT OF COLUMBIA, THERE'S
7 A PRESUMPTION THAT COMMUNICATIONS TO OUTSIDE COUNSEL OR THE
8 GENERAL COUNSEL OF THE COMPANY ARE PRIMARILY RELATED TO LEGAL
9 ADVICE.

10 BOCA INVESTORING PARTNERSHIP --

11 THE COURT: I'M SORRY. YOU'RE CITING SOMETHING NOW
12 THAT YOU DIDN'T CITE IN THE TWO PREVIOUS BRIEFS?

13 MS. LEMOINE: I THINK WE DID.

14 DIDN'T WE?

15 MR. KAPLAN: NO.

16 MS. LEMOINE: OKAY. IF WE DIDN'T, THEN, I'M GOING
17 TO SIT DOWN.

18 THE COURT: YES. YES, YOU ARE.

19 MS. MANIFOLD: THANK YOU, SIR.

20 THE COURT: UNLESS -- UNLESS YOU WANT ADDITIONAL
21 BRIEFING --

22 MS. LEMOINE: NO --

23 THE COURT: -- AND -- YES.

24 MS. LEMOINE: NO. PLEASE GOD, NO. I DON'T THINK
25 ANY OF US WANT THAT.

1 THE COURT: ALL RIGHT. OR RULE 37 TO COME BACK
2 INTO PLAY.

3 ANYTHING ELSE FOR YOU FOLKS?

4 MR. RIFKIN: NONE, YOUR HONOR.

5 THANK YOU VERY MUCH FOR YOUR TIME, AS ALWAYS.

6 THE COURT: NOT AT ALL.

7 THANK YOU VERY MUCH --

8 MS. LEMOINE: THANK YOU.

9 THE COURT: -- FOR A VERY HIGH-LEVEL -- HIGH-LEVEL
10 WORK ON THIS.

11 THE CLERK: COURT IS ADJOURNED.

12 (PROCEEDINGS ADJOURNED AT 10:56 A.M.)
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C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT
TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE
PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/S/ DOROTHY BABYKIN

7/30/14

FEDERALLY CERTIFIED TRANSCRIBER

DATED

DOROTHY BABYKIN
