

EXHIBIT 108

Ex. 108

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8 Attorneys for Defendants
9 Warner/Chappell Music, Inc. and
Summy-Birchard, Inc.

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
WESTERN DIVISION

13 GOOD MORNING TO YOU
PRODUCTIONS CORP.; et al.,
14
15 Plaintiffs,
16 v.
17 WARNER/CHAPPELL MUSIC, INC.,
et al.,
18 Defendants.

Lead Case No. CV 13-04460-GHK
(MRWx)

**DECLARATION OF THOMAS B.
MARCOTULLIO IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Hearing
Date: January 26, 2015
Time: 9:30 a.m.
Judge: Hon. George H. King,
Chief Judge
Courtroom: 650

1 I, THOMAS B. MARCOTULLIO, hereby declare:

2 1. I am currently the Vice President and Senior Counsel, Mergers and
3 Acquisitions, Corporate Governance & Securities at Warner Music Group
4 (“WMG”). In connection with my job responsibilities, I am familiar with the nature
5 and scope of the business, including but not limited to the copyrights, business
6 records, and business relationships, of Warner/Chappell Music, Inc., which is an
7 affiliate entity of WMG, and of Summy-Birchard, Inc., which is a wholly-owned
8 subsidiary of Warner/Chappell Music, Inc. For the sake of convenience, I will refer
9 to Warner/Chappell Music, Inc. and Summy-Birchard, Inc., collectively, as
10 “Warner/Chappell.” Except as noted below, I have personal knowledge of the
11 following facts and/or possession, custody and/or control of the business records of
12 Warner/Chappell relevant thereto and, if called as a witness, could and would
13 competently testify thereto.

14 2. Warner/Chappell is the owner of copyright registration certificates
15 E51990 and E51988. I recognize the documents bearing Bates numbers
16 WC0000388-WC0000390 and WC0000385-WC0000387 as true and correct copies
17 of these registration certificates.

18 3. Copyright registration certificates E51990 and E51988 were issued on
19 December 9, 1935. Copyright was renewed on December 9, 1962, as R306186 and
20 R306185, respectively. I recognize the documents bearing Bates numbers
21 WC0000103-WC0000104 and WC0000953-WC0000954 as true and correct copies
22 of these renewal certificates.

23 4. I recognize the document bearing Bates numbers WC0002081-
24 WC0002090 as a true and correct copy of an agreement between Clayton F. Summy
25 and John F. Sengstack, dated August 7, 1931, that reflects the August 1931
26 reorganization of Clayton F. Summy Co. (Illinois) and sale of assets to Clayton F.
27 Summy Co. (Delaware)).

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1 5. I recognize the document bearing Bates numbers WC0002091-
2 WC0002093 as a true and correct copy of the minutes of a September 29, 1931,
3 meeting of the Board of Directors of C.F.S. Musical Co. that reflects the August
4 1931 change of name from Clayton F. Summy Co. (Illinois) to C.F.S. Musical Co.
5 (Illinois), and the sale of assets to Clayton F. Summy Co. (Delaware).

6 6. I recognize the document bearing Bates numbers WC0001998-
7 WC0002075 as a true and correct copy of a declaration of David K. Sengstack,
8 which is dated January 20, 1981, and was recorded in the Copyright Office, that
9 attaches business records and/or public records that reflect the following: (a) the
10 1956 change of name of Clayton F. Summy Co. (Delaware) to Summy Publishing
11 Co. (Delaware); (b) the 1957 name change of Summy Publishing Co. (Delaware) to
12 Summy-Birchard Publishing Co. (Delaware), Ex. 7 at WC0002003-05; (c) the 1961
13 name change of Summy-Birchard Publishing Co. (Delaware) to Summy-Birchard
14 Co. (Delaware), *id.* at WC0002006-08; (d) the 1973 merger of Summy-Birchard Co.
15 (Delaware) with Educational Music Bureau, an Illinois corporation, and the
16 resulting surviving company named Summy-Birchard Co., an Illinois corporation,
17 *id.* at WC0002033-48, WC0002062-75; (e) the 1976 merger of Summy-Birchard
18 Co. (Illinois) with New Summy-Birchard Co., a Wyoming corporation, with the
19 surviving corporation being Summy-Birchard Co. (Wyoming), *id.* at WC0002018-
20 32, WC0002049-61; (f) the 1978 name change of Summy-Birchard Co. (Wyoming)
21 to Sumco Corp. (Wyoming), *id.* at WC0002015-17; (g) the May 1979 name change
22 of Sumco Corp. (Wyoming) to Summy-Birchard Co. (Wyoming), *id.* at
23 WC0002013-14; (g) the July 1979 name change of Summy-Birchard Co.
24 (Wyoming) to The Birch Tree Group Ltd. (Wyoming), at WC0002011-12; and
25 (h) the September 1979 name change of The Birch Tree Group Ltd. (Wyoming) to
26 Birch Tree Group Ltd. (Wyoming), *id.* at WC0002009-10.

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1 7. I am informed and believe that the document bearing Bates numbers
2 WC0001998-WC0002075 consists of copies made from microfiche and, according
3 to the Copyright Office, these copies are the best available copies.

4 8. I recognize the document bearing Bates numbers WC0000760-
5 WC0000827 as a true and correct copy of the stock purchase agreement between
6 Warner/Chappell Music, Inc. and David K. Sengstack, dated December 1, 1988,
7 regarding the sale of all the capital stock of Birch Tree Group Ltd. (Wyoming).

8 9. I recognize the document bearing Bates numbers WC0001995-
9 WC0001997 as a true and correct copy of a Certificate of Amendment from the
10 Secretary of State of Wyoming, dated December 27, 1988, which reflects the name
11 change of Birch Tree Group Ltd. (Wyoming) to Summy-Birchard, Inc. (Wyoming).

12 10. I recognize the document bearing Bates numbers WC0002094-
13 WC0002097 as a true and correct copy of the stock certificate that David K.
14 Sengstack transferred to Warner/Chappell Music, Inc. on January 3, 1989.

15 11. Summy-Birchard, Inc., a Wyoming corporation, is the defendant in this
16 lawsuit and is a wholly owned subsidiary of defendant Warner/Chappell Music, Inc.

17
18 I declare under penalty of perjury under the laws of the United States that the
19 foregoing is true and correct. Executed this 24th day of November 2014, at New
20 York, New York.

21
22 
23 Thomas B. Marcotullio

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27 Ex. 108

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EXHIBIT 109

UNITED STATES DISTRICT COURT CENTRAL
DISTRICT OF CALIFORNIA
WESTERN DIVISION

5 GOOD MORNING TO YOU)
 PRODUCTIONS CORP., et al.,)
 6)
 Plaintiffs,) Lead Case Number
 7) CV 13 04460 GHK
 VS.) (MRWx)
 8)
 WARNER/CHAPPELL MUSIC INC.,)
 9 et al.,)
)
 10 Defendants.)
 _____)

DEPOSITION OF JEREMY BLIETZ
Los Angeles, California
Thursday, July 10, 2014

23 Job No: 81817
24 Reported by: NIKKI ROY
25 CSR No. 3052

1 Deposition of JEREMY BLIETZ, taken on behalf of
2 the Plaintiffs, at 355 South Grand Avenue,
3 35th Floor, Los Angeles, California, on Thursday,
4 July 10, 2014 at 10:36 a.m., before NIKKI ROY,
5 CSR No. 3052.
6
7

8 APPEARANCES OF COUNSEL:
9

10 FOR THE PLAINTIFFS:

11 WOLF HALDENSTEIN ADLER FREEMAN & HERZ
12 BY: BETSY C. MANIFOLD, Attorney at Law
13 Symphony Towers
14 750 B Street
15 San Diego, California 92101

16 DONAHUE FITZGERALD ATTORNEYS
17 BY: DANIEL SCHACHT, Attorney at Law
18 1999 Harrison Street
19 Oakland, California 94612
20
21
22
23
24

25 ///

1 APPEARANCES OF COUNSEL (CONTINUED) :

2
3 FOR THE DEFENDANTS:

4 MUNGER TOLLES & OLSON

BY: MELINDA EADES LeMOINE, Attorney at Law

5 355 South Grand Avenue

Los Angeles, California 90071

6
7
8 MUNGER TOLLES & OLSON

BY: ADAM KAPLAN, Attorney at Law

9 560 Mission Street

San Francisco, California 94105

10
11
12
13 ALSO PRESENT:

14 NATHAN OSHER

Vice President Legal & Business Affairs

15 Warner/Chappell Music, Inc.
16
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I N D E X

WITNESS	EXAMINATION	PAGE
JEREMY BLIETZ	MS. MANIFOLD	6, 111, 160
	MS. LeMOINE	157

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
Exhibit 42	Plaintiffs' Second Amended Notice Continuing the Taking of Deposition of Jeremy Blietz Pursuant to Fed. R. Civ. P. 30(b)(1)	8
Exhibit 43	Color photocopy of Application for Copyright	89
Exhibit 44	Letter from William Lichtenwanger to Robert Olsen, January 23, 1961	137

(Exhibits previously marked for identification:
Exhibit 2, Exhibit 3, Exhibit 4, Exhibit 5, Exhibit 6,
Exhibit 7, Exhibit 9, Exhibit 10, Exhibit 12,
Exhibit 13, Exhibit 17, Exhibit 19, Exhibit 21,
Exhibit 39, Exhibit 40, and Exhibit 41)

I N D E X (CONTINUED) :

QUESTIONS INSTRUCTED NOT TO ANSWER

Page	Line
86	18

INFORMATION REQUESTED

None

1 (The record was read as follows:

2 Q Do you have any general
3 recollection I know you don't have
4 a specific one. Do you have any
5 general recollection of sending a song
6 question over to legal on Happy
7 Birthday to You?)

8 MS. LeMOINE: You can answer to the extent
9 you don't reveal any communication.

10 THE WITNESS: No, I don't.

11 (The document referred to was marked
12 by the CSR as Deposition Exhibit 43
13 for identification and attached to the
14 deposition transcript hereto.)

15 BY MS. MANIFOLD:

16 Q. Okay. I placed in front of the witness
17 excuse me an exhibit that's been marked as
18 Plaintiffs' Exhibit 43 for identification. It is the
19 same document as Plaintiffs' Exhibit 2 for
20 identification. It's just what I think is a more
21 legible copy.

22 Plaintiffs' 2 for identification was used in
23 the Marcotullio's deposition, and we've decided to
24 mark a clearer version so you can look at the
25 document.

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1 Do you know what this is?

2 A. Yes. It's an application for copyright.

3 Q. And for which copyright?

4 A. Well, I can read the document. It says here
5 Happy Birthday to You unison song.

6 Q. And to the best of your knowledge, in
7 looking at this document, does this refer to
8 copyright number 51988?

9 MS. LeMOINE: Objection; lacks foundation.
10 You can answer if you can.

11 THE WITNESS: Well, that is the number that
12 does appear here on the document.

13 BY MS. MANIFOLD:

14 Q. In the archives at Warner/Chappell, would
15 you have this type of information, pictures of a card
16 catalog?

17 A. No. We wouldn't have pictures of a card
18 catalog. We may have copies of registrations if they
19 are in the files.

20 Q. Okay. All that work to get a nice copy, but
21 at least you had a nice copy to look at.

22 A. Yeah.

23 MS. MANIFOLD: I'm placing in front of the
24 witness a document that's been previously marked as
25 Plaintiffs' Exhibit 4 for identification, and this is

Ex. 109

1 entitled Copy of Registration E51988. It's excuse
2 me Bates stamped WC 385 to 387.

3 Q. Do you recognize this document?

4 A. I recognize that this was a document that I
5 received from the copyright office on a search
6 request.

7 Q. And did you make that search request in or
8 about December of 2013?

9 A. Yes, that is correct.

10 Q. And did the archives at Warner/Chappell not
11 have a copy of this registration prior to December of
12 2013?

13 MS. LEMOINE: Objection; it's broad It's
14 overbroad and vague.

15 As of the time he made the request or at any
16 time?

17 MS. MANIFOLD: At the time he made the
18 request.

19 THE WITNESS: I can't say as to whether we
20 had this specific document. The look of this looks
21 different than most typical copyright searches. So I
22 couldn't say we had it on file.

23 BY MS. MANIFOLD:

24 Q. And what is this a copyright registration
25 for?

1 MS. LeMOINE: Objection to the extent it
2 calls for a legal conclusion. Objection to form.

3 You can answer if you can.

4 THE WITNESS: I mean, all I can say is I
5 could read this to you, but it looks fairly different
6 from how registrations look today, so I couldn't
7 testify as to the intent here. I see the same number
8 that appears on the previous picture, but I can't
9 can't speak to the content here.

10 BY MS. MANIFOLD:

11 Q. Okay. I notice in the upper right hand
12 corner of Bates stamped 386 of Plaintiffs' Exhibit 4
13 for identification, there's a number 27970. Do you
14 know what that number means?

15 A. I do not.

16 Q. Okay. And it says on this registration,
17 copy of registration for E51988, it says (reading):

18 Published musical composition by
19 Mildred J. Hill.

20 Do you see that?

21 A. Yes, I do.

22 Q. Do you have an understanding of what that
23 means on the registration?

24 MS. LeMOINE: Objection; that's asked and
25 answered. That's asked and answered.

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1 the record while you get a chance to look at. I
2 don't want to hurry.

3 And it's Plaintiffs' Exhibit 5 for
4 identification. It's Bates stamped WC 413, 414.
5 It's entitled Happy Birthday to You unison song,
6 Mildred J. Hill's name appears in caps to the right,
7 arranged by Mrs. RR Forman is on the left, and the
8 front of it is School Choral Chorus Music.

9 And I note in pencil in the front cover it
10 says M1998. And, again, is this what you would refer
11 to as the lead sheet for E51988?

12 MS. LeMOINE: Objection; it calls for
13 speculation, but you can answer if you can.

14 THE WITNESS: Yeah. As I review it here and
15 I see that number printed on the cover, and the
16 contents appear to match with the record that we
17 reviewed.

18 BY MS. MANIFOLD:

19 Q. Do you have an understanding of what a
20 deposit copy is?

21 A. Yes, I do.

22 Q. And what's a deposit copy?

23 A. A deposit copy is something that we file
24 with the copyright office as support for our
25 copyright certificate and could be a lead sheet,

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1 could be a recording. Speaking in general terms, the
2 item can vary.

3 Q. And do you know whether this Plaintiffs'
4 Exhibit 5 for identification is the deposit copy for
5 E51988?

6 A. I know that when I inquired to the copyright
7 office as to receive copies of the deposit copies,
8 they informed me that they had separated the lead
9 sheets or the backup copies from the certificates and
10 that I would need to contact their music division.
11 So we did receive this lead sheet with cover from
12 that music division, and I can see the numbers there,
13 but I can't tell you definitively because they have
14 separated the documents.

15 Q. Okay. So you have no reason to doubt that
16 this is the deposit copy for E51988; is that correct?

17 MS. LeMOINE: As he sits here today, you're
18 asking him that question?

19 MS. MANIFOLD: Yeah.

20 MS. LeMOINE: As someone reading the
21 document.

22 THE WITNESS: As I sit here today and review
23 it, I think that it is the deposit copy as I read it
24 here.

25 BY MS. MANIFOLD:

1 Q. As I understand your testimony and
2 correct me if I'm misstating it you made a request
3 to the US Copyright Office to get both the copy of
4 registration for E51988; is that correct?

5 A. Yes, that is correct.

6 Q. And then you made a separate request, since
7 the deposit copy had been separated from the
8 registration, to get the sheet music; is that
9 correct?

10 A. Yes.

11 Q. And this is, to the best of your knowledge,
12 a copy of that deposit copy that you received from
13 the US copy department, is that correct, referring to
14 Plaintiffs' Exhibit 5 for identification?

15 A. To the best of my knowledge, yes.

16 Q. And looking at Bates stamp WC 414 of
17 Plaintiffs' Exhibit 5 for identification, it says on
18 the left ARR. Can we agree that that stands for
19 arranged?

20 A. I think that is the common term used, yes.

21 Q. Arranged by Mrs. RR Forman. Do you have an
22 understanding of what that means with regard to this
23 lead sheet?

24 A. I would be speculating because I haven't
25 reviewed the music itself to know what that what

Ex. 109

1 that is, but it appears that this is a lead sheet of
2 an arrangement by this individual.

3 Q. And you notice all the way over to the
4 right, it's in all caps, it says Mildred J. Hill. Do
5 you have an understanding of what that means to have
6 her name all the way over to the right?

7 A. From the placement of the name on the lead
8 sheet, I would say that they are one of the creators
9 of the work.

10 Lead sheets are often though limited in
11 names and so and since it doesn't have anything in
12 front of it clarifying what that individual
13 contributed, all I can say is they're one of the
14 creators of the work based on this.

15 Q. Okay. I've placed I haven't yet, but I
16 will.

17 I've placed in front of the witness a
18 document that's been previously marked as Plaintiffs'
19 Exhibit 7 for identification. It's a certificate of
20 copyright registration.

21 And it's Bates stamped WC 952.

22 Have you seen this document before?

23 A. Yes, I believe I have, yeah.

24 Q. And what is it?

25 A. This is a copyright registration

1 A. Could you be could you rephrase the
2 question?

3 Q. Well, in reviewing the documents in the
4 archives at Warner/Chappell in your database, when
5 you see the use of the word "arrangement," have you
6 ever understood it to include lyrics?

7 A. I think because people use that term
8 differently, I think I've often received, in general,
9 songs where people call things arrangements and they
10 have changed lyrics, so it's pretty broad. I
11 couldn't say specifically.

12 MS. MANIFOLD: So I'm going to start on 5
13 can we go off the record for two seconds?

14 MS. LeMOINE: Sure.

15 (Off the record discussion.)

16 (At 1:21 P.M., the deposition of JEREMY BLIETZ was
17 adjourned for luncheon recess.)

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1 LOS ANGELES, CALIFORNIA, THURSDAY, JULY 12, 2014

2 2:19 P.M.

3
4 EXAMINATION

5 BY MS. MANIFOLD:

6 Q. Good afternoon. Back on the record.

7 Did you discuss your testimony at all with
8 your counsel during the break?

9 A. No.

10 Q. I'm placing in front of the witness a
11 document that's been previously marked as Plaintiffs'
12 Exhibit 9 for identification. It's a copy of
13 registration E51990. It's Bates stamped WC 388, 389.

14 Can you identify this document?

15 A. Yeah. This is a copy of a copyright
16 registration that I received from the copyright
17 office in Washington.

18 Q. And did you receive it on or about December
19 2013?

20 A. That is correct.

21 Q. And do you know whether there was a copy of
22 this registration in Warner/Chappell's archives
23 before you requested it?

24 A. I do not.

25 Q. Did you make a search of the records to see

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1 if there was a copy of it?

2 A. I don't believe I did, no.

3 Q. And did you also make a request for the
4 deposit copy of the lead sheet for registration
5 E51990?

6 A. Yes, I did.

7 Q. And what was the result of that request?

8 A. Similar to as we discussed with the other
9 registration I'm sorry, I can't recall the
10 number I was told that the deposit copies had been
11 separated from the registrations and that I would
12 need to speak with the separate department at the
13 copyright office to obtain anything they may have on
14 file.

15 Q. And did you speak with the separate
16 department at the copyright office in an attempt to
17 obtain a deposit copy for E51990?

18 A. I did ask for copies of any lead sheets they
19 had on file, yes.

20 Q. I apologize. Were you done? I didn't mean
21 to talk over you.

22 A. No.

23 Q. And what were you told by the US Copyright
24 Office with regards to lead sheets for E51990?

25 A. I was provided with a few lead sheets, but

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DECLARATION UNDER PENALTY OF PERJURY

I, JEREMY BLIETZ, do hereby certify under penalty of perjury that I have read the foregoing transcript of my deposition taken July 10, 2014; that I have made such corrections as appear noted herein, in ink, initialed by me; that my testimony as contained herein, as corrected, is true and correct.

DATED this _____ day of _____, 2014, at _____, California.

JEREMY BLIETZ

1 STATE OF CALIFORNIA)
) ss.
2 COUNTY OF LOS ANGELES)
3

4 I, NIKKI ROY, Certified Shorthand Reporter,
5 certificate number 3052, for the State of California,
6 hereby certify:

7 The foregoing proceedings were taken before me
8 at the time and place therein set forth, at which
9 time the deponent was placed under oath by me;

10 The testimony of the deponent and all objections
11 at the time of the examination were recorded
12 stenographically by me and were thereafter
13 transcribed;

14 The foregoing transcript is a true and correct
15 transcript of my shorthand notes so taken;

16 I further certify that I am neither counsel for
17 nor related to any party to said action nor in any
18 way interested in the outcome thereof.

19 In witness whereof I have hereunto subscribed my
20 name this 12th day of July, 2014.

21
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24
25

NIKKI ROY

ERRATA SHEET FOR THE TRANSCRIPT OF:

Case Name: Good Morning to All vs. Warner/Chappell

Depo. Date: July 10, 2014

Deponent: JEREMY BLIETZ

Reason codes:

- 1. To clarify the record.
- 2. To conform to the facts.
- 3. To correct transcription errors.

Pg.	Ln.	Now Reads	Should Read	Reason

EXHIBIT 110

In The Matter Of:

GOOD MORNING TO YOU PRODUCTIONS CORP.

v.

WARNER/CHAPPELL MUSIC, INC.

SACHS, Ph.D., JOEL - Vol. 1

September 9, 2014

MERRILL CORPORATION

LegalLink, Inc.

20750 Ventura Boulevard
Suite 205
Woodland Hills, CA 91364
Phone: 818.593.2300
Fax: 818.593.2301

Ex. 110

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

-----x

GOOD MORNING TO YOU PRODUCTIONS
CORP.; et al.,

Plaintiffs,
Lead Case No.

-against-

CV 13-04460-GHK

WARNER/CHAPPELL MUSIC, INC.,
et al.,

Defendants.

-----x

September 9, 2014
9:32 a.m.

Videotaped Deposition of JOEL SACHS, Ph.D.
taken by Defendants, pursuant to Notice, at the
offices of Paul, Weiss, Rifkind, Wharton &
Garrison, 1285 Avenue of the Americas, New
York, New York, before William Visconti, a
Shorthand Reporter and Notary Public within and
for the State of New York.

1 A P P E A R A N C E S:

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12 BY: MELINDA LE MOINE, ESQ.
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14 ADAM I. KAPLAN, ESQ.
15 adam.kaplan@mto.com

16 ALSO PRESENT:

17 WILLIAM PACE, VIDEOGRAPHER
18
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E X H I B I T S		
	DESCRIPTION	PAGE
1		
2		
3	(Sachs Exhibit 45 for	14
4	identification, Deposition Notice	
5	for Professor Sachs.)	
6	(Sachs Exhibit 46 for	43
7	identification, letter from	
8	Mr. Rifkin to Professor Sachs.)	
9	(Sachs Exhibit 47 for	45
10	identification, Expert report of	
11	Professor Sachs.)	
12	(Sachs Exhibit 48 for	45
13	identification, CV of Professor	
14	Sachs dated November, 2012.)	
15	(Sachs Exhibit 49 for	74
16	identification, Binder.)	
17	(Sachs Exhibit 50 for	110
18	identification, document.)	
19	(Sachs Exhibit 51 for	140
20	identification, document.)	
21	(Sachs Exhibit 52 for	142
22	identification, document reflecting	
23	Irving Berlin's Pretty Girl Is Like	
24	A Melody.)	
25		

1	E X H I B I T S	PAGE
2	DESCRIPTION	
3	(Sachs Exhibit 53 for	144
4	identification, document.)	
5	(Sachs Exhibit 54 for	226
6	identification, document.)	
7	(Sachs Exhibit 55 for	267
8	identification, document.)	
9	(Sachs Exhibit 56 for	272
10	identification, document.)	
11	(Sachs Exhibit 57 for	275
12	identification, document.)	
13		
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1 IT IS HEREBY STIPULATED AND AGREED
2 by and between the attorneys for the
3 respective parties herein that filing and
4 sealing be and the same are hereby waived.

5 IT IS FURTHER STIPULATED AND AGREED
6 that all objections, except as to the form
7 of the question, shall be reserved to the
8 time of the trial.

9 IT IS FURTHER STIPULATED AND AGREED
10 that the within deposition may be signed
11 and sworn to before any officer authorized
12 to administer an oath with the same force and
13 effect as if signed and sworn to before the
14 Court.

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1 Q. Do you have any evidence looking at 11:01:16
2 this that the other words are as you understand 11:01:16
3 them today? 11:01:18

4 A. No, there is no way to know that. 11:01:21
5 I would say that the odds are that they are 11:01:23
6 because of the structure of the poem. You 11:01:26
7 sing Happy Birthday To You, Happy Birthday To 11:01:31
8 You, Happy Birthday Dear So And So, Happy 11:01:34
9 Birthday To You. This is not exactly a haiku. 11:01:36

10 Q. Are you relying on anything other 11:01:37
11 than just these sentences -- 11:01:37

12 A. No. 11:01:39

13 Q. -- for the principle that this was 11:01:41
14 widely known at this time? 11:01:43

15 A. I'm relying only on the sentence 11:01:47
16 and the context of this entire bottom paragraph. 11:01:50

17 Q. Do have any evidence that this 11:01:53
18 sentence means that it was widely known at the 11:01:53
19 time? 11:01:56

20 A. No. It's an inference and I 11:02:02
21 certainly acknowledge that. I guess you might 11:02:04
22 say it's a kind of circumstantial evidence but 11:02:08
23 only a little type of circumstantial evidence. 11:02:12
24 But it is more an inference which we make all
25 the time as historians.

1 We see evidence and we try to 11:02:17
2 decide what it means. It could mean various 11:02:20
3 things but sometimes it seems so clear what it 11:02:23
4 means that you sort of accept it. You know you 11:02:26
5 don't have the absolute proof of it. We are 11:02:30
6 not alive in 1901 so we don't immediately know 11:02:32
7 that someone sang Happy Birthday. But this 11:02:35
8 certainly suggests very strongly that they did. 11:02:37

9 Q. So the absence of the additional 11:02:41
10 lyrics suggests to you that the lyrics were 11:02:42
11 well known? 11:02:44

12 A. That people knew the words. 11:02:55

13 Q. You didn't survey materials other 11:02:57
14 than what Mr. Rifkin provided you to confirm 11:02:58
15 that belief? 11:03:01

16 A. Frankly it probably would have taken 11:03:05
17 me a couple of years to locate the materials if 11:03:07
18 they even exist. This could be unique. 11:03:09

19 Q. That is not my question. My 11:03:10
20 question is you did not? 11:03:12

21 A. I did not. I did not feel that I 11:03:12
22 could do that. 11:03:19

23 Q. Do you know whether Clayton F. 11:03:24

24 Summy authorized the publication of Good

25 Morning To You lyrics in the Inland Educator

1 Journal here? 11:03:28

2 A. I have no idea. 11:03:30

3 Q. Do you have any idea whether 11:03:33

4 Clayton F. Summy knew that the lyrics were 11:03:34

5 reprinted in this book? 11:03:36

6 A. I don't know. There is no evidence 11:03:37

7 based on what I have. 11:03:39

8 Q. How about the Hill sisters, do you 11:03:43

9 have any evidence that they knew this was 11:03:45

10 printed in the Inland Educator Journal? 11:03:47

11 A. There is no evidence. Since they 11:03:51

12 were both educators and apparently very dedicated 11:03:54

13 educators, I think there is a reasonable possibility 11:03:54

14 that they read this journal. 11:03:56

15 Q. But you don't have any evidence of 11:03:56

16 that? 11:03:57

17 A. I don't have any evidence of that. 11:04:01

18 Q. Do you have any evidence that they 11:04:04

19 authorized the reprinting of the lyrics in this 11:04:04

20 journal? 11:04:05

21 A. Neither that they did or they 11:04:09

22 didn't. But if they authorized the reprint of 11:04:10

23 the Good Morning To You, why would they not 11:04:14

24 have wanted them also to print Happy Birthday 11:04:14

25 To You to be sure that people knew those words.

1 That was the question that I asked myself. 11:04:20

2 Q. You don't know whether they 11:04:20

3 authorized -- 11:04:21

4 A. I don't, no. 11:04:23

5 Q. Do you have a opinion either way as 11:04:25

6 to whether they authorized this printing of 11:04:26

7 Good Morning To You in this journal? 11:04:28

8 A. I don't. There is no way to form 11:04:41

9 an opinion based on what is here. 11:04:42

10 Q. Look at paragraph 18. 11:04:43

11 A. 18 did you say? 11:04:52

12 Q. Yes, sir. Paragraph 18 some of 11:04:54

13 these questions are going to be the same but I 11:04:56

14 want to make sure that your testimony is the 11:04:56

15 same. 11:04:56

16 A. Right. 11:04:59

17 Q. This is with regard to material 11:05:02

18 called "Tell Me A True Story Tales Of Bible 11:05:04

19 Heros For The Children Of To-day" which 11:05:10

20 includes a birthday service. Again, we have 11:05:14

21 here and that is at tab C; correct? 11:05:14

22 A. That's right. 11:05:16

23 Q. If we look at tab C? 11:05:18

24 A. Page 250.

25 Q. Page 250 the last line says "Sing

1 Happy Birthday To You music same as Good-Bye To 11:05:34
2 You." Correct? And you say in your report 11:05:37
3 that "Because the author did not include the 11:05:39
4 printed words for Happy Birthday To You that 11:05:42
5 that indicates that the lyrics were well known 11:05:42
6 at that time."? 11:05:44

7 A. Yes, I probably could have added 11:05:48
8 that it also didn't include the words to Good-Bye 11:05:50
9 To You which would indicate to me that both of 11:05:53
10 those texts were very well known at that time. 11:06:00

11 Q. If you look at the prior page, 11:06:03
12 those are the lyrics to Good-Bye To You, aren't 11:06:04
13 they? 11:06:07

14 A. Yes, sure. 11:06:10

15 Q. Does the fact that those lyrics -- 11:06:12

16 A. I'm sorry, I didn't notice that, I 11:06:14
17 have to say that Good-Bye To You was already 11:06:14
18 printed. 11:06:16

19 Q. Does the fact that Good-Bye To You 11:06:21
20 was printed indicate to you that the lyrics were 11:06:22
21 not well known at that time? 11:06:24

22 A. Well since the song always says 11:06:28
23 Good Morning To You I suppose that the author 11:06:28
24 might have wanted to provide the words to
25 Good-Bye To You because maybe you couldn't

1 was? 11:10:08

2 A. No, we don't unless we find a 11:10:10

3 written version of the text. 11:10:18

4 Q. So when you say well known by that 11:10:20

5 time -- in paragraph 17 you said well known by 11:10:24

6 1901. The absence of the lyrics here and just 11:10:27

7 the reference in Exhibit C led you to conclude 11:10:27

8 that the lyrics were well known by 1901; 11:10:30

9 correct? 11:10:30

10 A. Yes. 11:10:40

11 Q. Let's go through a few more of 11:10:44

12 these. Paragraph 18, did we cover that, we 11:10:48

13 did. When you say -- I'm at paragraph 18 for 11:10:51

14 Exhibit C. 11:10:53

15 A. That is what we just did. 11:10:56

16 Q. You say it indicates the lyrics 11:10:59

17 were well known by that time. What does that 11:11:00

18 time mean there? 11:11:05

19 A. Whenever this came out. Is there 11:11:10

20 some kind of indication? That is copyright 11:11:15

21 1909 by Revel & Company which means it was at 11:11:23

22 least by 1909. 11:11:25

23 Q. Do you know whether in Exhibit C of 11:11:27

24 Exhibit 47 --

25 A. Exhibit C or D did you say?

1 Q. I said C. I'm still at Tell Me A 11:11:32
2 True Story. 11:11:32
3 A. Okay. 11:11:36
4 Q. Do you have any knowledge of 11:11:39
5 whether the Clayton F. Summy Corporation 11:11:46
6 authorized the reprinting of Good-Bye To You? 11:11:47
7 A. There is no evidence in this. 11:11:48
8 Q. Do you have any evidence that the 11:11:51
9 Hill sisters authorized the reprinting of 11:11:53
10 Good-Bye To You? 11:11:54
11 A. There is no evidence. 11:11:58
12 Q. How about whether they knew that it 11:11:59
13 was reprinted in this book? 11:12:00
14 A. There is no evidence. 11:12:02
15 Q. That is true for both the Hill 11:12:04
16 sisters and the Summy Corporation; correct? 11:12:06
17 A. Based on what we have in front of 11:12:19
18 us there is no evidence of any of that. However, 11:12:25
19 sorry to just continue that. I think the same 11:12:29
20 probability exists that as admired apparently 11:12:32
21 and busy educators that this is the kind of 11:12:36
22 volume that they probably would have seen and 11:12:40
23 they might have gotten very angry. So it is 11:12:42
24 possible that they did authorize it.
25 Q. Do you have any basis for that

1 statement? 11:12:47

2 A. No. No, it is just the inference 11:12:50

3 that it seems to be intended for teachers and 11:12:54

4 they were teachers and lots of teachers who are 11:12:57

5 very diligent would keep up on the journals 11:12:59

6 about teaching and try to be abreast of what is 11:13:01

7 going on. So I think it is possible that they 11:13:01

8 saw it. 11:13:03

9 Q. Do you have any evidence that they 11:13:03

10 saw it? 11:13:04

11 A. No. 11:13:07

12 Q. Are you opining today that they did 11:13:07

13 see it? 11:13:09

14 A. I'm opining that they may have seen 11:13:12

15 it. I would not say they did see it because I 11:13:13

16 don't know. I think they might have seen it. 11:13:16

17 It is the kind of thing that might have crossed 11:13:19

18 their vision. 11:13:21

19 Q. What are you relying on for that 11:13:22

20 statement other than the fact that they were 11:13:23

21 teachers? 11:13:24

22 A. That is all and that this is 11:13:26

23 intended for teachers. 11:13:29

24 Q. Did you read any biographies of the 11:13:29

25 Hill sisters in preparation of your report? 11:13:29

1 A. No, I haven't.

11:13:38

2 Q. Have you done any study of what the
3 Hill sisters did or how they prepared or what
4 kind of things they read at all?

11:13:40

11:13:41

11:13:43

5 A. No, I only know the fact that they
6 were educators that had a very good reputation.

11:13:46

11:13:47

7 Q. How do you know that?

11:13:51

8 A. Marc probably informed me of that
9 and it seemed like a reasonable supposition
10 since he seemed to have done his research. I
11 could have duplicated the research, but I think
12 the main point was that I knew they were
13 educators and that was the market.

11:13:54

11:13:57

11:13:58

11:14:00

11:14:02

11:14:04

14 Q. The only fact that you're relying
15 on to conclude that they may have seen this is
16 something that you learned from Mr. Rifkin; is
17 that correct?

11:14:06

11:14:06

11:14:11

11:14:12

18 A. The only thing that led me to this
19 conclusion is that I knew they were educators.
20 That I did know. I looked them up. But I
21 didn't see any elaborate biography and didn't
22 after that. I just needed to know they were
23 composer and a writer pair who were educators.

11:14:15

11:14:17

11:14:20

11:14:22

11:14:27

11:14:30

24 And since I know many educators who
25 routinely read all the journals, it seems to me

1 possible that they did the same. 11:14:37

2 Q. Because you know today that 11:14:40

3 educators read journals you're concluding that 11:14:42

4 it is possible that the Hill sisters read this 11:14:44

5 journal in the early 20th century? 11:14:46

6 A. No, I know that educators in the 11:14:52

7 late 19th early 20th century also read journals. 11:14:52

8 Q. How do you know that? 11:14:55

9 A. From my research into Henry Cowell 11:14:56

10 and his mother. 11:14:57

11 Q. But again, just to be clear, you 11:14:59

12 don't have any evidence, this is speculation? 11:15:07

13 A. This is purely speculation. 11:15:19

14 Q. Go to paragraph 19 which refers to 11:15:33

15 Exhibit D or tab D of Exhibit 47, correct? 11:15:36

16 This is an excerpt from something called 11:15:38

17 Program For Beginners' Department? 11:15:38

18 A. Yes. 11:15:41

19 Q. This does include the lyrics to 11:15:42

20 Happy Birthday as we understand them. 11:15:43

21 A. That's right. 11:15:45

22 Q. And you say that that leads you to 11:15:51

23 conclude that the words were widely known at 11:15:51

24 that time, correct?

25 A. It leads me to conclude that they

1 could be widely known at that time. 11:15:57

2 Q. But I thought the absence of the 11:15:59
3 lyrics would lead you to conclude that they 11:16:05
4 were widely known at that time? Here it is the 11:16:09
5 presence -- I'm trying to determine in previous 11:16:12
6 examples the absence of the lyrics led you to 11:16:14
7 conclude they were widely known? 11:16:15

8 A. Yes. 11:16:17

9 Q. Here the lyrics are included and 11:16:19
10 that leads you to conclude that they were 11:16:20
11 widely known? 11:16:24

12 A. Well, in the sense that it seems 11:16:26
13 they are now being picked up by people and put 11:16:28
14 in their books, so in the context of what we 11:16:30
15 have gone through it strikes me that it is 11:16:32
16 becoming known to people who feel that they 11:16:43
17 want to include it for one reason or another. 11:16:45

18 Q. But doesn't under the prior logic 11:16:48
19 of when we were talking about the words 11:16:50
20 Good-Bye To You having been included, that 11:16:53
21 indicated to you people did not know the 11:16:55
22 lyrics. So by that same logic doesn't the fact 11:16:58
23 that these lyrics are included here indicate 11:16:59
24 that people did not know --

25 A. I think that you're quite right

1 that that was the question that you asked. 11:27:56

2 MS. LE MOINE: I asked whether it 11:27:58
3 was authorized by Clayton F. Summy Co. and 11:27:59
4 Professor Sachs testified that he thought the 11:28:02
5 note 2 strongly suggested that it was. 11:28:05

6 MR. RIFKIN: I would object to the 11:28:07
7 prior question because I don't think the prior 11:28:10
8 question referred to the song Happy Birthday To 11:28:17
9 You that appears on page 63 in Exhibit D to 11:28:19
10 Exhibit 47. I thought the reference was more 11:28:20
11 general. 11:28:21

12 MS. LE MOINE: Let's clarify. 11:28:23

13 Q. Let me be clear then. I want to be 11:28:25
14 clear. I apologize if that was not clear. 11:28:27

15 What I'm trying to determine is 11:28:29
16 whether it is your testimony today that the 11:28:31
17 words "Happy Birthday To You, Happy Birthday To 11:28:34
18 You, Happy Birthday Dear John, Happy Birthday 11:28:36
19 To You," the printing of those in this book 11:28:38
20 Program For Beginners' Department was 11:28:41
21 authorized by the Clayton F. Summy Co. or 11:28:44
22 authorized by the Hill sisters? 11:28:47

23 A. I would have to go back and say I 11:28:51
24 would only say that note 2 indicates that some 11:28:51
25 contact was made between the publisher of this 11:28:51

1 and the Clayton F. Summy Company since, as Marc
2 pointed out, we don't actually know whether the
3 words to Happy Birthday To You were included in
4 the volume that referred to Song Stories For
5 The Sunday School. We simply don't know that.

11:28:59

11:29:01

11:29:03

11:29:06

11:29:07

6 But something in the text of this
7 program for the Beginner's Department I think
8 clearly provoked the publisher of it to make
9 contact with Summy because Summy is referred to
10 here.

11:29:10

11:29:13

11:29:16

11:29:17

11:29:18

11 Q. Song Stories For The Sunday School
12 is referred to here in note 2?

11:29:20

11:29:21

13 A. Song Stories For The Sunday School
14 and Clayton F. Summy is given as the publisher. No, it isn't
15 actually.

11:29:25

11:29:26

11:29:27

16 Q. It isn't?

11:29:27

17 A. It isn't, yes.

11:29:30

18 Q. So let's try again. Do you have
19 any evidence -- let's start very generally.
20 You pointed me to the note and I want to start -- I'm
21 taking it from the top, very general.

11:29:33

11:29:37

11:29:39

11:29:39

22 A. Okay.

11:29:41

23 Q. Are you aware of any evidence that

11:29:43

24 the Clayton F. Summy Co. authorized the

25 printing of the lyrics to Happy Birthday To You

1 in Program For Beginners' Department? 11:29:48

2 A. No. 11:29:50

3 Q. Are you aware of any evidence that 11:29:55

4 the Hill sisters authorized printing of Happy 11:29:57

5 Birthday To You in Program For Beginners' 11:29:57

6 Department? 11:29:57

7 A. No. 11:29:59

8 Q. Are you aware of any evidence that 11:30:03

9 they are even aware of the printing of Happy 11:30:05

10 Birthday To You in this volume, either the Hill 11:30:07

11 sisters or the Clayton F. Summy Co.? 11:30:08

12 A. There is no direct evidence of 11:30:08

13 that. To that I might add, however, that the 11:30:17

14 confusion in my mind about Song Stories came 11:30:21

15 from Exhibit A which is Song Stories For The 11:30:22

16 Kindergarten Published by Clayton F. Summy 11:30:24

17 Corporation which strikes me as probably 11:30:32

18 related to Song Stories For The Sunday School 11:30:35

19 because the title is the same. 11:30:37

20 So it strongly suggests that it is 11:30:40

21 Clayton F. Summy Company who is referred to in 11:30:43

22 footnote 2. But it does not imply that Happy 11:30:46

23 Birthday is in the collection Song Stories. 11:30:49

24 Q. Nor does it imply, does it, that 11:30:49

25 Clayton F. Summy Co. authorized the printing of

1 Happy Birthday To You in this volume; is that
2 right?

3 A. No, it does imply that Clayton F.
4 Summy may have authorized the publication of
5 something in this volume, but it doesn't refer
6 specifically to Happy Birthday To You.

7 Q. So just to be totally clear, you're
8 not offering any opinion that this is an authorized
9 publication of Happy Birthday To You by Clayton
10 F. Summy Co. or by the Hill sisters; correct?

11 A. Not on the basis of any evidence.

12 Q. Let's talk about paragraph 20. In
13 paragraph 20 and it is referring to tab E,
14 Exhibit E. We are discussing a song book
15 entitled "The 101 Best Songs For Home School
16 And Meeting." And you note that this print has
17 no copyright date, correct? Do you know when
18 this was published, tab E?

19 A. Well, I don't. This was the first
20 of the compositions to provoke me to write
21 Nicholas Bell about the backwards based clef on
22 page 23. Because that struck me as a very old
23 form of musical notation that one almost never
24 sees. And it happened that there was one song
25 in the Julliard Library that was published in

11:30:54

11:30:56

11:30:59

11:31:01

11:31:02

11:31:04

11:31:08

11:31:11

11:31:14

11:31:27

11:31:29

11:31:33

11:31:38

11:31:45

11:31:50

11:31:59

11:32:02

11:32:05

11:32:08

11:32:11

11:32:14

11:32:17

11:32:21

1 the 1840s, if I remember correctly, I think I
2 may refer to it here, which used that backwards
3 based clef. And it was publication of Novello,
4 a famous English publisher.

5 At that point I wrote to Nicholas
6 Bell and said how late do you see this
7 backwards based clef and he replied that it is
8 impossible from the Novello archives to know
9 when they changed their orthography, but
10 certainly the 19th century I think he said.

11 In any case this is the 10th
12 edition of something. It means that whatever
13 we are looking at goes back probably 10 years,
14 if not more. Which makes me infer that it is
15 probably from the very early 20th century or
16 possibly even the late 19th century.

17 Q. Let's take a minute to discuss this
18 backward based clef issue.

19 A. Yes.

20 Q. What can you conclude based on the
21 use of a backwards based clef in a piece of
22 printed music?

23 A. The same thing that one concludes
24 with various symbols. It may date the
25 engraving. It may date the visual practice.

11:32:33

11:32:36

11:32:39

11:32:40

11:32:42

11:32:45

11:32:51

11:32:54

11:32:58

11:33:00

11:33:02

11:33:06

11:33:10

11:33:13

11:33:15

11:33:18

11:33:20

11:33:22

11:33:24

11:33:26

11:33:27

11:33:30

11:33:33

1 putting out new editions. It is lot a work to
2 put out new editions.

3 Q. I think we covered that you don't
4 have expertise in music publishing in this era?

5 A. I don't have any expertise in music
6 publishing, but if you just think about it, you
7 realize that putting out a new edition is an
8 expense and you probably wouldn't want to do it
9 every week.

10 Q. I'm wondering why you are making an
11 assumption about the music publishers' practice
12 in the early 20th century?

13 A. It is purely instinct based on
14 music that I have looked at and new editions
15 that I looked at that they don't come out that
16 frequently.

17 I have to say that I think that
18 while I understand the need for hard evidence
19 of a lot, I think my 60 or 65 years of experience
20 in working with and looking at music gives me a
21 certain amount of basis to make some
22 inferences. Because as an historian I know you
23 can't always depend upon evidence. The
24 evidence may not be there. So you have to take
25 other circumstances and that includes your own

11:47:50

11:47:51

11:47:58

11:48:00

11:48:00

11:48:02

11:48:04

11:48:05

11:48:10

11:48:13

11:48:15

11:48:18

11:48:20

11:48:21

11:48:23

11:48:25

11:48:27

11:48:33

11:48:38

11:48:42

11:48:46

11:48:48

11:48:50

1 experience. You have to be careful about it 11:48:57
2 because you don't want to draw conclusions 11:48:59
3 based on experience that might not prove to be 11:49:00
4 valid. 11:49:02

5 Q. What I'm trying to define is what 11:49:04
6 is it about your experience that you're relying 11:49:06
7 on when you make some of these inferences? 11:49:07

8 A. Exactly, in this case it is from 11:49:10
9 looking at a lot of music that's comes out in 11:49:13
10 multiple editions and having some sense of the 11:49:15
11 time span they covered and therefore some sense 11:49:19
12 of perhaps a publisher's instinct about when it 11:49:21
13 is time to do a new edition. 11:49:27

14 Q. Just to clarify. You haven't done 11:49:30
15 any actual study of how frequent editions were 11:49:32
16 issued of music collections in the early 20th 11:49:33
17 century in America? 11:49:39

18 A. That's correct. 11:49:46

19 Q. In tab E this Good Morning To You 11:49:51
20 printing referred to as number 23 it says under 11:49:54
21 that Good-Bye To You, Happy Birthday To You, my 11:49:56
22 questions are going to be similar to those that 11:49:58
23 we already covered. 11:50:00

24 Do you have any evidence that the
25 Clayton F. Summy Co. was aware of this edition

1 of the printing of Good Morning To You? 11:50:08

2 A. There is no evidence of that. 11:50:13

3 Q. How about the Hill sisters, do you 11:50:15

4 have any evidence that they knew about this 11:50:17

5 version of Good Morning To You and Happy 11:50:17

6 Birthday To You? 11:50:19

7 A. There is no evidence of that. And 11:50:23

8 if I may add there is no evidence that they 11:50:23

9 wrote the thing. 11:50:24

10 Q. There is no evidence that they 11:50:25

11 wrote what? 11:50:28

12 A. Good Morning To You. Number 23 in 11:50:29

13 that publication. 11:50:38

14 Q. What about tab A? 11:50:40

15 A. That is the one that we talked 11:50:44

16 about before. Where it credits Mildred J. Hill 11:50:46

17 composing and arranging and Patty Hill with 11:50:49

18 writing and adapting. And that is a publication 11:50:53

19 only of Good Morning To You which we know is by 11:50:54

20 them. 11:50:56

21 Q. Why would you say the song Good 11:50:57

22 Morning To You there is no evidence that they 11:50:58

23 wrote the thing? 11:51:01

24 MR. RIFKIN: He said in tab E.

25 A. In tab E there is no evidence that

1 they wrote the thing. 11:51:05

2 MR. RIFKIN: You were asking him 11:51:06
3 about tab E. 11:51:07

4 Q. I want to clarify. There is 11:51:10
5 evidence that they wrote that thing? 11:51:11

6 A. But not in tab E. 11:51:16

7 Q. What is the significance of that to 11:51:18
8 you that there is none in tab E? 11:51:20

9 A. Well, actually, you know, I was not 11:51:22
10 able to really make a conclusion as to why they 11:51:25
11 are not named there. The only thing I see is 11:51:28
12 they aren't named there, which did strike me as 11:51:31
13 very strange. Why would this be published 11:51:32
14 without them being named. 11:51:35

15 We seem to have the title page, 11:51:39
16 which doesn't refer to the Hill sisters at all. 11:51:43
17 So, I don't know. Frankly Amicci the one below 11:51:47
18 it also didn't indicate who wrote it. The 11:52:11
19 whole thing may be a pirate. 11:52:12

20 Q. Let's go to, there is a lot of 11:52:20
21 referring back and forth. Go to paragraph 21. 11:52:23
22 Paragraph 21 we are talking about a book called 11:52:26
23 "The Golden Book Of The Favorite Songs." 11:52:26
24 Correct? 11:52:26

25 A. Yes.

1 Q. And you again reference the 11:52:35

2 backward -- 11:52:37

3 A. I'm sorry, may I interrupt you to 11:52:37

4 go back one? 11:52:38

5 Q. Sure. 11:52:39

6 A. To the previous example? 11:52:40

7 Q. Sure. 11:52:42

8 A. The one thing that we didn't 11:52:45

9 mention is that the title is Good-Bye To You, 11:52:48

10 Happy Birthday To You, but Happy Birthday To 11:52:49

11 You is not included. 11:52:50

12 Q. What is the significance of that? 11:52:55

13 A. I could infer that the engraver 11:52:57

14 felt that if he tried to fit two lines of words 11:52:59

15 in there he wouldn't be able to fit the next 11:53:03

16 song in and that would cause him some sort of 11:53:06

17 problem. Although this doesn't quite have the 11:53:09

18 very end it clearly seems like the double bar 11:53:11

19 for Amicci is there. Which means that is the 11:53:13

20 whole of the second song. 11:53:20

21 And if he had tried to put the 11:53:20

22 Happy Birthday words under Good Morning To 11:53:23

23 You he would have had to space it out so that 11:53:23

24 that next song would not fit there. Another

25 solution would have been to put a different

1 song there that only occupied two staves, but 11:53:30
2 he didn't or she didn't do that. 11:53:32

3 Again, it implied to me that people 11:53:36
4 knew what the words of Happy Birthday were, 11:53:38
5 they didn't have to be printed. And perhaps 11:53:43
6 one might say the reasons why Good Morning To 11:53:45
7 You is printed is because that was copyrighted, 11:53:46
8 we know that. 11:53:48

9 Q. You said you don't have any 11:53:52
10 evidence that this is authorized or they knew 11:53:52
11 about it? 11:53:55

12 A. No, but the implication is whoever 11:53:59
13 put this together felt that there was no need 11:54:01
14 to put the words of Happy Birthday in there. I 11:54:04
15 think one can go on to say that since the words 11:54:09
16 of Good Morning To You are in there, Good 11:54:10
17 Morning To All along with the music, whether 11:54:14
18 this is a pirated edition, whoever put it 11:54:16
19 together seems to have respected the 11:54:19
20 association of those two which were 11:54:22
21 copyrighted. And it may be that there was no 11:54:22
22 association in mind between the Happy Birthday 11:54:25
23 words and anything else, but that so many 11:54:27
24 people knew them that there was no point in
25 fiddling around with the layout of this page in

1 order to try to fit them in. 11:54:32

2 Q. Do you have any evidence of what 11:54:34
3 you're describing right now that that was what 11:54:35
4 was going on in the minds of the engraver? 11:54:38

5 A. No, I don't have evidence of it. 11:54:40
6 But it would have required a major rearrangement 11:54:44
7 of the page. There is simply no room to fit in 11:54:46
8 Happy Birthday To You in addition to the words 11:54:48
9 to Good Morning To You. There is no room. 11:54:48
10 There is no space 11:54:52

11 Q. Could that be the reason just as 11:54:55
12 well that it was widely known? 11:54:57

13 A. It could be, but I think the two go 11:54:59
14 hand in hand. If you want people to know what 11:55:00
15 they are singing you either have to figure out 11:55:01
16 a way to layout the page. The solution was 11:55:04
17 clear to me. You have to find a shorter part 11:55:06
18 song for the bottom half of the page and be 11:55:10
19 able to space out the staves a little bit so 11:55:12
20 you can fit in Happy Birthday. 11:55:15

21 It seems, again, we don't know what 11:55:18
22 the engraver was thinking, but it seems that 11:55:19
23 the engraver didn't feel it was necessary to 11:55:21
24 put in those words. Probably, I have to say
25 probably because people knew the words.

1 Q. But again, the same question, you 11:55:34
2 don't have any evidence that people knew the 11:55:36
3 words at the time other than the documents that 11:55:38
4 you have been provided by Mr. Rifkin? 11:55:39
5 A. That's right. 11:55:41
6 Q. We haven't done any independent 11:55:44
7 study about how widely, quote unquote, widely 11:55:47
8 the lyrics to Happy Birthday To You were known 11:55:48
9 at this time, correct? 11:55:49
10 A. Well as I explained to you before, 11:55:53
11 yes, I don't see how you could do that. You're 11:55:55
12 talking about lyrics that may be associated 11:55:59
13 with hundreds of thousands, millions of people 11:56:03
14 perhaps even who never wrote down yesterday we 11:56:06
15 sang Happy Birthday or who may have written it 11:56:08
16 down but those letters can't be found anywhere 11:56:11
17 or if you went through 500,000 letters you 11:56:13
18 might find two that referred to it. But that 11:56:16
19 doesn't prove anything because it is not the 11:56:19
20 sort of thing that you bother writing about. 11:56:22
21 Look at it this way, you write Dear 11:56:24
22 Granny we went yesterday or we had yesterday my 11:56:28
23 birthday party and we sang Happy Birthday. Do 11:56:30
24 you think that letter is going to be preserved
25 somewhere.

1 Q. Is it possible that it is? 11:56:33

2 A. Yes, somewhere sure in the 11:56:35

3 universe. 11:56:39

4 Q. But you have not looked for -- 11:56:43

5 A. It's a haystack. It's a haystack 11:56:46

6 with maybe a needle in it and maybe not. 11:56:50

7 Because on something that may be, as I have to 11:56:53

8 say may be on a universal popular level the 11:56:58

9 chances of finding documentation are extremely 11:56:59

10 tiny. 11:57:00

11 Live me give you one example of 11:57:05

12 this. Popular music in the 17th century. We 11:57:08

13 know there was popular music in the 17th 11:57:11

14 century that is referred to, but hardly a note 11:57:14

15 of it is preserved because popular music was 11:57:16

16 sung by poorer people and they couldn't even 11:57:19

17 read, so nobody would bother engraving it. But 11:57:22

18 even if they engraved it, who had the money to 11:57:22

19 buy it. 11:57:25

20 So it is a complete mystery. We 11:57:27

21 know it is there. We can't say there was no 11:57:31

22 popular music because there is no evidence of 11:57:31

23 it, but it is there. You see paintings with 11:57:33

24 people singing and they were singing something

25 and they are poor. This is very much the same.

1 If three-quarters of the world were 11:57:39
2 singing Happy Birthday by 1910, which we don't 11:57:41
3 know, the chances of finding evidence of it I 11:57:45
4 would say are extremely small. Maybe if you 11:57:47
5 went through every last page of every English 11:57:50
6 language newspaper in that period you might 11:57:54
7 find some little item about people singing 11:57:55
8 Happy Birthday. 11:57:59

9 Q. The paintings you're talking about, 11:58:03
10 you're hypothesizing about a means by which 11:58:05
11 someone could conduct a study, correct? 11:58:08

12 A. No. There have been major studies 11:58:09
13 done of what is called musical iconography. I 11:58:11
14 didn't do them. But it's a major part of the 11:58:14
15 music history. Looking at pictures that show 11:58:17
16 music being made and trying to determine what 11:58:18
17 is happening. There are some paintings in 11:58:20
18 which you can read the music, but those are 11:58:22
19 paintings for rich people. 11:58:24

20 Q. Are you aware of any such paintings 11:58:27
21 that have any evidence of Happy Birthday To You 11:58:29
22 contained within any of these paintings? 11:58:31

23 A. None whatsoever. But that doesn't 11:58:36
24 mean that there wasn't one. Somebody might 11:58:36
25 have sketched the birthday party which they are 11:58:36

1 all singing Happy Birthday. 11:58:44

2 Q. But you're not aware of that 11:58:45

3 sitting here today? 11:58:47

4 A. No. 11:58:53

5 Q. Paragraph 21 The Golden Book Of 11:58:53

6 Favorite Songs. 11:58:59

7 A. Yes 11:59:12

8 Q. Look at tab F. Look at the piece 11:59:16

9 of music again similar to the one, the previous 11:59:16

10 one; is that correct 11:59:19

11 A. Yes, the same thing with the 11:59:20

12 backward base. 11:59:21

13 Q. My questions are the same, is there 11:59:23

14 any evidence from this document that this was 11:59:28

15 authorized by the Clayton F. Summy Co., this 11:59:35

16 printing in tab F? 11:59:37

17 A. No, although as I think about it it 11:59:43

18 is another Chicago company and maybe that would 11:59:45

19 have been a little dangerous. 11:59:48

20 Q. When you say a little dangerous, 11:59:48

21 what do you mean? 11:59:57

22 A. To Hall & McCreary. The publisher 11:59:59

23 of this excerpt. 12:00:00

24 Q. What I'm asking you is do you have 11:59:59

25 any evidence that it was authorized by the 12:00:00

1 Clayton F. Summy Co. 12:00:04

2 A. No. 12:00:07

3 Q. Do you have any evidence that it 12:00:10

4 was authorized by the Hill sisters, either one? 12:00:10

5 A. No. 12:00:11

6 Q. Do you have any evidence that 12:00:14

7 Clayton F. Summy Co. knew about this publication? 12:00:14

8 A. No. 12:00:16

9 Q. How about the Hill sisters, any 12:00:17

10 evidence that they knew about this publication? 12:00:23

11 A. No. And in fact it is exactly the 12:00:25

12 same as the example in number E. So this seems 12:00:31

13 to be a reprint of something. 12:00:33

14 Q. The type phase is a little 12:00:35

15 different, correct, between E and F? 12:00:39

16 A. Just looking at this, let me just 12:00:52

17 compare. I would say it is the same. 12:01:00

18 Q. In the sample in Exhibit E and the 12:01:02

19 sample Exhibit F of your report you say it is 12:01:03

20 the same. 12:01:04

21 A. No, I'm sorry, there is one 12:01:12

22 difference. There are two differences. This 12:01:15

23 must have been re-engraved in some way. Namely 12:01:17

24 the bottom line, the first cord of the last

25 line in the left-hand and the last cord have

1 their stem facing downward rather than upward. 12:01:26

2 Q. Can you could look at the title, 12:01:27

3 aren't the titles printed differently? 12:01:30

4 A. Yes, the title is redone. That is 12:01:32

5 not a re-engraving that could be done with type 12:01:36

6 I would think. The rest of it to be sung 12:01:40

7 standing brightly Good Morning To You/Happy 12:01:41

8 Birthday To You that all seems to be the same. 12:01:43

9 In fact it could even be that the 12:01:48

10 engraver of 23 decided to have the left hand 12:01:51

11 stems face up so it wouldn't look so crowded 12:01:53

12 with respect to the next song, I don't know. 12:02:04

13 But they are essentially the same. 12:02:10

14 Q. Look at tab G paragraph 22 of your 12:02:13

15 report you state that tab G is an undated copy 12:02:24

16 of Harvest Hymns from the '20s. How do you 12:02:25

17 know it is from the '20s? 12:02:28

18 A. One of the pieces, "Let Others See 12:02:34

19 Jesus In You" is copyrighted 1924. It would 12:02:37

20 probably be better to say no later than the 12:02:46

21 '20s. But I suspect pretty close to that. The 12:02:49

22 next one is copyrighted 1922 of the three 12:02:53

23 examples that we have here number 37. 12:02:54

24 Q. You note in your report that there

25 is no author -- Good Morning To You, number

1 218? 12:02:59

2 A. Yes. 12:03:01

3 Q. And you note in your report that 12:03:04

4 there is no author, composer or copyright 12:03:09

5 indication despite the fact that such information 12:03:11

6 is given for the other two pieces that you 12:03:12

7 include, correct? 12:03:12

8 A. Yes. 12:03:14

9 Q. What is the significance of that to 12:03:14

10 you? 12:03:15

11 A. I don't know. It struck me as odd. 12:03:17

12 Q. What do you mean by odd? 12:03:19

13 A. Supposedly Good Morning To You 12:03:22

14 was copyrighted and yet the compiler of this is 12:03:25

15 very careful to indicate the copyright of the 12:03:29

16 other two specimens that I was sent. It seems 12:03:31

17 very strange that there was no credits for this 12:03:34

18 nor any authorship of either the music or the 12:03:37

19 words. Whereas Herbert Tovey is credited in 12:03:40

20 one example and what is his name in the other 12:03:43

21 one for having written the words and music. 12:03:48

22 And you notice in 37 Herbert G. Tovey in the 12:03:52

23 composer's place and HGT on the left hand side 12:03:55

24 as the author.

25 As far as this piece by McKinney

1 which doesn't seem to have a number on it, 12:04:01
2 there is -- it is bound in so it is really hard 12:04:03
3 to see. Do you know what number that is in the 12:04:05
4 big binder off hand? 12:04:15

5 Q. McKinney, not offhand. You might 12:04:18
6 know, I'm assuming that these are organized in 12:04:25
7 the way that you provided them? 12:04:28

8 A. Whatever, this is bound tightly but 12:04:31
9 I could see the K period on the left-hand side. 12:04:35
10 So I think what it probably says is BBK or 12:04:36
11 BBMK. 12:04:37

12 Q. BBM? 12:04:40

13 A. BBMK. But there is a copyright 12:04:44
14 credit there and author. In both cases Tovey 12:04:48
15 and McKinney apparently did both the words and 12:04:51
16 music and that is carefully credited and yet no 12:04:53
17 information at all about Good Morning To You. 12:04:57

18 Q. Does the absence of there being any 12:04:58
19 of that sort of information on Good Morning to 12:05:00
20 You suggest to you that Good Morning To You has 12:05:01
21 no author? 12:05:03

22 A. Yes, that would be the implication. 12:05:05
23 That nobody wrote it. Nobody wrote the music 12:05:08
24 and nobody wrote the words. Dropped from
25 heaven.

1 Q. We know that is not true? 12:05:12

2 A. We know that is not true. And also 12:05:14

3 if you look at the example of Good Morning To 12:05:17

4 You you can see on the right the beginning of 12:05:20

5 220 where there is credit of some sort. 12:05:22

6 Q. Is it possible that Good Morning To 12:05:24

7 You the authorship was not known by the 12:05:27

8 publisher, is that possible? 12:05:31

9 A. I suppose anything is possible. It 12:05:33

10 seems kind of stupid to me. 12:05:35

11 Q. Why is that you stupid? 12:05:36

12 A. That tune was around in 12:05:39

13 circulation. We know, we have seen so many 12:05:40

14 prints of it. 12:05:43

15 Q. What reason do you give for there 12:05:46

16 being no authorship noted here? 12:05:48

17 A. One is I don't know, and the other 12:05:53

18 is the publisher of this was very careless, 12:05:56

19 possibly assuming that everybody knew that it 12:05:59

20 must have been like a folk song that has been 12:06:02

21 in the air for years. And the third is that he 12:06:05

22 is stupid and did not bother to check because 12:06:07

23 it's a little dangerous it strikes me. 12:06:09

24 Q. For this publication you're not

25 aware of any evidence that Clayton F. Summy Co.

1 authorized this publication? 12:06:17

2 A. No, actually strangely enough 12:06:19

3 unless I'm missing something here there doesn't 12:06:21

4 seem to be any indication on the cover who 12:06:22

5 published it. 12:06:25

6 Q. You're not aware if Clayton F. 12:06:27

7 Summy Co. knew about this publication? 12:06:27

8 A. No idea. 12:06:29

9 Q. You're not aware that the Hill 12:06:32

10 sisters authorized publication, are you, any 12:06:33

11 evidence of that? 12:06:34

12 A. There is no evidence. 12:06:35

13 Q. How about whether they knew about 12:06:36

14 this publication? 12:06:38

15 A. No evidence. When I say no 12:06:41

16 evidence it always means maybe so, maybe not. 12:06:41

17 But there is evidence. 12:06:43

18 Q. No evidence that you're aware of? 12:06:44

19 A. That I'm aware of, yes. 12:07:02

20 Q. Let's look at tab H which is 12:07:09

21 referred to in paragraph 23 of your report. 12:07:11

22 Again the version of Happy Birthday To You 12:07:17

23 printed in this volume, do you note that it 12:07:17

24 does not include any author information;

25 correct?

1 A. Whereas the one above it does? 12:07:31

2 Q. Right. Nor any copyright 12:07:33

3 information whereas the one above it does? 12:07:37

4 A. Yes. 12:07:39

5 Q. I guess my question is the same. 12:07:42

6 What do you conclude based on that? Is it the 12:07:45

7 same three things that you concluded about 12:07:46

8 absence in the prior document? 12:07:48

9 A. Yes, the music is identical, I 12:07:54

10 believe it is identical. I haven't compared it 12:07:56

11 completely. It is identical to the music of, 12:08:03

12 for example, tab F with the exception that to 12:08:08

13 accommodate happy and birthday -- sorry, happy, 12:08:11

14 it is always necessary to divide the single 12:08:29

15 pickup D into two parts. 12:08:32

16 Q. My questions are the same with 12:08:35

17 regard to this publication? 12:08:36

18 A. My answers are the same. 12:08:37

19 Q. You don't have any evidence of any 12:08:39

20 authorization or knowledge by Clayton F. Summy 12:08:42

21 or the Hill sisters with regard to this publication, correct? 12:08:44

22 A. That's correct and there is no 12:08:47

23 evidence as to who wrote it. 12:08:49

24 MS. LE MOINE: Let take a break.

25 THE VIDEOGRAPHER: Going off the

1 record at 12:09. 12:18:22

2 (Recess Taken.) 12:18:26

3 THE VIDEOGRAPHER: Returning to 12:18:30

4 the record at 12:18. 12:18:30

5 BY MS. LE MOINE: 12:18:34

6 Q. Professor Sachs, let's look at 12:18:47

7 paragraph 23. Paragraph 23 you say, "In song 12:18:54

8 number 219 Birthday states copyright 1924 with 12:18:55

9 the composer's name on the right where by 12:18:58

10 convention the music composer is identified and 12:19:00

11 his initials on the left where by convention 12:19:04

12 the lyricist is identified." Do you see that? 12:19:06

13 A. Yes. 12:19:07

14 Q. Is it true that the convention that 12:19:10

15 you're referencing is not always followed? 12:19:12

16 A. I would say it is followed about 12:19:14

17 99.999 percent of the time. 12:19:21

18 Q. But the survey you didn't find that 12:19:23

19 it was followed 99.999 percent of the time, 12:19:24

20 right? 12:19:27

21 A. Well, there were other examples. 12:19:30

22 For example just the indication traditional or 12:19:33

23 nothing at all because it's a Gospel song or 12:19:36

24 things like that. But of the ones in which

25 there is author attribution that is where it

1 the composer. I don't know what I would think 12:25:42
2 frankly if it appeared on the left. It would 12:25:48
3 be so weird because the composer's name is on 12:25:50
4 the right except for that one example which you 12:25:53
5 managed to find. At that time everybody knew 12:25:56
6 he wrote his words and music, so there is no 12:25:57
7 reason not to put it that way. 12:25:58

8 Q. By seeing it on the right you would 12:26:01
9 conclude that he wrote the words and music? 12:26:04

10 A. Since there is no other reference 12:26:06
11 to a writer, yes. 12:26:07

12 MS. LE MOINE: I'm going to 12:26:15
13 identify this as Exhibit 53. 12:26:17

14 A. But I would add that because one 12:26:22
15 does know a little bit about Irving Berlin. 12:26:25
16 What one knows is he wrote his words a music. 12:26:27

17 Q. You assume perhaps it is outside of 12:26:29
18 the convention because everyone knows that 12:26:31
19 Irving Berlin wrote the words and music? 12:26:34

20 A. Or maybe because he wanted you to 12:26:46
21 remember that he did it all. 12:26:47

22 MS. LE MOINE: Mark this as 12:26:48
23 Exhibit 53. 12:27:12

24 (Sachs Exhibit 53 for
25 identification, Document.)

1 Q. Similarly we have the composer and 12:27:18
2 writer of the words in the same place? 12:27:19

3 A. Yes. 12:27:21

4 Q. On the right-hand side of the page? 12:27:21

5 A. Yes. 12:27:23

6 Q. And it does not say words by, 12:27:23
7 correct? 12:27:23

8 A. Correct. 12:27:26

9 Q. So is this consistent with 12:27:30
10 convention for there to be on the right-hand 12:27:33
11 side of the page one name when that person 12:27:35
12 wrote both the words and the music? 12:27:56

13 A. Yes, I think that is fine. 12:27:59

14 Q. Go back to paragraph 23 for a 12:28:06
15 moment of your report. When the preface -- 12:28:16
16 page 6 the last line of paragraph 23. It says 12:28:18
17 "The preface to this volume says that the 12:28:21
18 publishers or compilers pay hundreds of dollars 12:28:23
19 to get permissions, but if that is true, there 12:28:25
20 is no evidence that such permission was 12:28:28
21 required for Happy Birthday To You." Right? 12:28:29

22 A. Right. 12:28:32

23 Q. So I want to confirm that though it 12:28:36
24 says in the preface that the publishers and the
25 compilers pay hundreds of dollars to get

1 permissions, you don't see any evidence in that
2 volume at tab H that Happy Birthday To You is
3 authorized by the publisher Clayton F. Summy
4 Co.?

12:28:44

12:28:48

12:28:48

12:28:48

5 A. There is no evidence.

12:28:50

6 Q. And there is no evidence that the
7 Hill sisters authorized it?

12:28:51

12:28:54

8 A. There is no evidence.

12:28:55

9 Q. Right before we took a break you
10 also said there is no evidence that the Hill
11 sisters wrote the song that is at tab H and I
12 want to confirm you're talking about in tab H
13 there is no evidence?

12:28:59

12:29:04

12:29:07

12:29:08

12:30:08

14 A. In tab H there is no evidence.

12:30:13

15 Q. Let's look at paragraph 24. I want
16 to clear up some confusion first and make sure
17 we are clear on the record about this.

12:30:17

12:30:19

12:30:24

18 Tabs B -- you say paragraph 24 "The
19 materials before 1934 carry only two references
20 to Patty Hill. Tabs B, Inland Educator Indiana
21 School Journal and D, Program For Beginners'
22 Department." Right? And I'm looking at B it
23 is Inland Educator and D is Program For
24 Beginners' Department. And only one reference,
25 Tab A, Inland Educator and Indiana School

12:30:27

12:30:32

12:30:37

12:30:39

12:30:44

12:30:45

1 Journal to Mildred is author of the song. Tab 12:30:57
2 A is actually Song Stories For The 12:31:03
3 Kindergarten. So should that read tab B, 12:31:03
4 Inland Educator School Journal? 12:31:05
5 A. Tab B, probably, yes. 12:31:10
6 Q. Significantly Happy Birthday To You 12:31:14
7 is not present in tab A. It says Inland 12:31:15
8 Educator and Indiana School Journal but I think 12:31:17
9 is what you mean there, tab B? Since that is 12:31:21
10 where Indiana -- Inland Educator and Indiana 12:31:22
11 School Journal is? 12:31:25
12 A. Yes, I don't know how those -- oh, 12:31:30
13 yes, that may have come from Marc's office 12:31:32
14 rearranging things in chronological order and 12:31:35
15 perhaps forgetting to change the tab references 12:31:38
16 there. That is why I put the titles in on 12:31:40
17 everything to be sure it is clear. 12:31:43
18 Q. If the tabs are incorrect and this 12:31:45
19 happens a few times, there are things that 12:31:47
20 aren't present -- there is a tab that you 12:31:49
21 referenced that doesn't have a document or 12:31:52
22 there is tabs that are called something that 12:31:55
23 don't match up, should we rely on the title 12:31:55
24 rather than the tab?
25 A. Yes, rely on the title.

1 that is in Exhibit J? 12:54:30

2 MS. LE MOINE: That is a fair 12:54:32

3 question. What I'm asking if I could clarify, 12:54:32

4 Marc. 12:54:34

5 MR. RIFKIN: I'm trying to follow 12:54:35

6 all of this. 12:54:38

7 MS. LE MOINE: Is Professor Sachs 12:54:40

8 relying on anything other than what is behind -- 12:54:43

9 because the paragraph referring to what is 12:54:46

10 behind Exhibit J does not reflect what is 12:54:49

11 actually behind the Exhibit J tab. 12:54:50

12 MR. RIFKIN: I disagree with that 12:54:52

13 characterization. I think in paragraph 29 he 12:54:55

14 refers to the sample that is attached as 12:54:57

15 Exhibit J and he also references the fact that 12:55:01

16 there are other samples of that same music that 12:55:05

17 are identical except as he knows. 12:55:07

18 If you want to see them I think if 12:55:10

19 we let him point to you in Exhibit 49 where 12:55:14

20 they might be, maybe that is the easiest way to 12:55:17

21 get the information. It is up to you, do 12:55:18

22 whatever you want. 12:55:21

23 Q. If it is important -- what I was 12:55:23

24 trying to identify, if this is the only sample

25 you feel that I need to look at to support the

1 point that you're making in paragraph 28, fine. 12:55:34
2 If there are other documents that you feel you 12:55:38
3 need to include in your report, then I want you 12:55:39
4 to have the opportunity to do that. Maybe we 12:55:39
5 don't take that now. Maybe we take a break and 12:55:40
6 you identify it in the production which ones 12:55:40
7 you think -- 12:55:42

8 A. No, I could tell you right now. I 12:55:45
9 just want to look back at that paragraph to see 12:55:48
10 what I actually referred to, but the various 12:55:57
11 samples start in the big black binder, Exhibit 49, 12:56:06
12 up to tab 38 and continue to tab 50. 12:56:09

13 Q. Look at paragraph 28 where it says 12:56:11
14 "Various samples of this piece differ in their 12:56:15
15 cover information, design, publisher or price. 12:56:21
16 Some say Summy Publishing Company, (Summy 12:56:23
17 3075)." What does Summy 3075 refer to there? 12:56:25

18 A. The publication number so you can 12:56:28
19 find it among the various samples, some of them 12:56:32
20 have different numbers to indicate what they 12:56:32
21 are. That is standard. 12:56:35

22 Q. If I look at J and I see the 12:56:39
23 publication number, I see the number 3075 in 12:56:40
24 the lower left corner?

25 A. Yes, that is the one.

1 Q. Is that what you're referring to? 12:56:44

2 A. Yes. 12:56:45

3 Q. What does that number tell you? 12:56:49

4 A. Normally when a publisher puts a 12:56:51

5 number it is the number of their publication. 12:56:54

6 It is his 3,075th publication. 12:56:57

7 Q. So is it sequential? 12:57:04

8 A. It should be. It may be in some 12:57:06

9 periods it is called a plate number for the 12:57:07

10 engraving plate. 12:57:11

11 Q. My question is the one before it 12:57:16

12 the engraving plates would be number. And 12:57:17

13 3074 would be something else? 12:57:19

14 A. Yes. And 76 would follow it. 12:57:22

15 Q. Can you look at Exhibit L for a 12:57:31

16 moment. You see in the lower left-hand corner 12:57:32

17 that is 3076? 12:57:33

18 A. That is probably the next one. 12:57:34

19 Q. The next what? 12:57:36

20 A. The next thing they published. 12:57:40

21 That would be my inference based on what I know 12:57:42

22 that they would number sequentially. 12:57:49

23 Q. Let's look back at paragraph 28 to 12:58:00

24 make sure that I'm done there. Did you review

25 the certificate for the copyright registration,

1 E 51990, in preparing your report that is

12:58:10

2 referred to in paragraph 28?

12:58:11

3 A. I think I did. I don't remember

12:58:12

4 the number offhand.

12:58:15

5 Q. It is referred to here in paragraph

12:58:15

6 28?

12:58:16

7 A. Then I did.

12:58:19

8 Q. It says it suggests that it may be

12:58:22

9 the print for the December 6th, 1935 copyright

12:58:24

10 certificate which says, "arrangement as easy

12:58:28

11 piano solo with text." You said the thing that

12:58:33

12 led you to believe that about Exhibit J is that

12:58:37

13 it was copyright 1935. Does the fact that the

12:58:40

14 cover of Exhibit J also says it is underlined

12:58:43

15 piano with words, does that also support that?

12:58:46

16 A. Yes. However there are a few of

12:58:48

17 them and that is what is in 30 whatever is the

12:58:50

18 number I just gave you that do that and there

12:58:53

19 are certain differences among them. They seem

12:58:56

20 possibly to be reprinted later, who knows. But

12:58:59

21 some of them have Preston Ware Orem's name and

12:59:02

22 some don't and that is peculiar, but that is

12:59:02

23 what it is.

12:59:04

24 Q. The fact that this says this is the

25 piano solo with words version also supports

1 that it is the copy of copyright 51990? 12:59:13

2 MR. RIFKIN: What are we referring 12:59:16

3 to that says piano solo with words? 12:59:17

4 MS. LE MOINE: Exhibit J. 12:59:19

5 MR. RIFKIN: I thought you were 12:59:20

6 referring to Exhibit J. 12:59:21

7 MS. LE MOINE: I am. 12:59:22

8 MR. RIFKIN: Where does it say 12:59:22

9 that. 12:59:24

10 MS. LE MOINE: The title page. 12:59:25

11 MR. RIFKIN: I thought you were 12:59:28

12 looking at plate number 3074. 12:59:29

13 MS. LE MOINE: No I'm asking the 12:59:31

14 professor if the fact that that piano solo with 12:59:33

15 words is underlined that that is the indication 12:59:36

16 that this is this piece of music. 12:59:46

17 A. As far as I could say yes. 12:59:49

18 Q. Let's look at paragraph 29 which 12:59:58

19 refers to tab K. If you look at tab K it has 13:00:02

20 the Hill sisters both names in the upper right 13:00:04

21 and arranged by Preston Ware Orem underneath 13:00:04

22 that. 13:00:05

23 A. Yes. 13:00:07

24 Q. Do you have any opinion as to why

25 Mildred Hill and Patty Hill are listed in the

1 upper right? 13:00:12

2 A. I don't know why Patty is listed 13:00:15

3 there because again there are no words. 13:00:17

4 Mildred Hill is there because she wrote the 13:00:20

5 original music and Preston Ware Orem made this 13:00:23

6 arrangement. The problem with that being in J -- 13:00:24

7 Q. I'm in K? 13:00:30

8 A. I'm sorry, in K is that that is 13:00:33

9 redacted. But there is an unredacted copy in 13:00:37

10 the big binder which is more important and I'm 13:00:41

11 not sure why this was bound in. Let's see if I 13:00:42

12 could quickly find that for you. 13:00:48

13 Q. We did not locate it but maybe you 13:00:51

14 can tell me where it is. 13:00:53

15 (Witness reviewing document.) 13:00:56

16 A. It is number 42 in the big binder. 13:01:00

17 Q. So you're saying number 42 in the 13:01:04

18 big binder is the unredacted. This does 13:01:07

19 include -- this is not exactly the same, is it, 13:01:10

20 because what I'm looking at is behind K has 13:01:14

21 Mildred Hill and Patty Hill and arranged by 13:01:16

22 Preston Ware Orem and the one that you pointed 13:01:20

23 me to behind 42 just says Mildred Hill and 13:01:22

24 arranged by Preston Ware Orem scratched out.

25 A. Yes. The problem that I said with

1 well with her -- the edition that she had. With her 13:03:53
2 original version. 13:03:57

3 Q. You're presuming that she didn't? 13:03:59

4 A. Well, Preston Ware Orem had to do 13:04:00
5 something and since the piano part has changed, 13:04:05
6 that's what he did. The piano part is more 13:04:10
7 elaborate than the earlier versions of Good 13:04:12
8 Morning To You and -- because they are all the 13:04:14
9 same up to there. Very, very tiny change. 13:04:16

10 He has made something that is a 13:04:20
11 little bit more difficult. Suggests a slightly 13:04:23
12 higher level of piano playing. There are a lot 13:04:26
13 of perhapses, perhaps Summy Birchard said why 13:04:28
14 don't you do this, we could sell it to a 13:04:31
15 slightly more advanced piano store. Who knows. 13:04:33

16 Q. The fact that Preston Ware Orem is 13:04:41
17 referred to in 51990 and not in tab J doesn't -- you still 13:04:46
18 believe tab J has been arranged by Preston Ware 13:04:46
19 Orem? 13:04:49

20 A. Well, it is identical to the ones 13:04:51
21 that have his name on it. We don't know why 13:04:54
22 his name was deleted from that copy. Nobody 13:04:56
23 knows who or why as far as I have been told. 13:05:02

24 Q. My point is the absence of the 13:05:02
25 attribution to Mr. Orem doesn't indicate it was

1 arranged by Mr. Orem?

13:05:09

2 A. I would say the absence in the

13:05:10

3 attribution does not indicate and in fact that

13:05:14

4 he said later he said wait a minute, I want my

13:05:16

5 name on it. The copyright certificate talks

13:05:20

6 about an easy piano solo with words and that is

13:05:36

7 what this is.

13:05:39

8 Q. In tab K paragraph 29 that refers

13:05:42

9 to tab K, I apologize for bouncing back and

13:05:42

10 forth.

13:05:43

11 A. That's all right.

13:05:44

12 Q. You say at the end of this

13:05:47

13 paragraph, "The fact that one sample has Orem's

13:05:51

14 name crossed out is immaterial another does

13:05:55

15 not. It appears that his name should be on it

13:05:58

16 since he created the new piano part."

13:06:01

17 Again that is not behind tab K but

13:06:03

18 it is somewhere in there?

13:06:05

19 A. It is in the black binder

13:06:10

20 somewhere.

13:06:12

21 Q. Do you know why those portions of

13:06:17

22 tab K were redacted?

13:06:19

23 A. Marc explained it to me a long time

13:06:19

24 ago and I seem to have forgotten.

25 Q. You don't independently know, you

1 just know from Marc? 13:06:25

2 A. Well I assume there was some 13:06:25
3 copyright reason and whoever provided that 13:06:32
4 decided it was better at that point to not 13:06:34
5 provide the actual text lest it being an 13:06:36
6 infringement of some sort. 13:06:40

7 Q. Let's look at paragraph 30. 13:06:44

8 Paragraph 30 refers to tab L that we looked at 13:06:48
9 briefly. The sequential catalog number, right 13:06:51
10 or engraving plate number, I'm not sure what -- 13:06:54

11 A. Yes. I don't know what it is 13:06:57
12 called now but that is what it is. It is some 13:07:01
13 kind of publisher's index. 13:07:03

14 Q. And indicating the order in which 13:07:04
15 these items were published? 13:07:06

16 A. Yes, I assume so. That is what it 13:07:07
17 always does. 13:07:09

18 Q. You have here at the top arranged 13:07:10
19 by Mrs. R.R. Forman? 13:07:11

20 A. Yes. 13:07:14

21 Q. And again Mildred Hill's name on 13:07:14
22 the right? 13:07:14

23 A. Yes. 13:07:17

24 Q. And you say, "It is customary for 13:07:17
25 arrangers to appear either on the upper right

1 under the composer's name or on the left." 13:07:24

2 A. Yes. 13:07:25

3 Q. What is the basis for that? 13:07:26

4 A. Just experience of looking at many 13:07:27

5 many scores. 13:07:29

6 Q. I think one of the earlier Preston 13:07:32

7 Ware Orem samples that we just looked at a few 13:07:35

8 moments ago, his name is under the composer's 13:07:35

9 name? 13:07:35

10 A. Yes, it can appear both ways. 13:07:37

11 Q. So it can appear both ways? 13:07:39

12 A. Sometimes it just depends on the 13:07:42

13 eye of the engraver that decides is it's going 13:07:43

14 to look nicer if is balanced rather than with a 13:07:43

15 big space on the right. 13:07:46

16 Q. Does it always say arranged by if 13:07:47

17 it is an arranger? 13:07:48

18 A. I would say yes. I would put it 13:07:51

19 another way. If it doesn't say arranged by 13:07:53

20 then we don't know. But if it says arranged by 13:07:58

21 we know that is what the arranger did. 13:08:00

22 Q. Would you say that this is a custom 13:08:05

23 but, it being a custom but sometimes it is not 13:08:05

24 followed? 13:08:05

25 A. I would say it is possible that it

1 the videotape deposition at 16:09.

2 (TIME NOTED: 4:09 P.M.)

3

4

5 JOEL SACHS, Ph.D.

6

7 Subscribed and sworn to before me

8 this day of , 2014

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, WILLIAM VISCONTI, a Shorthand Reporter
and Notary Public within and for the State of New York,
do hereby certify:

That prior to being examined, the witness named in
the foregoing deposition was duly sworn to testify the truth,
the whole truth, and nothing but the truth;

That said deposition was taken down by me in
shorthand at the time and place therein named and
thereafter reduced by me to typewritten form and that the
same is a true, correct, and complete transcript of said
proceedings.

Before completion of the deposition, review of the
transcript [X] was [] was not requested. If requested,
any changes made by the deponent (and provided to the
reporter) during the period allowed are appended hereto.

I further certify that I am not interested in the
outcome of the action.

Witness my hand this 23rd day of September, 2014.



WILLIAM VISCONTI

Ex. 110