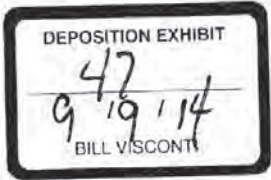


EXHIBIT 111

Ex. 111

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Interim Class Counsel for Plaintiff and the Proposed Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

**EXPERT REPORT OF
JOEL SACHS, Ph.D.**

EXPERT REPORT OF JOEL SACHS, Ph.D.

I. Qualifications

1. I am a graduate faculty member of The Juilliard School, where I have been a professor of Music History and Chamber Music for over 40 years. The focus of my academic study is 19th, 20th and 21st century music history and performance.

2. I earned my Bachelor of Arts degree in Music from Harvard University in 1961, my Master of Arts degree in Musicology from Columbia University in 1965 and my Doctorate degree in Musicology from Columbia University in 1968. In 2011, I became an honorary member of the Phi Beta Kappa Society at Harvard University in recognition of my work in contemporary music.

3. I have received several professional awards and honors, including Columbia University's Alice M. Ditson Conductor's Award, which recognizes distinguished conductors for their contributions to American music. In 2011, I received the Gloria Artis Medal, a decoration in Arts awarded by the Ministry of Culture and National Heritage from the Republic of Poland for my contributions to Polish music and culture.

4. In 1993, I founded the New Juilliard Ensemble, which celebrates contemporary music and repertory of the last decade. I also produce and direct The Juilliard School's annual FOCUS! Festival and, since 1993, have been the artistic director of The Juilliard School's concerts at the Museum of Modern Art (MoMA). I was a co-director of the Sonic Boom Music Festival, a project organized by some of New York's most prestigious contemporary music ensembles.

5. In June 2012, Oxford University Press published my book, *Henry Cowell: A Man Made of Music*, the first complete biography of one of the most influential figures in 20th century American music.

6. I have performed a variety of traditional and contemporary music as a conductor and pianist in hundreds of performances throughout the United States Europe, Asia, and Latin America and have guest-conducted orchestras and ensembles in Austria, China, El Salvador, Germany, Iceland, Mexico, Mongolia, Poland, Switzerland, and

Ukraine. I have held new music residencies in Berlin, Germany; London, England; Salzburg, Austria; Curitiba, Brazil; Helsinki, Finland; and Banff Alberta, Canada.

7. In 2006, I conducted the internationally-acclaimed contemporary music ensemble, Continuum, in Jakarta, Indonesia, including a performance of Tony Prabowo's opera, *The King's Witch*, in full staging, Mr. Prabowo's piano concerto, *Psalm* (both of which were composed for and premiered by the New Juilliard Ensemble) and music by American composers. In 2007, I conducted a concert of American music at the Shanghai Conservatory, including the Chinese premiere of Ives's Symphony No. 3, and I conducted the Danube-Hudson Project, comprising works by Juilliard and Liszt Academy composition students in Budapest, Hungary.

8. In 2012 and 2013, I conducted the Arthur Rubinstein Philharmonic, in Lodz, Poland, in the prize-winners' concert of the Grazyna Bacewicz international composition competition and the Mongolian State Philharmonic Orchestra in Ulaan Baatar, Mongolia. I also made my third, annual appearance conducting Camerata Aberta, the distinguished São Paulo contemporary chamber orchestra,

9. My keyboard appearances include numerous performances of John Cage's seminal work, *Sonatas and Interludes for Prepared Piano*, in Brazil, China, and mixed recitals around the world, including a Beethoven and Hummel recital in France.

10. My recordings appear on the Advance, CRI, Naxos, New Albion, Nonesuch, and TNC labels. The Dorian Sono Luminus label released a CD of my music with Camerata de las Américas, a leading chamber ensemble based in Mexico City.

11. I have been a regular delegate to international music conferences and a radio commentator on contemporary music.

II. Scope of Assignment

12. Plaintiffs' counsel in the matter captioned *Good Morning to You Productions Corp., et al., v. Warner/Chappell Music, Inc., et al.*, Case No. CV 13-04460-GHK (MRWx), have asked me to review certain musical compositions relating to the song *Happy Birthday to You*, including several versions of the song *Happy Birthday to You*

itself, as well as versions of the song *Good Morning to All*, and to give my expert opinion regarding the new matter contained in the various versions.

13. Plaintiffs' counsel also have asked me to give my expert opinion regarding the historical and conventional meaning ascribed to certain indications in the printed music, including the placement and identification of the composer, arranger, and author of lyrics on musical scores.

14. Finally, Plaintiffs' counsel have asked me to give my expert opinion regarding the conventional meaning of the term "arrangement" as applied in musical composition.

15. The various works I have studied, the sources of information I have considered, and my analysis, opinions, and conclusions are set forth below.

III. Study of "Good Morning to All" and "Happy Birthday to You" Compositions

A. Materials Before 1934

16. Tab A: *Song Stories for the Kindergarten* © 1896, Clayton F. Summy, renewed in 1921 with various reprints. This volume contains *Good Morning to All*. The cover attributes the music to Mildred J. Hill and the words to Patty S. Hill. The index to this volume does not include any version called *Happy Birthday to You*. A later copy of *Song Stories for the Kindergarten*, hand-dated, "1918," with the same cover but no designation of copyright ownership, was probably published by the London-based, Curwen, whose name appears at the lower right-hand corner. This later copy includes *Good Morning to All* in A-major with a more elaborate piano part than the piano part in the earlier copy. The British Library catalog shows a Curwen publication of *Song Stories for the Kindergarten* as early as 1900.

17. Tab B: A chapter called "*First Grade Opening Exercises*" within the *Inland Educator and Indiana School Journal* (January 1901), notes that "[s]imple devices assist in securing unity." The author suggests singing *Good Morning to You*, and provides the words to the song, without any designation of authorship. The chapter also suggests singing "*Happy Birthday to You*" to the same music for birthday celebrations. The author

does not include the words to *Happy Birthday to You*, which indicates that the words were well known by 1901.

18. Tab C: “*Tell Me a True Story: Tales of Bible Heroes for the Children of Today*” includes a “*Birthday Service*,” (p. 250), which suggests that this sample comes from a volume about teaching in a church-affiliated school. The author advises that when a student has a birthday, the class should recite a prayer and sing *Happy Birthday to You*. The sample provides music that is the same as the music for *Good-bye to You*. Again, that the author did not include the printed words for *Happy Birthday to You* indicates that the lyrics were well-known by that time. The sample does not provide authorship credit or designate copyright ownership.

19. Tab D: Unidentified volume, marked 1911, “*Program for Beginners’ Department*,” pp. 63 and 67, excerpts from a Methodist teachers’ manual. The author writes (p. 63) that when a student has a birthday, the class should sing *Happy Birthday to You* to the same tune as *Good Morning*. The section includes the words to *Happy Birthday to You*, but not the music. In addition, the section includes a note about sources – how to get the music – and refers to “*Song Stories for the Sunday School*,” by Patty Hill. That the author suggests the class should sing *Happy Birthday to You* to the same tune as “*Good Morning*,” indicates that the words to *Happy Birthday to You* were widely known at the time. In any event, the copy of *Song Stories for the Sunday School* (Tab D) does not include *Happy Birthday to You*.

20. Tab E: “*The One Hundred and One Best Songs for Home, School, and Meeting*,” 10th edition, published by The Cable Company, Chicago. No. 23. Cable, a piano, player-piano, and organ manufacturer in Chicago, was founded in 1880. This print has no copyright date. Another print, marked 1912, includes the same music except for one discrepancy in the left hand of the piano in measure 9, and is a fresh engraving, without the backwards bass clef. The use of a backwards bass clef implies a reprint of an earlier edition of *Good-Morning to You. Good-Bye to You – Happy Birthday to You*. See ¶¶ 21, 54, 56 (discussing backwards bass clef). The usual musical setting; no attribution of author or

composer. Only the text of *Good Morning* is provided. Again, this short reference to *Happy Birthday to You* without accompanying text implies widespread public knowledge of the alternate words. The sample does not provide authorship credit. I assume that the “tenth edition” sample was printed a number of years before 1912, again reinforcing the idea that the words to *Happy Birthday to You* were well known in the early 20th century and possibly the late 19th century.

21. Tab F: “*The Golden Book of Favorite Songs*,” 10th edition, Hall & McCreary, Chicago © 1915. Compiled and edited by N. H. Aitch. The engraving on the cover is in a dated style, with a backwards bass clef that I have seen in music as early as 1840, typically by English engravers. Nicolas Bell, Curator of Music Collections at the British Library, informed me that the backwards bass clef is associated with Novello, a very old English publishing house. Mr. Bell could not recall seeing the backward bass clef in music published after the late 19th century. On page 81, “*Good Morning to You. Good-Bye to You - Happy Birthday to You.*” The music is printed, but only the text for *Good Morning to You* is printed in full. Again, the short reference to *Happy Birthday to You* without accompanying text suggests that the words to that variation were popular and well known at the time. The sample does not give authorship credit for either the words or music.

22. Tab G: An undated copy of “*Harvest Hymns*” from the 1920s includes song number 218: *Good Morning to You!* with four verses, the second of which is *Happy Birthday to You*. There is no author, composer, or copyright indication, despite the fact that such information is given for two other pieces from that collection supplied to me, *Let Others See Jesus in You* and *The Place of Peace and Rest*. This work has the backwards bass clef, implying that it might have come from an older publication to which other pieces were added.

23. Tab H: “*Children’s Praise and Worship for the Beginners, Primary and Junior Grades of the Sunday School*” [Anderson is a Christian College in Anderson, Indiana.] Warner Press, Anderson, Indiana. © 1928, Gospel Trumpet Company. Song no. 220: *Happy Birthday to You* does not designate an author, composer, or copyright. The

previous piece, Song no. 219, *Birthday*, states © 1924, with the composer's name on the right (where by convention the music composer is identified) and his initials on the left (where by convention the lyricist is identified), indicating that he wrote both music and words. The composer's and author's positions on *Happy Birthday to You* (Song no. 220) are empty except for black dots; this meaning is unknown. The use of the backwards bass clef suggests that many of the songs came from an earlier edition, to which the 1924 piece was added. The preface to this volume says the publishers or compilers paid hundreds of dollars to get permissions, but if that is true, there is no evidence that such permission was required for *Happy Birthday to You*.

B. Summary of Materials Before 1934

24. The materials before 1934 carry only two references to Patty Hill (Tabs B: *Inland Educator and Indiana School Journal* and D: *Program for Beginners' Department*) as the author of *Good Morning to You*, and only one reference (Tab A: *Inland Educator and Indiana School Journal*) to Mildred as author of the song. Significantly, *Happy Birthday to You* is not present in Tab A (*Inland Educator and Indiana School Journal*); it is mentioned but not included in Tab D (*Program for Beginners' Department*). There is no reference in any of these items to the author or composer of *Happy Birthday to You*, although it is clear that the music itself is the same as Mildred's music for *Good Morning to You*. The short references to the birthday lyrics in prefaces to the various song and hymn collections strongly implies that the lyrics were widely known and simply substituted for the words of *Good Morning to You*.

25. Nothing in these materials suggests that the words to *Happy Birthday to You* were copyrighted. To the contrary, the absence of copyright or authorship attribution in any of these works strongly implies that the words were commonly known as early as the very beginning of the 20th century.

26. Apart from the Curwen edition of *Good Morning to All* appearing in Tab B (*Inland Educator and Indiana School Journal*), the piano parts are identical in the pre-1934 samples. The small exception is *Good Morning to You!* appearing in in Tab G (*Harvest*

Hymns), which includes a fermata in the next-to-last phrase. (In the vocal line, the rhythm is altered to provide for the two short syllables of “happy,” as opposed to the single syllable of “good”.)

C. Materials from 1934 and Later

27. Tab I: “*Happy Birthday! March.*” © 1934, Clayton F. Summy Co. is a piano solo piece with no words or separate melodic line. The main credit for the song appears on the upper-right: “Mildred J. Hill and Patty S. Hill.” Also, the words “Arranged by Preston Ware Orem” appear on the left. I understand that the copyright is for the march arrangement, since the original music for the song itself had been around so long. Since there are no words, the reason for Patty Hill’s name is unclear; the piece could be construed as Orem’s arrangement of Mildred’s copyrighted music to *Good Morning to You*, with the title referring to the common practice of singing the words *Happy Birthday to You* to the melody. On the cover of the specimen in black-white reversal appear the words, “Happy Birthday by Mildred Hill.” A vocal version attached (“Happy Birthday to You! / Vocal or instrumental”) [WC0000122] does not mention Patty at all although this particular piece is for voice and piano. Another copy of the same music and copyright date, was published, with the imprint by Keith Prowse, London, has the same date, 1935 Clayton F. Summy.

28. Tab J: “*Happy Birthday*” By Mildred J. Hill. Piano Solo with Words. Copyright 1935 Clayton F. Summy Co. This seems to be the same as the version in Sample I at the end, WC000122, but the negative copy in Sample I is not clear. Various samples of this piece differ in their cover information, design, publisher, or price; some say Summy Publishing Company (Summy 3075); those that say Summy Birchard are clearly reissues. One sample has the imprint of Keith Prowse & Co., Ltd, a London publisher. Although this copy has words – the subtitle reads “Vocal or Instrumental” – only Mildred Hill is mentioned on the upper right of the score (where by convention the composer of the music is identified); there is no name on the upper left (where the lyricist would be identified), nor any other attribution as to lyricist. For each sample of this publication, the only credit is on the upper right, to Mildred Hill. One sample says “Arranged by Preston Ware Orem,” also

on the upper right below Mildred Hill's name, suggesting it may be the print for which the Dec. 6, 1935 copyright certificate (No. E51990) says "arrangement as easy piano solo, with text." In that sample, Orem is credited with the arrangement, but nothing else, indicating that was his only creative addition to the original work. For more on this, see my summary below.

29. Tab K: "*Happy Birthday to You: Piano Solo with Words plus Vocal-Instrumental Arrangement*" Copyright 1935 by Summy Birchard Company Copyright renewed 1962. Copyright 1952 by Summy-Birchard Company. Sumco 6031. On the cover, by Mildred J Hill, Patty S. Hill. On the score, credit: Mildred J. Hill / Patty S. Hill / Arranged by Preston Ware Orem. Although there is no explicit mention of who wrote the words or the music, all of the credits appear on the right where, by convention, the composer is typically identified; nothing appears on the left, where credit for the lyricist would appear. Orem is credited as creator of the slightly different piano part. It is not uncommon for composers to revise their compositions to obtain new or extension copyrights; Igor Stravinsky, for example, was widely known for doing this. The fact that one sample has Orem's name crossed out is immaterial; another does not. It appears that his name should be on it, since he created the new piano part. None of the samples include any implication that Orem provided the familiar words; he could have been credited with the new arrangement even if the words had not been printed. The piece can be played as an easy piano solo or as a sing-along.

30. Tab L: *School Chorus Music. "Happy Birthday to You!"* Unison song" © 1935 by Clayton F. Summy Co. Upper right of score: Mildred J. Hill. Upper left: Arr. By Mrs. R.R. Forman. It is customary for arrangers to appear either on the upper right, under the composer's name, or on the left. There is no mention of Patty Hill. Forman doubtless created the new piano part, which is more elaborate than Orem's arrangement, in the style of a waltz, with some new harmonies. Forman's arrangement appears intended for more accomplished pianists, as opposed to Orem's very basic version. The sample includes a second verse without crediting authorship. I am aware that the 1935 copyright certificate

(No. E51988) says “for unison chorus and revised text.” The phrase “revised text” can only mean the added second verse since there is no other revised text on the sample. The piano part is entirely new and apparently was written by Forman, since Mildred Hill was long since dead. The phrase “unison chorus” simply means a single line of music sung by any number of people simultaneously. With regard to musical notation, a piece for a single singer and a piece for unison chorus are notationally indistinguishable. The notation signifies absolutely nothing about Forman making a musical contribution to the vocal line, which differs from other scores of *Happy Birthday to You* only by the addition of one dynamic marking, a trivial contribution.

31. Tab M: “*HAPPY BIRTHDAY!*”: A piano four-hands version of the march, copyright 1935 by Clayton F. Summy Co. On the cover and on the right, where the composer’s name usually appears, Mildred J. Hill; on the left, Arranged by Preston Ware Orem. There is no reference to Patty Hill and no words. This appears to be the work covered by the copyright for the four-hands arrangement, which is Orem’s new contribution.

32. Tab N. “*HAPPY BIRTHDAY!*”; A piano six-hands version of the march, copyright Clayton F. Summy Co. 1935. On the cover, by Mildred J. Hill. On the score, right, where the composer’s name usually appears, Mildred J. Hill & Patty S. Hill. The sample has no lyrics. Arranged Preston Ware Orem, on the left. This appears to be the work covered by the copyright for the six-hands version, which is Orem’s new contribution.

33. Tab O: Two-piano version of the march; the cover reads “*Second Piano Part*”. Copyright 1935 by Clayton F. Summy Co. On the cover, by Mildred J. Hill. On the score, right, where the composer’s name usually appears, Mildred J. Hill & Patty S. Hill. Arranged by Preston Ware Orem. This sample, which has no lyrics, appears to be the work covered by the copyright for the arrangement for two pianos, which is again Orem’s new contribution.

34. Tab P: “The World Famous Birthday Song Happy Birthday to You” by Mildred J. Hill. Waltz arrangement by Debroy Somers, Copyright 1935 by Clayton F.

Summy Co. of Chicago. Arrangement copyright MCMXXXIX by Keith Prowse for all countries. Authorized for sale only in the British Empire, excluding Canada and Newfoundland. On the right, Mildred S. Hill. On the left, Arr. By Debroy Somers (Irish band leader, 1890-1952). No mention of Patty, although the words are provided. But another print of the same version (P2) says "Words and Music by Patti S. Hill and Mildred J. Hill." The words, however, have a second verse that is not on the 1935 version and is a new contribution. On the left, arr. by Debroy Somers. Another, P3, has on the cover various references to a South African publisher, Gallo (Africa) Ltd. The music is very different, very extended, with modulations from G to C to F. The music is a unique composition.

35. Tab Q: *Happy Birthday*, by Mildred Hill, arranged By Charles Lee Hill. Instrumentation for full band. Redacted, but clearly an elaboration. Southern Music Company, San Antonio. Copyright 1948 by Clayton F. Summy Co. No mention of Patty, although even through the redactions one can see that there are words.

36. Tab R: "*Happy Birthday to You by Mildred J. Hill.*" My copy has no copyright information, which was cut off. A redacted copy [R1] seems to be the same, with copyright date of 1948 by Clayton F. Summy Co. On the right, where the composer is identified, Hill-Coburn. Borrowing from the original musical composition, this sample is a sentimental version in 4/4, with new melodies and more elaborate harmonies throughout. The second system of the last page has very elaborate chromatic harmonies not seen before. These changes appear to be the musical composition of Coburn. The original lyrics have been rewritten and expanded. On the left, where the lyricist is identified, "Words by Gene Barry." This appears to attribute authorship of the expanded and rewritten lyrics to Gene Barry. There is no attribution for authorship of the original lyrics.

37. Tab S: "*Happy Birthday to You,*" with an arrangement for any size instrumental combination on the back cover. Clayton F. Summy Co. Chicago copyright 1950. The score, which has a new piano part, reads "arranged by Kenneth Kimes" on the upper right side, and "by Mildred and Patty Hill" on the left. This is highly unconventional and the only example like it I have seen. The piano part is quite different from the other

versions, including a key change from the key of G to the key of C and different harmonies at the end.

38. Tab T: "*Happy Birthday to You*" with an arrangement for any size instrumental combination on back cover. Redacted score and set of parts for instruments. Copyright 1950, Clayton F. Summy Co. The left side of the redacted score reads, "Arranged by Kenneth Kimes;" on the right, "by Mildred and Patty Hill."

39. Tab U: *Happy Birthday to You*. Vocal-inst. Edition Hill-Wilson. Vocal in G. Redacted. On the score: on right, Mildred Hill-Wilson; on left, Gene Barry. No mention of Patty. An extended version. Although redacted, the visible chord changes show very elaborate harmonies.

40. Tab V: "*Twice 55 Community Songs, The Brown Book*," Revised edition. C. C. Birchard Co. Sole selling agent Summy Publishing Company. © 1957. Song no. 15 "*Happy Birthday to You!*" for voice only. Upper right: Mildred J. Hill. Upper left, the normal place for the author of the words, "Traditional." This is consistent with the convention for identifying the author or authors of the words and the music, and acknowledges that the lyrics were originally a traditional adaptation of the earlier work "*Good Morning to All*."

41. Tab W: A vocal instrumental version arranged by Robert Dahnert, whose name appears along with Mildred and Patty's on the upper right corner of the score. On the upper left (where by convention the author of the lyrics is listed) is the name Gene Barry. Robert Dahnert is clearly identified as the person who arranged it with instruments and made the transposed parts for B flat and E flat instruments (clarinets and saxophones). The piano part is also very different from earlier one, with new harmonies and different voice-leading throughout, plus chord symbols. Gene Barry must be the author of the considerably lengthened words for the vocal-instrumental version. Also another copy with different cover and no mention of Patty Hill at all. Marked 1952 by hand, which is wrong; on the bottom, marked 1998 by hand, which could be correct.

42. Tab X: “*Happy Birthday to You!*” Mildred J Hill and Patty S. Hill. Copyright 1935, Summy-Birchard Music, division of Summy-Birchard Inc. Exclusive print rights administered by Alfred Publishing Inc. I am informed that Summy-Birchard Music and Summy-Birchard Inc. did not exist in 1935, meaning that this sample was printed later than the copyright date. On the right: Words and Music by Mildred J. Hill and Patty S. Hill. This is a new musical version, with a four-measure introduction and many changes to the piano part, including a distinctive harmonic change on the last beat of the third bar from the end. This version also has chord symbols. It seems to be a later version than the prior versions of the song; however, it bears no credit to who revised the music, nor any sign of a later copyright, but the new version is a unique work. A short introduction claims that Mildred Hill and Patty Hill wrote the song, although who made what contribution is not stated. I am generally aware of historical evidence that Mildred Hill (a music teacher) composed the music for *Good Morning to All* and Patty Hill (a kindergarten teacher) wrote the words for that song.

43. Tab Y: “*Happy Birthday to You!*” The same as Tab X, but on the text on the right reads, “Mildred J. Hill / Patty S. Hill” without the phrase “Words and Music by”. © 1935 Summy Birchard Music, division of Birch Tree Group, Ltd., Princeton New Jersey. Copyright renewed. This arrangement has a copyright date of 1979. This sample is otherwise identical to the previous Tab X, suggesting that the arrangement in both samples, which is very different from any other arrangements, was created in 1979. I am informed that Birch Tree Group came into existence after Summy-Birchard Inc., suggesting that this sample is more recent than the sample in Tab X. The deletion of the phrase “Words and Music by” appears to correct the earlier sample.

D. Summary of Materials from 1935 and Later

44. Perhaps the most important aspect of the samples from 1935 and later is the new piano parts by R.R. Forman and Preston Ware Orem. Orem’s and Forman’s new piano parts began a series of transformations departing from the simple G-major diatonic harmonic style in which the song was first composed by Mildred Hill, then gradually

“modernizing” the song with chromatic alterations, secondary dominants, and elaborate voice leadings or piano writing. Based on all the materials I reviewed, I conclude that Mildred Hill’s original music was never again published after 1935. Orem’s score, though described in the copyright (No. E51990) as an easy piano solo, is not particularly simpler than Mildred Hill’s original composition.

45. These later samples have considerable contradictory information. The fact that on some of them, only Mildred Hill is listed on the cover but both sisters are on the score is not unusual in music publishing. Typically, only the composer’s name is listed on the front cover, unless the composer is also the lyricist, in which event a phrase such as “Words and Music by” may appear with the author’s name. If the lyricist is also identified along with the composer, the contributions of both will be delineated on the cover. I cannot recall ever seeing only the lyricist’s name listed on the cover of published music.

46. What is odd is that Patty Hill’s name does not appear on any vocal version until Tabs S, T, X, and Y, all of which were published much later than 1935. On the other hand, Patty’s name appears on many of the purely instrumental versions, usually without being identified as the author of the “text” or “words.” Even when Patty Hill is referred to as the author of the words, there usually are no words at all. Furthermore, the samples also contain reprints of exactly the same plates, making dating of the various samples quite difficult.

47. As noted above, there are a number of variations to the original composition of *Good Morning to All*, one of which is the familiar lyrics *Happy Birthday to You*. I saw no definitive indication of whether the attribution of text authorship to Patty Hill in a few 1935 publications refers to the lyrics to *Happy Birthday to You* or to *Good Morning to All*.

48. From my review of the materials from 1935 and later, it is certain that Forman wrote a new second birthday verse; Gene Barry also wrote new and expanded lyrics.

49. The familiar *Happy Birthday to You* words resemble a folk text commonly sung to this tune, as is also suggested by the short-hand references prior to 1934. The later samples added new work in the form of changes in the music, including arrangements for

other performers, new harmonies, etc. The new words by Forman and Barry are original works. Other than the new words by Forman and Barry, the only new work that appears in any of the scores from 1935 and later are the new arrangements (such as the march in Tab I, the four-hand piano part in Tab M, and the second piano part in Tab O) and the more complex musical compositions as I have noted above.

50. Orem was 70 years old at the time his arrangement was published (and presumably around the time it was composed). By then, he had a long career behind him as an educator and author of an elementary harmony text book (published in 1919) and had been a prolific composer. As an aside, I note that I was taught from Orem's elementary harmony text book around 1954. Apart from Orem's vast experience as a musical composer, having spent decades as a teacher Orem surely heard *Happy Birthday to You* sung many times before 1935. I do not recall seeing any lyrics credited to Orem. Since the published version of *Happy Birthday to You* credits him for the arrangement but not for the words, I conclude that his contribution to the publication was limited to the new, simple piano part.

51. My conclusion is not contradicted by any additional information that I have reviewed, namely, that the "new matter" for which a copyright was claimed is an "arrangement as an easy piano solo, with text." Although the description as "easy piano solo, with text" is different than "easy piano solo" without referring to "text," the addition of the term "with text" does not carry any implication that Orem wrote the text. Rather, it merely describes the music as an easy piano part with some words, which can be performed either as a piano solo or with the melody sung, by the pianist or other persons.

52. I understand that Orem served as a Director and Vice President of Summy, which makes it extraordinarily unlikely he did not know of Forman's version with revised text, which also included the familiar *Happy Birthday to You* lyrics. If her revision of the text consisted of the added second verse as well as the familiar *Happy Birthday to You* words, and if Orem also had been the author of the *Happy Birthday to You* words, then both of them wrote and copyrighted *Happy Birthday to You* for the same employer at the same

time, which would be a remarkable coincidence. Considering Orem's position at Summy, he in all probability he knew that Forman was creating another version of the song with a more elaborate part and a new verse. Indeed, it appears that what Summy wanted was two versions of *Happy Birthday to You* with piano parts of different difficulty intended for pianists of different skill levels.

53. The sample in Tab V (*Twice 55 Community Songs, The Brown Book*) is particularly informative. Published in 1957 by C.C. Birchard, which apparently had some formal publishing arrangement with Summy – I note that the company was later identified as Summy-Birchard, Inc. – this score identifies the authorship of the words as “traditional.” In common publishing practice, this attribution means that the words are a folk-type text, for which no individual is known as the author. All the works I have discussed, including the early works that referred to the short-hand *Happy Birthday to You* words or that used the words in combination with the song *Good Morning to All* without attributing authorship of the lyrics to anyone, strongly suggest that the *Happy Birthday to You* lyrics (except the second verse plainly written by Forman and those additional lyrics plainly written by Barry) were widely known without any single author being identified. Therefore, I agree with the designation in Tab V that the words were traditional. In Tab V, the publisher acknowledged there was no known author of the *Happy Birthday to You* words.

54. One other matter concerns the form of the bass clef, which represents the letter F. The two dots are the remains of the cross bars of the letter; they took on this form over many years of notational evolution. The curved part of the clef is normally open to the left. In the *Happy Birthday to You* samples, some are open to the right, an older form which, in my experience, has not been used since the early 20th century.

55. Two scores at Juilliard, both from about 1840, show this older form. In my memory, it was used by some British publishers through the 19th century and early in the 20th century, after which it disappeared.

56. To verify my recollections, I asked Nicolas Bell, the Curator of Music Collections at the British Library, if he recalled seeing that form of the clef. He replied that

he remembered it only from some 19th century publications, especially by Novello Co., a leading London publisher. I believe, therefore, that any original publications using that clef would have originated in the 1890s and perhaps prior to World War I. After that, they are most likely to be reprints using old plates.

IV. Study of Position of Composers and Authors' Names on Scores

57. By convention, the credit for the author of words normally appears on the upper-left side of the score or the score will identify the author of the words explicitly, using terminology such as "lyrics by" or "words by" together with the author's name.

58. I reviewed 560 scores of single songs that I selected from approximately 1,500 such scores in the Juilliard library, an extensive collection of musical compositions. These were all scores for authors whose last names began from "A" to "Ha." I selected these scores as a representative sample of the full number of approximately 1,500 scores in the Juilliard library. My purpose was to determine where the name of the composer is listed, and where the name of the author of the words is listed. All of these scores were published from the late 19th century to very recently.

59. The convention is clear in the scores I reviewed. In 460 or 72.5% of the scores, the composer's name is placed on the upper right of the first page of the score. The lyricist's name is placed with no meaningful exception on the upper left. In the two exceptions I saw where the lyricist is also on the right, the functions of composer and lyricist are clearly differentiated. This was how-the composer and the lyricist were identified in 406 of the 560 scores I reviewed.

60. In 49 or 8.75% of the scores, the name of the author of the words was given only on the cover, or a preface. In all 49 of those instances, the author of the lyrics was identified as such.

61. In 28 or 5% of the scores, the pieces used sacred texts for which no author was given because the words are of ancient origin and the authors are unknown.

62. In 38 or 6.7% of the scores the words are considered traditional – either of folkloric or spiritual (but not liturgical) origin. In a few cases, the arranger’s name was given on the right; the author of the words and composer of the melody are both unknown.

63. In 45 or 8% of the scores, mostly arrangements of extracts from famous operas, no author’s name was given.

64. In only 1 case was the author’s name given on the right side of the score. In that lone instance, the words and music were written by the same person, which was indicated by the phrase “words and music by” preceding the author’s name.

65. In a few instances, especially in German publications, the name of the author is centered under the title of the composition, sometimes in parentheses; the composer is on the right, as usual. There are also some instances where the name of the author is printed on the cover but not credited on the first page of the score.

66. When the text is traditional, such as a carol, a spiritual, a folk text or a religious text, there may be a credit such as “traditional,” “gospel,” etc., but there is almost never any citation of an author (or a composer, for that matter). Also, in my experience, the absence of a citation of an author for either words or music indicates that that part of the work is traditional.

V. Meaning of “Arrangement”

67. In conventional musical terminology, an “arrangement” applies to changes (additions, elaborations, instrumentations, and the like) to the musical content of a composition.

68. The term “arrangement” is defined that way in *The New Grove Dictionary*, an authoritative text in the field of music. *The New Grove Dictionary* has an extensive article on the history of arranging, which makes clear that the term is used as I have seen it.

69. The word “arranger” is used only for a person who has made some kind of changes to the original music, such as a new instrumentation, some kind of elaboration – which can be small or extensive – and similar. In my long experience as a musician and music historian, I do not recall ever seeing the term used for someone who has set words to

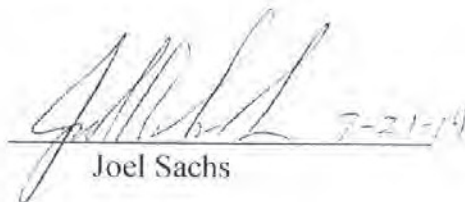
music. That includes hundreds, if not thousands, of pieces composed during the period from the late 19th century through the present day.

70. In my experience, the term “arrangement” is never used to describe adding words to an existing song or instrumental piece. The technical term for adding words to an existing song or instrumental piece is “setting.” Thus, words are “set” to music; to the best of my knowledge, they are never said to be “arranged” to music. In my recollection, I am not aware of ever seeing the word “arrangement” or any derivative thereof used to refer to the addition of words to music.

71. I do not believe anyone active in the music field and familiar with conventional music notation would understand the word “arrangement” to mean setting words to music. I believe that to be true in the early part of the 20th century as well as today.

72. The claim that Forman and Orem composed arrangements of the pre-existing song *Happy Birthday to You* does not indicate that either of them wrote any lyrics or set existing lyrics to the existing melody. The arrangements that Forman and Orem composed are unique works, for which the arrangement claim gives them credit. In addition, as noted above, it appears that Forman also wrote a second verse of lyrics for *Happy Birthday to You* that is different from the familiar *Happy Birthday to You* lyrics.

73. I hold these opinions to a reasonable degree of certainty in my professional judgment.

 7-21-14
Joel Sachs



HAPPY BIRTHDAY



by
MILDRED J. HILL

Piano Solo with words....25 cents
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CLAYTON F. SUMMY CO.
CHICAGO NEW YORK

HAPPY BIRTHDAY TO YOU!

(Vocal or Instrumental)

MILDRED J. HILL

Brightly

mf Hap-py Birth-day to you, Hap-py

The first system of music is in G major and 3/4 time. It consists of two staves: a treble clef staff and a bass clef staff. The treble staff contains the melody with notes G4, A4, B4, A4, G4, F#4, E4, D4. The bass staff contains a simple accompaniment with notes G2, B2, D3, E3, F#3, G3. The lyrics 'Hap-py Birth-day to you, Hap-py' are written below the treble staff. Fingerings are indicated by numbers 1-5 above the notes. A dynamic marking of *mf* is present.

Birth-day to you, Hap-py Birth-day, dear

The second system continues the melody and accompaniment. The treble staff notes are G4, A4, B4, A4, G4, F#4, E4, D4. The bass staff notes are G2, B2, D3, E3, F#3, G3. The lyrics 'Birth-day to you, Hap-py Birth-day, dear' are written below the treble staff. Fingerings are indicated by numbers 1-5 above the notes.

* _____, Hap-py Birth-day to you!

The third system concludes the piece. The treble staff notes are G4, A4, B4, A4, G4, F#4, E4, D4. The bass staff notes are G2, B2, D3, E3, F#3, G3. The lyrics '* _____, Hap-py Birth-day to you!' are written below the treble staff, with a blank line for a name. Fingerings are indicated by numbers 1-5 above the notes.

* Here insert the name of the one celebrating.

2075

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95	A SAILOR DEAR (<i>SSA</i>)10
96	HAPPY BIRTHDAY (<i>Unison</i>)08

CLAYTON F SUMMY COMPANY
CHICAGO NEW YORK

Happy Birthday to You!

Arr. by Mrs. E. R. Forman

Unison Song

MILDRED J. HILL

Lively *mf*

Hap - py birth - day to you, Hap - py birth - day to

you, Hap - py birth - day, dear * Hap-py birth - day to

you; May your birth - day be bright, Full of cheer and de -

light, Hap-py birth-day, dear * Hap-py birth - day to you.

* Here insert the name of the one celebrating.

3076

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