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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE

GOOD MORNING TO YOU PRODUCTIONS)
CORP., ET AL.,)
) CASE NO.
 PLAINTIFFS,) CV 13-4460
)
 VS.)
)
 WARNER/CHAPPELL MUSIC, INC.,)
 ET AL.,)
)
 DEFENDANTS.)

REPORTER'S TRANSCRIPT OF
CROSS MOTIONS FOR SUMMARY JUDGMENT AND
MOTION BY PLAINTIFF TO EXCLUDE EVIDENCE
MONDAY, MARCH 23, 2015
9:38 A.M.
LOS ANGELES, CALIFORNIA

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I N D E X

CASE CV 13-4460

Monday, March 23, 2015

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1 LOS ANGELES, CALIFORNIA; MONDAY, MARCH 23, 2015

2 9:38 A.M.

3 -oOo-

4 THE CLERK: Please remain seated and come to order,
5 this United States District Court is now in session, the
6 Honorable George H. King, Chief Judge presiding. Calling Item
7 No. 1 on today's calendar, Civil 13-4460, Good Morning to You
8 versus Warner/Chappell Music, Incorporated. Counsel, state
9 your appearances for the record.

10 MR. RIFKIN: Good morning, Your Honor. Mark Rifkin
11 of Wolf Haldenstein on behalf of the plaintiffs.

12 THE COURT: Good morning.

13 MR. NEWMAN: Good morning, Your Honor. Randall S.
14 Newman, Randall S. Newman, P.C., on behalf of plaintiffs.

15 THE COURT: All right.

16 MR. SCHACHT: Your Honor, Daniel Schacht of Donahue
17 Fitzgerald on behalf of the plaintiffs.

18 THE COURT: Yes, good morning.

19 MS. MANIFOLD: Good morning, Your Honor. I'm Betsy
20 Manifold. I'm a partner with Mr. Rifkin at Wolf Haldenstein.

21 THE COURT: Good morning.

22 Now for the defendants.

23 MR. KLAUS: Good morning, Your Honor. Kelly Klaus
24 from Munger, Tolles & Olson, joined by my colleagues, Melinda
25 LeMoine and Adam Kaplan, also joined by Ellen Hochberg who is

1 the head of litigation for Warner Music Group. And we are here
2 for the defendants.

3 THE COURT: All right. Very good. Thank you very
4 much. All right. Counsel, I have had an opportunity to review
5 your moving papers and the exhibits. I do have some questions,
6 some of which may be organizational from the standpoint of what
7 is a good analytical framework by which I can approach this. I
8 have questions for both sides, but let me start with the
9 defendants.

10 Mr. Klaus, will you be addressing the Court on behalf of
11 the defendants?

12 MR. KLAUS: I will, Your Honor.

13 THE COURT: Would you approach the lectern, please.

14 MR. KLAUS: Yes, of course.

15 THE COURT: Okay. Let me just start out with some
16 preliminary questions. I think I know the answer to these
17 questions, but I just want to make sure that there are no
18 disputes. I don't believe there are any disputes.

19 You, on behalf of the defendants, you admit that
20 Mrs. Forman and Mr. Orem did not author the so-called familiar
21 lyrics of *Happy Birthday*. Do you agree with that?

22 MR. KLAUS: That's correct, Your Honor.

23 THE COURT: Look, instead of saying familiar lyrics,
24 I'm just going to say lyrics.

25 And then, if I refer to the second verse, I'll call it the

1 second verse so we understand each other and we don't have to
2 have additional words when not necessary.

3 Do you also now agree that Exhibits 44 and 48 are the
4 certificates of registration for your two claimed copyrights?

5 MR. KLAUS: Yes.

6 THE COURT: And with respect to which of these or
7 both cover the so-called lyrics, is it your argument that
8 E51990 covers the lyrics and E51988 really puts it into proper
9 context as to why E51990 covers the lyrics?

10 MR. KLAUS: It is our position, Your Honor, that
11 E51990 covers -- was intended to cover the lyrics and does
12 cover the lyrics. And 51988 covers -- it was intended to cover
13 it on the same day, what we'll call the second verse, refers to
14 it as the revised text.

15 THE COURT: So you're not claiming E51988
16 independently covers the lyrics?

17 MR. KLAUS: I believe we haven't actually briefed
18 that issue, Your Honor. I do think that, because the deposit
19 copy unquestionably -- the 51988 -- included both the lyrics
20 and the second verse, if necessary, we would fall back on it.
21 But our position is, Your Honor, that it's 51990.

22 THE COURT: Okay. My second question is both you
23 and the plaintiffs spend a lot of your 50 pages focused on
24 talking about the certificates as such. And unfortunately the
25 initial briefing, there was some dispute as to which are the

1 certificates. So, you know, having read that, I had to sort of
2 rewind it a little bit to now know what your true position is.

3 But my question is do you claim that you hold any kind of
4 statutory federal copyright even if the lyrics were not
5 covered, let's say for today's purposes, in E51990?

6 MR. KLAUS: I'm not sure. I believe, Your Honor,
7 that our position is 51990 does cover the lyrics.

8 THE COURT: I understand. I understand.

9 MR. KLAUS: And --

10 THE COURT: We can talk about that issue, and we
11 will in a moment. What I'm trying to understand is the
12 substantial focus that you folks put in that because,
13 obviously, you know that a copyright is not necessarily the
14 same as the registration. You could have a copyright even
15 under the 1909 Act, a statutory one, even if you don't
16 technically have a registration for it.

17 MR. KLAUS: I believe, Your Honor --

18 THE COURT: There may be consequences. I'm not
19 saying there are no consequences, but I'm just trying to
20 understand.

21 MR. KLAUS: I believe, Your Honor, that under the
22 1909 Act, that for the initial term of the copyright, which
23 would have started in 1935, registration technically was not
24 necessary. What was necessary was publication with notice --

25 THE COURT: Right.

1 MR. KLAUS: -- which we believe has happened here.

2 The renewal term, I believe there was a requirement that a
3 certificate of registration be filed, and we do have in the --
4 in the record the renewal of both 51990 and --

5 THE COURT: In 1962.

6 MR. KLAUS: Correct.

7 THE COURT: So what you're telling me -- and make
8 sure that my summary is accurate. What you're telling me is
9 that's the reason why it is important that your position is
10 that E51990 includes the lyrics.

11 MR. KLAUS: Yes. Well, the -- one of the -- one of
12 the issues that we have debated at length with the other side
13 in the papers is what was encompassed within the copyright.
14 And it's our position that the registration certificate, which
15 we now know to be, I believe, Exhibit 48 for E51990, covers not
16 just the easy arrangement with the piano solo but also covers
17 text.

18 THE COURT: I understand. I'll get to that in a
19 moment. I just want to make sure that so in your case you
20 don't have any further claim to copyright protection as to the
21 lyrics if the Court were to determine that E51990 does not
22 cover the lyrics; is that true?

23 MR. KLAUS: I believe, Your Honor, that what we
24 would have is we would have the publication in 1935 plus the
25 renewal, which also states that it's with text. So I don't

1 think it's just the underlying certificate. I think that it's
2 the publication with the -- with the lyrics.

3 What the -- what the copyright certificate does for us, I
4 believe, Your Honor, the 1935 copyright certificate, is it
5 gives us the presumption that what was covered was not simply
6 the arrangement but also the text.

7 THE COURT: Well, we'll talk about the presumption
8 and all of that, but the renewal does no more than what you say
9 was copyrighted in 1935 other than to renew it. You weren't
10 renewing anything else.

11 MR. KLAUS: That's correct, Your Honor.

12 THE COURT: Okay. So if I were to determine that in
13 1935 it didn't cover the lyrics, it couldn't have covered the
14 lyrics by reason of the renewal. Wouldn't you agree with that,
15 if I were to determine that?

16 MR. KLAUS: If you were to determine that the
17 registration and publication in 1935 didn't cover the lyrics,
18 then yes I would agree with you that the renewal would not.

19 THE COURT: Okay. Now, let's talk about the
20 question about what does it cover, does it or does it not. And
21 my initial question to you is -- and I don't believe either
22 side has really addressed this; so I want to give you an
23 opportunity to weigh in on it -- is that a question of law, or
24 is that a question of fact in terms of what those certificates
25 actually cover, or that certificate actually covered?

1 MR. KLAUS: I believe, Your Honor, that the
2 interpretation of a copyright certificate is traditionally
3 treated as a question of law.

4 THE COURT: Even if there might be a need to go
5 beyond the four corners of the certificate to accept extrinsic
6 evidence?

7 MR. KLAUS: If there were a need to go beyond the
8 four corners to accept extrinsic evidence, there might be a
9 fact question if there was a fact question that was disputed.
10 Our position is it's not, and I'm happy to explain that.

11 THE COURT: We'll get to that too.

12 MR. KLAUS: But one of the --

13 THE COURT: We'll do it one step at a time.

14 MR. KLAUS: Understood. But I believe, as the
15 Supreme Court made clear as recently as last term in the
16 Raging Bull case, the Petrella against MGM case, the function
17 of the registration certificate is to provide that Congress
18 knew that copyrights would last for a very long time. They
19 would last beyond the point where one could have extrinsic
20 evidence from people, as in this case who were alive in 1935.

21 THE COURT: There may be extrinsic evidence aside
22 from the testimony of the people who were the players.
23 Obviously, we're not going to have those.

24 MR. KLAUS: Understood, Your Honor.

25 So I think the -- I have not seen a case that holds that

1 the interpretation of what is covered by a copyright is a
2 question of fact. I would think that, if there were factual
3 disputes and extrinsic evidence that were required to be
4 answered, that would probably be a mixed question of law, in
5 fact, but I could understand --

6 THE COURT: That would be tried by a trier of fact
7 as opposed to being determined by the Court in terms of my role
8 of deciding what the scope is?

9 MR. KLAUS: It might be. The only hesitation I
10 have, Your Honor -- and we did not brief this question, as I'm
11 sure you're familiar with, from the patent context --

12 THE COURT: That's somewhat different now, isn't it?

13 MR. KLAUS: It's different now, but the -- but there
14 is the -- there is question of where you have, for example, the
15 construction of a claim --

16 THE COURT: Right.

17 MR. KLAUS: -- that that's what the Supreme Court
18 said in Markman, that this is an issue for the Court because
19 this is a -- it's a document of public consequence.

20 THE COURT: And that really hasn't -- my
21 understanding is -- and I'm no patent lawyer, believe me. But
22 my understanding, that really hasn't changed other than perhaps
23 the standard of review as to the underlying factual
24 determinations may have -- it did change from what the federal
25 circuit thought it was.

1 MR. KLAUS: Yes. As has happened in a number of
2 cases, the way the federal circuit construed the law did not
3 turn out to be that case. But I don't think the underlying
4 question as to who makes the determination has changed.

5 THE COURT: From your view then, borrowing from
6 patent law, is that if I'm deciding whether or not the
7 certificates -- certificate has within its scope the lyrics and
8 I feel that there is a need to go outside the four corners of
9 the certificate and if that evidence actually is conflicted, I
10 can still make that factual determination under my duty to
11 decide what the scope of the copyright certificate is.

12 MR. KLAUS: I believe that's correct, Your Honor,
13 with the -- with obviously the caveats about a number of points
14 in the chain, about if -- and excepting that -- excepting those
15 points out, the only other thing I would say is I can't say
16 that I have researched the question exhaustively, but I would
17 think that would be the way that it would be analyzed.

18 THE COURT: Okay. Let's talk about burden of proof
19 for a moment. You have at various parts in your briefing said
20 that the burden is not only not on you because you have the
21 benefit of the presumption to go forward, but you assert that
22 the burden of persuasion does not rest with you because you
23 didn't bring an infringement suit, and you cited Schaffer.

24 But this is a declaratory relief action, and don't we look
25 to what the underlying coercive claim would have been to

1 determine where the burden lies? That doesn't change any
2 presumption, if a presumption is to be applied. I understand
3 that, but the presumption is really rebuttable. It's the
4 burden of going forward. It's not an irrebuttable presumption
5 by any stretch of the imagination.

6 So do you still believe that, because this is a
7 declaratory relief action, because technically they're the
8 plaintiff, you're the defendant, they have the burden to prove
9 everything on persuasion?

10 MR. KLAUS: I believe that, at least with respect to
11 some issues, Your Honor, that they would. I also think --

12 THE COURT: Well, you're right. Some of those are
13 characterizable as affirmative defenses.

14 MR. KLAUS: Yes.

15 THE COURT: And affirmative defenses, I agree. They
16 have the burden.

17 MR. KLAUS: And I would say that -- I would say,
18 though, Your Honor, I don't know that a -- I don't know that
19 the issue has been explicitly decided with respect to a
20 declaratory judgment case for the validity of a copyright as
21 opposed to the invalidity of a copyright. But I can see why
22 from the cases one would -- one would conclude that, if you
23 were to treat this as a coercive action turned upside down, as
24 this case in some respects is, we might have the burden.

25 THE COURT: Well, there's no real conceptual

1 difference between our case, just because it's copyright,
2 versus Metronic because it was patent. And it seems to me that
3 Supreme Court decision might -- we may want to allow that to
4 inform us as to where the burden lies.

5 MR. KLAUS: Understood. And I would -- I would
6 agree with that, Your Honor.

7 THE COURT: Let's talk about the scope of E51990.
8 Do we apply the presumption first, or do we say we're going to
9 have to decide what the scope is so we know what presumption to
10 apply to it?

11 MR. KLAUS: I believe that the cases have always
12 looked first to the certificate and the presumption and then
13 said what is there to rebut the presumption.

14 THE COURT: Okay.

15 MR. KLAUS: And in this case, Your Honor, of course
16 our position is that, notwithstanding the claim by the
17 plaintiffs that they have rebutted the presumption, that the
18 evidence is undisputed, and it's entirely in our favor that
19 what was intended to be registered was not simply a piano
20 arrangement but also the text.

21 THE COURT: Let's explore that.

22 MR. KLAUS: Yes.

23 THE COURT: Let's explore, assuming you're right
24 about the applicability of the presumption, because, of course,
25 even under the 1909 Act, registration certificate presumes the

1 validity of whatever it was that was covered and the truth of
2 the statements made therein. Okay? You agree with that?

3 MR. KLAUS: Correct.

4 THE COURT: All right. So let's see where that gets
5 us. Okay? The certificates or this certificate, which is 48,
6 I believe -- right? -- Exhibit 48?

7 MR. KLAUS: Exhibit 48. Correct, Your Honor.

8 THE COURT: Okay. So in taking a look at
9 Exhibit 48, it says who's the author of the new material?
10 Because this is for "Republished Musical Composition with New
11 Copyright" material.

12 Question No. 3, "Author of new copyright matter: Preston
13 Ware Orem, employed for hire by Clayton," blah, blah, blah. So
14 the assertion that we have to presume to be correct, at least
15 on the presumption, prima facie, is that Mr. Orem was the
16 author of any new copyright matter.

17 Number 7, question, "State exactly on what new matter
18 copyright is claimed." And it says, "Arrangement as easy piano
19 solo, with text."

20 Okay. That's what is claimed. And assuming that is
21 correct, literally that it is easy piano solo -- arrangement as
22 easy piano solo, with text, and that's presumed to be correct,
23 prima facie to be true, then you apply that with your admission
24 that Mr. Orem did not author the lyrics.

25 So if we literally apply the presumption, one -- one,

1 maybe not the only -- but one logical deduction or conclusion
2 is that the text cannot refer to the lyrics.

3 MR. KLAUS: If there were no other evidence in the
4 record, Your Honor, that might be correct. But the other
5 evidence -- and we have to start from couple of propositions.

6 One is that the reference to -- and it is not uncommon in
7 copyright cases for there to be a mistake on the application as
8 to who the author was. And, in fact, one of the cases that
9 we've cited, to which I don't think there is a response, is the
10 Emmylou Harris against Emus Records case, Your Honor.

11 THE COURT: That's really not on point. Let me tell
12 you why I don't think so. There, it was not really a scope
13 issue. There was no question that sixth song, *Gliding Bird* or
14 whatever the name, was claimed in the copyright. So we are
15 questioning whether or not the lyrics were covered in this
16 copyright; so I think that's a pretty big difference.

17 MR. KLAUS: Well, except that the case that
18 Emmylou Harris relies on -- Emmylou Harris, it stands for the
19 proposition that inaccuracies that were not obtained by an
20 intent to defraud -- there is no claim by the plaintiffs that
21 there was an intent to defraud the copyright office here --
22 that cause no prejudice to the defendant, as in this case,
23 there's no claim that they have been prejudiced by any of
24 the -- in other words, that absent an intent to defraud and
25 prejudice, the technical inaccuracy in the registration doesn't

1 affect the validity of the copyright. And one of the --

2 THE COURT: I'm sorry. I'll let you finish that,
3 and then I'll follow up. Go ahead.

4 MR. KLAUS: The point I was going to make,
5 Your Honor, is Emmylou Harris is not the only case. There is
6 also the Barron against Leo Feist case. And that case is much
7 closer to what you were describing in terms of the scope
8 because the -- the arrangement that was at issue there, the
9 calypso arrangement, the underlying copyright registration had
10 attributed to the purported author simply the collection of
11 calypso lyrics in Jamaica, I think, at the time.

12 And the argument on -- the argument on appeal was that
13 that -- that that was an indication that the lyrics were not --
14 that the melody to what was pla- -- I believe the plaintiff's
15 work and then the defendant's work, which I think was *Rum and*
16 *Coca-Cola*, I think was the name of the song. And the argument
17 in that case was, because the registration certificate said
18 one -- because the registration certificate didn't attempt to
19 claim that, that therefore -- or the application, that
20 therefore it couldn't be claimed later on.

21 And what the Second Circuit said in case law that's been
22 continued all the way through the Emmylou Harris case is that
23 sort of technical defect is not going to upset the -- is not
24 going to upset the validity of the copyright if it's challenged
25 later on.

1 THE COURT: Well, but my concern with that is nobody
2 here -- or at least I don't think -- is suggesting that your
3 copyrights are invalid, period, gone, finished. You still have
4 a copyright. The question is again the scope. They're not
5 challenging that you have a copyright to the arrangements. It
6 doesn't blow it up. There's no fraud here shown. It doesn't
7 blow up the certificate so that you have nothing. That's not
8 the issue.

9 The issue is really a little bit different. The issue is
10 is it included in the claim? And by the very admission,
11 whether you call it sufficient to defeat and therefore set
12 aside any presumptions, or you say, okay, the presumption goes
13 so far but there is other evidence. So ultimately whether the
14 presumption technically applies or does not apply is not going
15 to have earthshaking consequences, in our case at least, on the
16 record.

17 So my question is, if you admit that there is at least
18 error -- and you claim that there's an error. They claim there
19 was no error. But let's just talk about your position. You
20 claim that there was just an error. We forgot to put on one of
21 the Hill sisters, whoever authored the lyrics -- and we'll
22 discuss that later on -- but one of the Hill sisters, we should
23 have put that name as the author of the text. That would have
24 been really helpful and clearer, but it didn't. That was just
25 a mistake.

1 Isn't that mistake sufficient to say that maybe we
2 shouldn't apply the presumption because what are we going to
3 presume? We can't presume Mildred or Patty wrote the lyrics
4 because there's nothing on the certificates for which we apply
5 the presumption that ever says that. So in any event, aren't
6 we into just receiving evidence as to what's your evidence and
7 what's their evidence?

8 MR. KLAUS: If that was -- if that was the case,
9 Your Honor -- and I've said I think the Barron against
10 Leo Feist case and the Emmylou Harris case would go against
11 that. But even if we are in the world where we are not relying
12 on the presumption, the evidence, the undisputed evidence
13 that's in the record is that the Hill sisters wrote *Happy*
14 *Birthday to You*, not simply the underlying melody, which was
15 their melody. Undisputed *Good Morning to All* was their melody,
16 their words.

17 The undisputed evidence in the record from the deposition
18 of the Hill sisters in the Hill v. Harris case is that it was
19 written -- that the lyrics were written by Patty Hill.

20 THE COURT: Okay.

21 MR. KLAUS: Point number one --

22 THE COURT: Let me ask you, there is deposition
23 testimony by -- I think it was Patty Hill's deposition that
24 says that she wrote the lyrics to -- the lyrics, what we'll
25 call the lyrics. Is that admissible?

1 MR. KLAUS: I don't believe there's been an -- I
2 don't believe there's been an objection. It is prior
3 testimony. I don't know why it -- why wouldn't it be
4 admissible?

5 THE COURT: Prior testimony doesn't solve anything
6 because she's not here to testify. If she were a witness or a
7 declarant and you have her declaration of something, maybe if
8 it satisfies some other foundational issues, that would be
9 admissible. I don't think prior testimony applies if she's not
10 going to be here, and I don't think she will be.

11 MR. KLAUS: Although she is unavailable as a
12 witness, Your Honor, it is deposition testimony. That's one --
13 that's one, but it's not the only thing, Your Honor, because --

14 THE COURT: Okay. What else?

15 MR. KLAUS: We also --

16 THE COURT: What you're saying is Patty says she did
17 it. Okay. What else do you have?

18 MR. KLAUS: Patty says she did it.

19 Number 2, which I don't think can be discounted, is the
20 fact that it was the Hill sisters' underlying song. They wrote
21 *Good Morning to All*. That is completely undisputed. It's not
22 like these are -- the sisters were strangers to the underlying
23 work.

24 THE COURT: If I may, I think we're going down a
25 different analytical road than I want to go down right now.

1 We'll come to that at a later point.

2 My question is still we're trying to determine scope. So
3 how is it that we're going to even determine what other
4 evidence do you have to suggest -- either I say the presumption
5 is gone or I say the presumption is met. What evidence do you
6 have that would convince me that the lyrics were included in
7 the registration?

8 MR. KLAUS: Well, so the other evidence I would
9 have, Your Honor -- let me point this to you very specifically.

10 THE COURT: Okay.

11 MR. KLAUS: We know that the same day that 51990 was
12 deposited, 51988 was deposited and there was an intention to
13 claim copyright on the -- the arrangement with the revised
14 text. So it's the combination of text plus -- revised text is
15 covered by 51988, some text must have been intended to be
16 included with 51990. Point number 1.

17 THE COURT: True. The question is what is that
18 text?

19 MR. KLAUS: I'm happy -- okay. I'm happy to get
20 into the question of what that text is, Your Honor, and why
21 don't I do that now. I do want to say, with respect to the
22 other evidence, we also have the Catalog of Copyright Entries
23 from 1935 which was prepared by the copyright office in 1935
24 and which, according to its inside cover, as the certificate
25 from the copyright office says, was -- was at the time

1 sufficient to establish a prima facie case. What the copyright
2 office used -- and this is important because the --

3 THE COURT: You're talking about Exhibit 105.

4 MR. KLAUS: No. It's Exhibit C to my declaration --
5 Exhibits C and D to my declaration on the motion to strike were
6 the Catalog of Copyright Entries we received from the copyright
7 office.

8 THE COURT: Are you talking about the card?

9 MR. KLAUS: No, Your Honor. A and B were the cards
10 that came.

11 THE COURT: Okay. Right.

12 MR. KLAUS: C and D --

13 THE COURT: Right.

14 MR. KLAUS: -- were the Catalog of --

15 THE COURT: Oh, the Catalog of the Copyright
16 Entries. Okay. And?

17 MR. KLAUS: And if you look at Exhibit C --

18 THE COURT: Yes.

19 MR. KLAUS: -- if you look at page 21 of
20 Exhibit C --

21 THE COURT: Page 21.

22 MR. KLAUS: -- the page number from the copyright
23 office in this bound volume was 1260.

24 THE COURT: Yes. I have it.

25 MR. KLAUS: And the column on the right-hand side,

1 the fourth entry from the top, *Happy Birthday to You*.

2 THE COURT: I'm sorry. Which column?

3 MR. KLAUS: Second column on the right.

4 THE COURT: On the right, yes.

5 MR. KLAUS: Four entries from the top.

6 THE COURT: Four entries from the top?

7 MR. KLAUS: I'm sorry. Four entries from the
8 bottom, Your Honor. My apologies.

9 THE COURT: Yes, yes. I see it.

10 MR. KLAUS: *Happy Birthday to You* by Mildred J.
11 Hill, arrangement Preston Ware Orem, PF, which I believe in the
12 day was piano forte or piano solo, with W, and the W means
13 words, as was typed onto the top of what we now know to be the
14 certificate.

15 THE COURT: Okay.

16 MR. KLAUS: So we have -- we have that from the
17 Catalog of Copyright Entries, and as you see on the -- if you
18 look at page number 20, which is the -- what we got from the
19 copyright office, after the title page, says the act of
20 March 4, 1909, going into effect July 1, 1909, provides the
21 Catalog of Copyright Entries shall be admitted in any court as
22 prima facie evidence of the facts stated therein as regards any
23 copyright registration.

24 THE COURT: So what this says is *Happy Birthday to*
25 *You* by Mildred J. Hill. It doesn't say it's the lyrics, does

1 it?

2 MR. KLAUS: It says, with W. Now --

3 THE COURT: It says arranged by Preston Ware Orem,
4 PF, with W.

5 MR. KLAUS: Correct.

6 THE COURT: So unless we say that your proffered
7 deposit copy, which is exhibit --

8 MR. KLAUS: 105, Your Honor.

9 THE COURT: 105.

10 MR. KLAUS: 106. I'm sorry.

11 THE COURT: 106. Unless I accept 106 as, in fact, a
12 true and correct copy of the deposit copy relating to this
13 copyright, even if I accept this as evidence, what it does say
14 is Mildred J. Hill wrote *Happy Birthday to You*, and the
15 evidence also seems to show that she wrote the music to it.
16 There's no question she didn't write the words. In fact, you
17 assert Patty did. You don't even assert that Mildred did.

18 So if that's true in combination, then *Happy Birthday to*
19 *You* by Mildred Hill refers to the music as to which there was
20 an arrangement for piano forte, with text or with words.

21 Question is, again, what words?

22 If we don't know whether 106, in fact, is the deposit
23 copy, then for all we know, it could include text by Mr. Orem
24 relating to nothing about the lyrics. If 106 is admissible and
25 I were to believe it and accept it, then I think you got a

1 pretty strong argument that what other text is there other than
2 the lyrics? But what I'm suggesting is we got a few facts that
3 we're going to have to sort out.

4 MR. KLAUS: May I get -- and I'm happy -- I can get
5 to those points right now, Your Honor.

6 THE COURT: Please do. Please do.

7 MR. KLAUS: Yes. So, first of all, we know,
8 Your Honor, that there was sheet music that was deposited with
9 the 51990 application.

10 THE COURT: Yes.

11 MR. KLAUS: We know that from Exhibit 105.
12 Exhibit 105 is the record of the filing of the copyright.

13 THE COURT: Correct.

14 MR. KLAUS: And right at the top of the page, what
15 it says is *Happy Birthday to You*, exclamation point, by
16 Mildred J. Hill, Preston Ware Orem, employed for hire by
17 Clayton F. Summy Company of U.S.

18 And then the examiner, the person who opened the envelope
19 that day in the copyright office and wrote this down in this
20 book, which is how it got the 51990 number, wrote in, piano,
21 capital S, solo, with words.

22 And if one -- now, what we know is that the --

23 THE COURT: You'll have your opportunity, Counsel.

24 MR. RIFKIN: That's fine, Your Honor.

25 MR. KLAUS: What we know, Your Honor, is that the

1 application that we've looked at, which was 48, didn't say
2 Mildred J. Hill. It didn't say piano solo, with words. It
3 said easy piano arrangement, with text.

4 The person who wrote this down --

5 THE COURT: But it did say also, copyright is
6 claimed on an arrangement as easy piano solo, with text.

7 MR. KLAUS: With text.

8 THE COURT: Exactly the same language as the
9 certificate.

10 MR. KLAUS: What seems -- what seems clear, if you
11 look at the -- if you look at Exhibit 105 and you look at that
12 in conjunction with Exhibit 106, which says on the cover, piano
13 solo, both words capitalized, with words, which says *Happy*
14 *Birthday to You* with an exclamation point, and Mildred Hill --
15 what I would suggest, Your Honor, is that -- that in
16 combination there's no contradictory evidence that what the
17 person was looking at when they filled in the record of the
18 filing was both the application which had the line that
19 Your Honor quoted and the sheet music that said Mildred Hill,
20 that says piano solo, with words. That's one point.

21 We also have the fact, Your Honor, that on the same day,
22 same day that 51990 was received, 51988 was received, that has
23 lyrics and the second verse. And no evidence -- and the
24 combination of those two points, Your Honor, I think, leads
25 only to the conclusion that what was submitted with 51990 were

1 the lyrics and what was submitted with 51988 was the revised
2 text.

3 I would also say, Your Honor, there is -- notwithstanding
4 a scouring of every piece of sheet music that exists, there is
5 nothing the plaintiffs have come up with that has said --
6 nothing that we have found that says here's something else,
7 here is an alternative arrangement, here is an alternative set
8 of lyrics for *Happy Birthday to You*.

9 Indeed, the plaintiffs in their first four complaints in
10 this case said that the deposit with 51990 did include the
11 lyrics, and they were challenging the -- they were challenging
12 the validity of whether or not that was eligible to be claimed
13 for copyright protection. But even they said it, and there is
14 no evidence anywhere that the lyrics could have been or that
15 the text could have been anything other than what we are
16 calling as the lyrics here.

17 So it seems to me the combination of the deposit record,
18 Exhibit 106, other editions of exactly the same lyrics -- and,
19 Your Honor, I would direct you to Mr. Rifkin's declaration in
20 support of the motion to strike, Exhibits C and D, which are
21 later printings of the same sheet music. They were printings
22 in a time when the copyright owner was Summy-Birchard Music.
23 Later on Summy-Birchard is a division of Birch Tree Group. The
24 only evidence of any record ever having been printed are the
25 sheet music that contains the lyrics. There is no evidence of

1 any other set of text.

2 THE COURT: Let me ask you this: The deposit copy
3 of E51988 says Mildred Hill on the top right-hand side, but it
4 also says arrangement by R.R. Forman; right?

5 MR. KLAUS: It says -- just one moment, Your Honor.
6 It also says --

7 THE COURT: On the top left-hand side.

8 MR. KLAUS: Yes. Arrangement by Mrs. R.R. Forman,
9 correct.

10 THE COURT: But 105 -- is it 105?

11 106, which you say is a deposit copy for E51990, doesn't
12 mention Mr. Orem at all. What about that? Does that have any
13 significance?

14 MR. KLAUS: I don't know. Your Honor, I -- I would
15 say the answer is no. I don't think it has any significance,
16 number one.

17 THE COURT: Has no significance in terms of the mix
18 of evidence that I would look at to see whether or not
19 Exhibit 106, in fact, is a true and correct copy of the deposit
20 copy?

21 MR. KLAUS: Your Honor, it's -- first of all,
22 whether Exhibit 106 is an exact duplicate of the deposit copy,
23 I think the evidence suggests very strongly it was, that this
24 was the version that was published in 1935. But I think
25 Exhibit 106 is very close to it, and I don't know what the

1 significance would be of Mr. Orem's name being in the left-hand
2 corner or upper left-hand corner as to whether or not what was
3 intended to be claimed would be what we are calling the lyrics
4 to *Happy* --

5 THE COURT: Let me ask you something. I know
6 nothing about music. Okay? I can see these -- the musical
7 signs and everything, but I wouldn't be able to tell you what
8 it means whatsoever.

9 Is there anything about that piece of sheet music,
10 Exhibit 106, that shows that this is a piano arrangement? I
11 don't know the answer to that. I'm confessing ignorance in
12 music. So I'm asking you that question because I'm trying to
13 search for ways of either confirming or refuting your position.
14 I'm just trying to understand it.

15 MR. KLAUS: I believe, Your Honor, that -- and I'm
16 not an expert in music myself, but I don't believe this was
17 disputed by their expert either.

18 THE COURT: That this is an expression of the piano
19 arrangement?

20 MR. KLAUS: It is an expression of a -- it is an
21 expression of a piano arrangement. It is an expression of a
22 piano arrangement. And by the way, one point that Mr. Kaplan
23 reminded me of that I don't want to forget here, Your Honor --

24 THE COURT: Yes.

25 MR. KLAUS: -- is in terms of you asked what is the

1 evidence that this was the deposit copy. If you look at -- if
2 you look, Your Honor, at the lower left-hand corner of the
3 sheet music --

4 THE COURT: You know, maybe if you have a better
5 copy, my copy is pretty -- it's not that great.

6 MR. KLAUS: May I approach, Your Honor.

7 THE COURT: Yes. Let's see if yours is a little
8 bit -- I guess -- no, no. I'm sorry. I'm sorry. This one is
9 fine. It's the other deposit copy that I have a problem with.

10 All right. Go ahead.

11 MR. KLAUS: Yes, Your Honor. In the --

12 THE COURT: You're referring to the 3075 and 3076
13 notation?

14 MR. KLAUS: Correct.

15 THE COURT: Okay. I understand.

16 MR. KLAUS: Correct, correct. And in serial -- that
17 they were published serially with the -- with the same number.

18 To return to your question, Your Honor, about whether
19 Exhibit No. 106 contains a piano arrangement, I don't believe
20 there's any dispute that the -- the setting of the notes here,
21 the musical notes, is a musical arrangement.

22 THE COURT: Is a musical arrangement?

23 MR. KLAUS: Is a --

24 THE COURT: Piano?

25 MR. KLAUS: I think it's intended for piano. What I

1 do understand, I believe, Your Honor, is that the -- the way
2 that this -- first of all, it says "piano solo, with words" on
3 the cover, and I also think the arrangement of the notes on
4 here is for it to be played -- I think it's a -- it's one hand
5 as opposed to two hands. I believe that, if there were three
6 bars, it would be for what's called a second hand.

7 THE COURT: I'll have to take your word for it.

8 MR. KLAUS: I'm not a pianist, Your Honor, but I do
9 think this would be an arrangement. And I also do think that
10 the -- what we have in terms of the registration certificate,
11 the record of copyright deposits that we have been discussing,
12 says this is both an arrangement and it includes text.

13 THE COURT: Let me just move on and ask you some
14 other questions in terms of what your position would be
15 depending upon how I resolve this question, and then I think I
16 should give plaintiffs an opportunity to address the Court as
17 well on these or any other issues.

18 If I were to conclude -- and let's say I go with your
19 tentative position -- and I'm not holding you to it -- your
20 tentative position that this is very much like the Markman
21 situation, that I would make a determination as to the scope
22 even if there are questions of fact to be determined. Let's
23 assume that's it, and I could decide one of two ways. Let's
24 say it is within the scope or it is not within the scope.

25 If I say it is within the scope, is that the end of the

1 inquiry as far as you're concerned?

2 MR. KLAUS: If the lyrics are within the scope, I
3 believe that it is. The plaintiffs have made an issue
4 regarding chain of title, which I would be happy to get into.

5 THE COURT: Put aside the chain of title. I don't
6 even think that chain of title was sufficiently briefed. It
7 was something you folks threw in there at the end. Whatever it
8 was, I think I need to have you folks really weigh in more on
9 that, but I don't want to talk about that right now.

10 What I'm talking about is, even if this was meant to be
11 included, can I apply the presumption of validity when there is
12 an obvious mistake in terms of the author?

13 MR. KLAUS: Clearly under the Emmylou Harris case,
14 Your Honor, which was a mistake as to the author, clearly the
15 answer is yes.

16 THE COURT: Wait. Emmylou Harris says that you
17 don't -- you don't void anything. I'm not voiding anything.
18 I'm saying, do we apply still a presumption? What presumption
19 do we apply?

20 MR. KLAUS: The presumption --

21 THE COURT: The presumption on -- on the face of it,
22 the certificates don't say any Hill sister. So how could I
23 presume it's true that it's a Hill sister?

24 MR. KLAUS: The answer in terms of whether -- first
25 of all, if the -- if the copyright is valid, then the

1 presumption that follows, Your Honor, is that the lyrics were
2 properly registered, that they were original to the author,
3 meaning they were not copied by someone else. The burden would
4 shift to the plaintiffs under the Feist case to establish that
5 there was a copy. There is no --

6 THE COURT: Let's hold that. It's original to the
7 author -- in this case, Mr. Orem -- which you have already said
8 it's not true. It can't be. The author, it can't -- you know,
9 that's what I'm saying. If I apply the presumption that's
10 permitted under the law, the only presumption I'm going to
11 apply is that the lyrics, if I say are included -- let's say I
12 conclude that way. It is included. They are included. I
13 cannot presume that they are original to the author because you
14 have admitted it is not.

15 MR. KLAUS: It's -- no, you can't -- Your Honor,
16 the -- what we say, the evidence that's in the record that is
17 undisputed is that the Hill sisters wrote this work.

18 THE COURT: Do you claim Mildred wrote the lyrics?

19 MR. KLAUS: We claim that it was Patty Hill. She
20 testified who wrote the lyrics. The two sisters, just as they
21 had with respect to the underlying work *Good Morning to All*,
22 that Mildred wrote the music, melody music, and that Patty was
23 the lyricist in the combination.

24 THE COURT: That's your position.

25 MR. KLAUS: Correct. And those --

1 THE COURT: Go ahead.

2 MR. KLAUS: I'm sorry. And those --

3 THE COURT: I appreciate you being very, very
4 polite. And I do appreciate that, and I don't mean to be
5 impolite when I cut you off. It's just that I'm trying to get
6 to something, and I don't want to forget it. At my age, I tend
7 to forget a lot of things if I don't tend to it right away. So
8 you'll forgive me.

9 MR. KLAUS: Your Honor, the -- we'd say that the
10 underlying evidence is -- which is the deposition testimony,
11 which are the assignments from the Hill sisters to the
12 foundation --

13 THE COURT: We still have to get to the evidence.
14 Whether you say there's a presumption, or no, they have
15 presented some evidence. We still have to get to the evidence.

16 MR. KLAUS: Okay. So that -- our position,
17 Your Honor, would be that even if -- first of all, there is a
18 presumption that the copyright is valid, that the copyright
19 covers the text. And it is their burden to discharge that.

20 Now, one thing I would say that they tried to do -- we
21 also haven't discussed yet, but I'm sure Mr. Rifkin will -- is
22 they claim what was licensed from a third sister, the youngest
23 sister Jessica Hill, to the Clayton Summy Company --

24 THE COURT: I'm glad you brought this up because
25 that is something I do want to talk about. Thank you.

1 MR. KLAUS: What was licensed, they say, was simply
2 piano arrangements, and they say a consequence of that, a
3 consequence of it being the licensing of piano arrangements, is
4 that Summy, as a licensee, as opposed to having a complete
5 assignment of the copyright, was not permitted to register the
6 work. And therefore, when the work was published in 1935, it
7 fell into the public domain.

8 And that is -- there's the Abend case which we have cited,
9 Your Honor, which is a Ninth Circuit case which says -- quite
10 clearly adopts the reasoning of the Second Circuit in a case
11 called Goodis. And the Abend case says that this exact
12 argument, which is called a doctrine of indivisibility rule,
13 that the licensee couldn't register and that the work slipped
14 into the public domain -- the Abend case rejects that
15 proposition, Your Honor, and what it says is that the problem
16 with applying the -- and this is at page 863 F.2d.

17 The case is at 1465, and the key discussion is pages 1469
18 to 1470, that it brings about an unnecessarily harsh result of
19 thrusting the author's product into the public domain where, as
20 here, everyone interested can see the copyright notice, as one
21 does on Exhibit 106, plainly published with notice, and there
22 was no evidence of an intention by the underlying authors,
23 copyright owners in this case, as of 1935 the Hill sisters, to
24 put their work into the public domain, of which there is no
25 evidence in this record that the Hill sisters intended for this

1 work to be placed in the public domain.

2 Under the -- under Abend and Goodis and under another
3 case, Your Honor, which is the -- which is Sanga Music against
4 EMI, 55 F.3rd 756 -- it's another Second Circuit case, cites
5 Abend, cites the Goodis case -- says this has been applied
6 repeatedly, that what happened over the years is that the
7 courts rejected the doctrine of indivisibility in saying that a
8 licensee was not permitted -- that a licensee's publication, if
9 they were a licensee, injected the work into the public domain.

10 THE COURT: I think -- I'll let Mr. Rifkin make his
11 own argument, but my understanding of his argument is really a
12 little bit different from that. It's not just that the
13 registrant is just a licensee but also that the license, even
14 the content of the license, was limited to some piano
15 arrangements.

16 So I think, if you're going to address that issue,
17 maybe -- I understand you've addressed this other issue.
18 That's fine. I appreciate it. But really it's the question as
19 to what was licensed.

20 Let's assume for the moment licensees -- you know,
21 registering is not going to affect the disastrous results that
22 Abend tries to avoid. All right. Let me know what your
23 response is, which I assume Mr. Rifkin will argue, is that the
24 allegation -- of course, we don't have that particular license
25 agreement. That's the '34 license agreement which we do not

1 have; right? Am I right on that?

2 MR. KLAUS: That's -- that's correct.

3 THE COURT: Okay.

4 MR. KLAUS: What we do, though, have is -- we do
5 have, Your Honor, in Exhibit 50 --

6 THE COURT: Right. That's the Complaint.

7 MR. KLAUS: Correct.

8 THE COURT: Okay. Let's put aside the evidentiary
9 issue as to its admissibility. But assuming it is admissible,
10 we look at that. Doesn't that seem to say that all that was
11 licensed was piano arrangements, not the lyrics? It doesn't
12 say anything about lyrics as far as I can see.

13 MR. KLAUS: It doesn't say lyrics were not included.
14 What it, in fact, says, Your Honor, is it describes in the
15 tenth paragraph on page 3 of the Complaint --

16 THE COURT: Okay. Hang on one second. Let me --

17 MR. KLAUS: Of course.

18 THE COURT: -- review that with you.

19 Tenth paragraph?

20 MR. KLAUS: Yes.

21 THE COURT: Okay. The one that says that one of the
22 songs contained in the works mentioned and described at
23 paragraphs 4th to 8th, inclusive hereof, is one entitled
24 *Good Morning to All*, which, with words, written by the said
25 Patty S. Hill, was later entitled *Happy Birthday to You* and was

1 included among the song copyrighted, as aforesaid, by Summy.

2 That one?

3 MR. KLAUS: That's one of them, Your Honor.

4 THE COURT: Okay. Why don't you tell me your take
5 on the significance of that.

6 MR. KLAUS: Our take on the significance of that is
7 that there's plainly an allegation that it wasn't simply the
8 *Good Morning to All* song. It was also *Happy Birthday to You*
9 with those lyrics that was included within the license.

10 And then if you look, Your Honor, at paragraph 15 --

11 THE COURT: 15, all right.

12 MR. KLAUS: -- which starts on page 4, continues on
13 to page 5, the nub of the Complaint in this case by the Hill
14 Foundation was that the license that had been granted -- not
15 that Summy had exceeded the license by publishing *Happy*
16 *Birthday to You* in sheet music with the lyrics. His Complaint
17 says, as she had done in her deposition, that Patty was the
18 author of the lyrics.

19 The allegation was that the -- that Summy had gone in
20 excess of the license by licensing people to include *Happy*
21 *Birthday to You* in motion pictures, what we now call
22 synchronization licensing. And what it says at the bottom of
23 that paragraph is the only rights acquired at any time by --

24 THE COURT: That paragraph meaning paragraph 15?

25 MR. KLAUS: 15.

1 THE COURT: Yes.

2 MR. KLAUS: Yes. And so at the top of page 5, what
3 it says is the only rights acquired at any time by Summy under
4 the original express license and the oral renewals thereof
5 being those of publication and sale of said songs or works in
6 sheet music form.

7 And then if Your Honor -- if you look at the paragraph 24
8 of the Complaint --

9 THE COURT: Yes.

10 MR. KLAUS: What it says, during the calendar years
11 1934 and 1935 the aforesaid Jessica M. Hill, as owner of the
12 copyright of the said book or work *Song Stories for the*
13 *Kindergarten* -- and there is this issue here where they are
14 debating what the reincorporation of the claim that Summy
15 Company was.

16 But the allegation is that Jessica Hill, it's undisputed,
17 controlled the -- controlled the interest that devised from
18 both Patty and Mildred, that she granted to this defendant a
19 number of licenses for the publication, sale, and performance
20 of various piano arrangements of the song variously entitled
21 *Good Morning to All* and *Happy Birthday to You*.

22 And *Happy Birthday to You* has already been previously
23 defined in this Complaint within paragraph 10 to say words
24 written by the said Patty Hill.

25 THE COURT: But that may be in terms of which

1 *Happy Birthday*, it's that *Happy Birthday*. But this says
2 publication, sale, and performance of various piano
3 arrangements of *Good Morning to You* and *Happy Birthday to You*.

4 MR. KLAUS: What I would submit to you, Your Honor,
5 is that the piano arrangement discussion must refer back to the
6 sheet music form that's in paragraph 15, that that was what
7 the -- the dispute between the parties was whether or not the
8 license that included the lyrics to *Happy Birthday to You*,
9 sheet music form which we know is the Exhibit 106, as opposed
10 to the question whether that reference to piano arrangements is
11 simply a reference to the musical notes.

12 And I would say this, Your Honor. This is -- and let
13 me -- let me come to this point, which is that the consequence
14 of the plaintiff's reading -- the consequence of the
15 plaintiff's reading which is presuming against the Hill
16 sisters, that what they licensed was not just notes but, as it
17 says in paragraph 10, the words *Happy Birthday to You*, to that
18 song, the consequence of their argument is that the publication
19 by Summy Company in 1935 with the copyright registration
20 destroyed the Hill sisters' common-law copyright.

21 THE COURT: Because that would have constituted a
22 general publication.

23 MR. KLAUS: It would have constituted a general
24 publication. Now, that's one thing. It would constitute an
25 abandonment into the public domain. I -- which -- and that's

1 what Abend says, we're going to go against that and not apply
2 this doctrine harshly to work that kind of forfeiture.

3 But the second point, Your Honor -- and this is
4 important -- if we're wrong about that, and their position is
5 it didn't put it into the public domain because it was not an
6 authorized publication -- if that's the case, the copyright
7 never left the Hill sisters and when they assigned it to Summy
8 in 1944 there had been no -- there had been -- there had been
9 no -- there had been no destruction of the copyright in 1935 by
10 the publication.

11 It remained their copyright, and at the point in time
12 where they assigned it to the Summy Company in 1944, Summy
13 Company's existing copyright certificate and the rights they
14 obtained from the Hill sisters would have merged.

15 THE COURT: I'll take another look at the 1944
16 assignment, but it seems to me the 1944 assignment just
17 assigned whatever rights they may have had in those specific
18 copyright certificates as identified. So if that's it, then
19 your argument becomes a little bit circular.

20 MR. KLAUS: Well, I think it was all -- it's a
21 matter of intent as to what was covered by the assignment,
22 Your Honor. That's the -- that's the holding of the Ninth
23 Circuit case we cite, South-Western Publishing Company,
24 651 F.2d 653, question of intent as to what would be assigned.

25 And given the -- I'll finish up, Your Honor. Given the

1 evidence -- we submit it's undisputed -- that the Hill sisters
2 wanted their works to be protected by copyright, given the
3 undisputed evidence that, for continuing on, a third of the
4 royalties from the -- from the licensing of the work continued
5 to go to the Hill Foundation and now to the Association For
6 Early Childhood Development, that the evidence that what the
7 Hill sisters wanted was for the copyright to protect this work
8 and that they intended to transfer that work is unmistakable
9 from the documentation, Your Honor.

10 THE COURT: Let me just ask you one other question.

11 MR. KLAUS: Yeah.

12 THE COURT: To the extent that the publication
13 occurred three days, I think, before -- it was actually the
14 same day as application but three days before the certificates
15 were issued, I think, something like that, and you say that the
16 publications, if you say these are the sheet music, including
17 the purported deposit copy for E51990 all said Mildred Hill on
18 it, why was there any occasion for mistake?

19 MR. KLAUS: I have no idea, Your Honor.

20 THE COURT: Does that mean maybe it wasn't a
21 mistake?

22 MR. KLAUS: Your Honor, what we know is there was no
23 effort to hide Mildred Hill's authorship if the sheet music was
24 submitted with her name on it.

25 THE COURT: I don't think anybody was trying to hide

1 it. Maybe somebody didn't claim it. Maybe, you know, if
2 Mildred Hill wrote the music, great. We're talking about the
3 lyrics, and they're not claiming lyrics.

4 I'm just saying that's a -- I'm thinking about it in
5 conjunction with everything else you've said.

6 MR. KLAUS: I under- -- I hear what Your Honor is
7 saying, but I think, when it is combined with the fact that
8 the -- specifically said, with text, in another application the
9 same day for exactly the same lyrics plus a second verse, was
10 intended to claim text.

11 When one looks at no one has up until the point in this
12 case so far has ever claimed that the "with text" was intended
13 to be something other than the lyrics, and there's no
14 evidence --

15 THE COURT: You never sued anybody on those lyrics
16 either.

17 MR. KLAUS: There's no evidence of there being --
18 there's no evidence -- which we're not -- which we have -- we
19 have licensed the work for 70 years. The people who have --

20 THE COURT: How much are the licenses?

21 MR. KLAUS: The licenses vary, Your Honor.

22 THE COURT: From what to what?

23 MR. KLAUS: That, I don't -- I don't have. I don't
24 know that information specifically. It depends. There are two
25 types of licenses that are at issue here, just so we're clear.

1 We're not talking about little kids' birthday parties in the
2 backyard with people singing. That's not a public performance.

3 THE COURT: That's good. So I haven't been
4 infringing anything. All that time when I'm in a restaurant
5 and somebody brings me a little cupcake, I'm okay on that then?

6 MR. KLAUS: Yes, Your Honor.

7 THE COURT: I'm relieved.

8 MR. KLAUS: Just to be clear, Your Honor, just as
9 with any other popular work -- *God bless America*, which is
10 under copyright, *Frosty the Snowman*, which is under
11 copyright -- there's no popularity penalty for a work that
12 achieves popularity.

13 And the way that it works, if you sing *Happy Birthday to*
14 *You* in your home, in your backyard, it's a private performance
15 to which there is no -- the copyright doesn't apply. If it's
16 something done in a space to which a public performance license
17 is required like a large restaurant or something that meets the
18 size requirements of the Copyright Act, just as with any other
19 work, Your Honor, that is sung in those cases or that is piped
20 in through the music in the background, that establishment has
21 an ASCAP public performance license which blanket --

22 THE COURT: You don't even have an estimate of the
23 range of the licensing fees?

24 MR. KLAUS: Your Honor, I believe --

25 THE COURT: I don't want you to guess. That's

1 worthless.

2 MR. KLAUS: I don't want to -- I don't want to
3 guess, but I think that sync licenses --

4 PERSON IN AUDIENCE: 500 to a thousand, 1,500.

5 MR. KLAUS: I'm told by my client from
6 Warner/Chappell that the range is from \$500 to \$1,500 for sync
7 licensing.

8 THE COURT: They add up.

9 PERSON IN AUDIENCE: It can be more depending on the
10 type of the --

11 MR. KLAUS: Yes. Depending on the type of --

12 THE COURT: So if it were a full-length feature
13 movie --

14 MR. KLAUS: If something were a full-length feature
15 movie produced by a major motion picture studio that has
16 budgets of tens of millions of dollars --

17 THE COURT: Right.

18 MR. KLAUS: -- then, yeah, a sync license, as with
19 any other work --

20 THE COURT: How much would that be?

21 PERSON IN AUDIENCE: I'm not trying to be overly
22 vague. It just depends on the scope of the --

23 THE COURT: Five figure, six figure?

24 PERSON IN AUDIENCE: It could be five figures, six
25 figures, like any other song.

1 THE COURT: Okay. One final question, and I will
2 give the plaintiffs an opportunity. I know that they've been
3 waiting patiently for this. Once I determine the scope issue,
4 even if what you assert is correct -- and I don't know whether
5 Mr. Rifkin agrees with you or not that I will determine it even
6 if there are factual issues on the scope -- but once we go
7 beyond the scope, and if I determine that there is going to be
8 some disputed facts to inform any of those other issues that
9 you and I have talked about, whether they're affirmative
10 defense issues, whether they're initially your burden issues
11 and so forth, those would, I take it, be something that would
12 be tried by a trier of fact.

13 MR. KLAUS: If there were factual disputes.

14 THE COURT: If there were factual disputes, of
15 course. If there are no factual disputes, it would be summary
16 judgment, but if I determine that there are factual disputes,
17 that would be something tried by a trier of fact in a trial.

18 MR. KLAUS: I believe -- I believe that's correct,
19 Your Honor, with the one caveat, which is that when you say
20 apart from the scope and valid- -- the plaintiffs have thrown
21 everything and the kitchen sink at this copyright, and I want
22 to know specifically where there was the dispute. But in
23 general --

24 THE COURT: Of course.

25 MR. KLAUS: But in general -- in general I do agree

1 with that, Your Honor.

2 THE COURT: Okay. And has there been a request for
3 a jury trial on this issue, and can there be a jury trial on
4 this declaratory relief aspect of it, or are we going to run
5 into some problems with the so-called Dairy Queen cases because
6 of certain other direct claims beyond the declaratory relief?

7 MR. KLAUS: There is, and there can't be a jury
8 trial right on the declaratory relief claim, Your Honor, I
9 believe. That said, the plaintiffs have a set of state law
10 claims -- breach of contract and the like -- that they have
11 held in abeyance or that Your Honor stayed pending the
12 determination of the federal copyright claim. And I believe we
13 discussed this the last time, that there is a potential
14 Beacon Theatres-Dairy Queen issue about whether the Seventh
15 Amendment would require facts that are necessary --

16 THE COURT: Those --

17 MR. KLAUS: The facts that are necessary to decision
18 on this -- and, again, we would have to see what those were.

19 THE COURT: But you're happy with a court trial.

20 MR. KLAUS: We're fine with a court trial,
21 Your Honor, yes.

22 THE COURT: Okay. Thank you.

23 Mr. Rifkin?

24 MR. RIFKIN: Good morning. And obviously I'm happy
25 to answer any questions Your Honor may have. I presume you

1 want to ask questions rather than have me make some prepared
2 remarks.

3 THE COURT: Well, I think you have heard my
4 discussion with Mr. Klaus, and to the extent that in light of
5 that discussion you want to make your point, because I
6 certainly don't mean to take your position, because I don't
7 know some of these positions you would take, and my questions
8 are not indicative of anything I decided to do. They're to
9 facilitate a discussion so that I can have the benefit of your
10 respective position.

11 So if you have something you want to particularly inject
12 in light of my conversation with Mr. Klaus, please do that.
13 And you're right. I do have some questions, and I may be able
14 to work it in at the propitious time.

15 MR. RIFKIN: Yes, Your Honor. And I'll try to be
16 brief in my remarks because I know Your Honor will have
17 questions. I know how much time you've spent thinking about
18 this.

19 First, I think the parties all agree that at least insofar
20 as the first claim is concerned, the request for declaratory
21 judgment, with respect to the scope of the copyright or its
22 validity -- and you recall there was an issue about whether we
23 challenged the scope or the validity or both, and we tried to
24 explain it. What we said was the copyright in question, 51990,
25 doesn't and can't cover the song, but if for some reason the

1 defendants took the position that it did, it would be invalid.
2 And we will address that at the Court's pleasure, but that is
3 the declaratory judgment claim as to which there is no right to
4 a jury trial and as to which no jury demand has been made.

5 So I think, to answer your first question, we agree that
6 if Your Honor believes that the record on summary judgment is
7 sufficient to decide the issues, if there are any disputed
8 issues of fact, Your Honor would decide them as the finder of
9 fact in that case.

10 THE COURT: As to scope.

11 MR. RIFKIN: As to the scope and as to the validity
12 of the copyright under Count 1 of the Complaint, the
13 declaratory judgment action. That's correct. So I think we
14 can take that issue -- I think that takes the issue off the
15 table.

16 THE COURT: Well, let me -- scope, okay. Validity,
17 you're the one who's got these other claims; so you can decide
18 what you want to do. I'm just trying to think whether or not,
19 if I decide validity, does that take away one also issue
20 relevant to your state law claims so that under Beacon Theatres
21 and Dairy Queen I can't do that, I have to allow you to
22 maintain your right to jury trial first as opposed to this?
23 And that's the only reason I raised the issue.

24 MR. RIFKIN: With respect to validity, if there are
25 issues that overlap, then, yes, I agree that there are issues

1 that would require that a jury trial take place first. But I
2 do believe that the scope issue resolves all of these disputes
3 because I believe -- and I understand the Court hasn't made a
4 decision yet, but Your Honor's question certainly anticipated
5 most, not all, but most of the arguments we wanted to make
6 today.

7 At one point I stood up during --

8 THE COURT: Yes.

9 MR. RIFKIN: -- counsel's argument. I certainly
10 didn't mean to interrupt and be disrespectful. I did want to
11 raise an evidentiary objection to the exhibit that Mr. Klaus
12 attached to his declaration in response to our motion to
13 strike, Exhibit 106. That exhibit, which I believe is
14 Exhibit C to Mr. Klaus's declaration --

15 THE COURT: That's not 106. 106 is the --

16 MR. RIFKIN: Correct.

17 THE COURT: -- purported deposit copy.

18 MR. RIFKIN: Correct. Your Honor, the prelude to
19 this is the presumption question, and as Your Honor has
20 discussed and as we briefed exhaustively, the presumption is a
21 limited presumption. It's a rebuttable presumption, and it
22 applies only to certain things. It applies to, for example,
23 the facts that are stated in the registration certificate.

24 There was a time when the defendants claimed that a
25 registration certificate, or what they said was a registration

1 certificate which had Mildred Hill's name in it, somehow
2 entitled them to a presumption that she wrote the song. They
3 have now admitted that that Exhibit 101 and Exhibit 103, that
4 they are not registration certificates, and we're grateful for
5 that admission.

6 And I believe today -- at least I made some notes -- they
7 now admit that Mildred did not write the lyrics to *Happy*
8 *Birthday*, that if any Hill sister wrote the lyrics to *Happy*
9 *Birthday*, it was Patty. We've seen that issue in a number of
10 iterations from the defendants, but I think today the record is
11 clear that they contend that Patty, whose name doesn't appear
12 anywhere in any copyright records as the author of *Happy*
13 *Birthday*, that Patty wrote the lyrics.

14 But the reason that I stood up is I also said that they
15 are relying on Exhibit C to Mr. Klaus's declaration, which is
16 not the registration certificate. It's --

17 THE COURT: Before you go --

18 MR. RIFKIN: Yes.

19 THE COURT: -- let me inject one of my questions.

20 MR. RIFKIN: Yes, of course.

21 THE COURT: Do you have any objection to Patty's
22 deposition testimony in which she says she wrote the lyrics or
23 the words to *Happy Birthday to You*?

24 MR. RIFKIN: No, Your Honor.

25 THE COURT: Okay.

1 MR. RIFKIN: We -- we believe that the Exhibit C to
2 which Mr. Klaus referred during his argument is not part of the
3 summary judgment record. And although it's not certified, we
4 agree that it is a copy, an accurate copy of what is called the
5 Catalog of Copyright Entries.

6 There's two sources for copyright entries. Before
7 sometime in the mid 1960s, they were published in volumes much
8 like Encyclopedias, and they were distributed to libraries all
9 over the country, and they were the primary source that the
10 public went to to look for a copyright, because most people
11 didn't have access in the early 1920s or '30s to the copyright
12 office's records in Washington.

13 So these books were published by the copyright office and
14 circulated all over the country, and they are entitled to a
15 presumption. That is, they are entitled to the same
16 presumption that the certificates are entitled to. And
17 Mr. Klaus points to that, but it's not -- and I think this is
18 important -- it's not in the summary judgment record. It's
19 only in his opposition to our motion to strike Exhibit 106,
20 which I will address in turn.

21 But were it placed in the record, then we would have
22 provided a comparison, and the comparison would be the -- and
23 that was the Catalog of Copyright Entries for copyright 51990.
24 And I apologize that this is so complicated, but there's two
25 series of copyrights. There's the 1935 copyright, and that's

1 51990, and then there's the renewal in 1962.

2 And I think Mr. Klaus said -- and I think he's right, I
3 agree with him -- that the 1935 copyright is expired. And its
4 only relevance is what did -- what did Summy preserve when it
5 renewed the copyrights in 1962?

6 And significantly, the copyright for the renewal for
7 51990, which is 306186, it's not in the record because 305- --
8 because the Catalog of Copyright Entries for 51990 also isn't
9 in the record.

10 But the renewal says in the copy -- in the Catalog of
11 Copyright Entries that the claim in the renewal, which is the
12 only certificate that matters now, is limited to the
13 arrangement written by Preston Ware Orem. If the Court is
14 going to consider --

15 THE COURT: You're saying that the catalog says
16 that?

17 MR. RIFKIN: Yes, Your Honor.

18 THE COURT: You're not saying that the renewal
19 certificates say --

20 MR. RIFKIN: No, Your Honor.

21 THE COURT: I don't have that document.

22 MR. RIFKIN: You have -- technically you have
23 neither document in -- in the summary judgment record.

24 THE COURT: Right.

25 MR. RIFKIN: You do have before you, in response to

1 our motion to strike Exhibit 106, you have a reference to the
2 Catalog of Copyright Entries for 1935 for 51990. And all I'm
3 saying is this: If Your Honor is going to consider that for
4 anything other than the motion to strike, then we would ask --
5 first, we would ask that it be excluded from the record on the
6 motion for summary judgment because it wasn't made part of the
7 record on the motion for summary judgment.

8 Your Honor knows this record is exhaustive. The parties
9 went back and forth for days and weeks, completing it. If
10 defendants had submitted that as part of the record, we would
11 have respond by submitting the catalog entry for 306186, which
12 says expressly and clearly that the claim is limited to an
13 arrangement by Preston Ware Orem.

14 We believe that the Court should allow us the opportunity
15 to supplement the record if it's going to consider the
16 Catalog of Copyright Entries for any purpose at all on the
17 summary judgment motion.

18 Now, I think, in fairness, the plaintiffs ought to be able
19 to complete the record by submitting that one page, the catalog
20 entries for 1962 for 306186, which Your Honor may look at and
21 say really ends the discussion.

22 THE COURT: Is there also an equivalent to
23 Exhibit 105?

24 MR. RIFKIN: Yes, there is. The equivalent for
25 Exhibit 105, which if I'm remembering all this correctly in my

1 head now, Exhibit 105 is 306185; is that right? I think
2 that's -- am I remembering that, or is that what you intended?
3 Because I don't know that that's correct now.

4 306185 and 306186 are plaintiff's Exhibits 67 and 68, and
5 I prefer we use those because we've moved to strike the
6 defendant's exhibits because they're not certified. 105 --

7 THE COURT: 105 is the, you know, the one that
8 assigned it 51990.

9 MR. RIFKIN: Yes.

10 THE COURT: It's more like a spreadsheet looking
11 document.

12 MR. RIFKIN: Yes, yes. And there is -- if
13 Your Honor is asking the question, is there a -- is there
14 something like this for the 1962 --

15 THE COURT: Yes. That's my --

16 MR. RIFKIN: I don't believe so. What we have is we
17 have a copy of the catalog entries which we were able to obtain
18 from the copyright office.

19 THE COURT: So there's a separate catalog entry for
20 1962 but not a separate document of the kind embodied in 105.

21 MR. RIFKIN: The handwritten record, no, not like
22 this for 306185 or 306186, the two renewals.

23 THE COURT: Okay.

24 MR. RIFKIN: Forgive me. I misunderstood your
25 question, and I apologize. So if -- if Your Honor would like

1 to hear some of my thoughts on some of the questions you asked
2 of Mr. Klaus, or if Your Honor has any questions --

3 THE COURT: Let me ask you whether or not you have
4 any evidentiary objection to the use of the Amended Complaint.

5 MR. RIFKIN: Of -- of our Amended Complaint,
6 Your Honor?

7 THE COURT: No, no, no, no. No, no, no. Of the
8 Amended Complaint in Hill Foundation v. Summy.

9 MR. RIFKIN: Exhibit 50?

10 THE COURT: Yes.

11 MR. RIFKIN: We think Exhibit 50 is admissible, but
12 we think it needs to be read in conjunction with Exhibit 51,
13 which is, frankly, the more important of the two. Exhibit 50
14 is -- if anything, it's a statement by the plaintiff in that
15 case. It's not -- it's not evidence, and as Your Honor knows,
16 it's -- it's allegations in a Complaint, which the defendant is
17 free to deny.

18 And here the Hill Foundation made the allegations that
19 Mr. Klaus discussed with Your Honor, and frankly I think it's
20 clear from the Complaint that what they were selling was the
21 right to various piano arrangements.

22 THE COURT: And hence you're not going to object
23 to --

24 MR. RIFKIN: No.

25 THE COURT: -- its consideration.

1 MR. RIFKIN: No. I will note here very briefly,
2 because I think Your Honor understands our argument, Mr. Klaus
3 seemed to think that we were basing our argument on the
4 distinction between a license and sale. It's immaterial.
5 Whether it's a license or sale, or anything else for that
6 matter, the -- the transfers from Jessica to Summy in 1934 and
7 1935 -- and by the way, let me correct one statement.

8 Patty Hill died in 1950. She was alive in 1934 and 1935
9 when Jessica made those assignments, and she was alive as well
10 in 1942 when the Hill Foundation sued Summy in Exhibit 50.

11 Mildred died many years before. She died in 1916; so she
12 was no longer alive. So if Mildred was acting as anyone's heir
13 or executrix, it would be as Mildred -- I'm sorry. If Jessica
14 was acting on anybody's behalf, it would be on behalf of
15 Mildred.

16 But what I think is even more pertinent is the answer
17 filed by Summy, the defendant's predecessor. And in the
18 answer, referring to the paragraph --

19 THE COURT: That's 51?

20 MR. RIFKIN: This is Exhibit 51, yes, Your Honor.

21 This is a binding judicial admission, unlike -- unlike an
22 allegation in a Complaint by a plaintiff who is not here
23 anymore, and answered by a defendant whose successor is
24 claiming to own the copyright. In it Summy says that it
25 acquired -- hence, the difference between a license and an

1 acquisition -- but it says it acquired the rights to -- now I'm
2 quoting from paragraph 18 on page 684 of Exhibit 51 -- various
3 piano arrangements of the said musical composition,
4 *Good Morning to All*.

5 And we think it could not be any clearer that what they
6 bought was what we've said all along, which was the rights to
7 various piano arrangements but not to the lyrics themselves.
8 The lyrics to the song are not mentioned anywhere in the
9 Complaint. They are not mentioned anywhere in the Answer
10 except where Summy denies that Patty Hill wrote the *Happy*
11 *Birthday* lyrics.

12 THE COURT: Let me ask you this. So this evidence
13 would be, in your mind, relevant not only to the question as to
14 whether or not any rights to the lyrics had ever been -- had
15 been transferred to Summy as of the time of the registration,
16 but it also may be circumstantial evidence tending to show that
17 the registration did not include the lyrics. Is that your take
18 on that?

19 MR. RIFKIN: Exactly. And I listened very carefully
20 to Your Honor's questions in the very beginning of Mr. Klaus's
21 presentation, and I thought they were particularly cogent when
22 Your Honor asked him about paragraph 3 of exhibit -- of the
23 registration certificate --

24 THE COURT: Question Number 3.

25 MR. RIFKIN: Question Number 3 from the registration

1 certificate where it identifies the author, and then Number 7
2 where it identifies the scope of the work that's claimed. And
3 Your Honor quite correctly said they now admit -- and they've
4 admitted in their brief, and now they've admitted again
5 today -- they now admit that Preston Ware Orem didn't write the
6 words and that Mrs. R.R. Forman didn't write the words. They
7 now seem to think that Patty wrote the words.

8 Patty's name -- even if Your Honor admits Exhibit 106,
9 Patty's name isn't on Exhibit 106. It's not on Exhibit 44,
10 which is 51988. It's not on Exhibit 48, which is 51990. And
11 for that matter, it's not on the renewals which are Exhibits 67
12 and 68. Patty's name doesn't appear anywhere in any record
13 that Your Honor has been asked to draw a presumption from.

14 And so I think, when you look at the -- at the Answer that
15 Summy filed, it is abundantly clear that the transfer from
16 Jessica was limited to the various piano arrangements which is,
17 of course, the series of copyrights that they began to register
18 in late 1934 and registered until the end of 1935.

19 And it does also inform the question whether Summy claimed
20 a copyright in the lyrics that were written by someone other
21 than the author that's identified. I think the answer is no.

22 And the suggestion that there was a mistake, I think,
23 frankly, when you look at Exhibit 51 and you put it into the
24 context of what happened after that, which as Your Honor knows
25 includes a series of lawsuits that were filed by not just the

1 Hill sisters but also by Summy, none of which ever asserted any
2 claim under either of the two copyrights that now
3 Warner/Chappell says were mistaken, and there was no attempt to
4 correct it in 1962 when it was renewed.

5 THE COURT: What about the assertion by Mr. Klaus
6 that in your previous versions of your Complaint that you have
7 admitted that E51990 includes the lyrics?

8 MR. RIFKIN: I disagree that we admitted it. I
9 think there was some confusion regarding what we alleged. I
10 think -- I think we tried to perhaps cover the possibility that
11 the lyrics may have been included in the song. We don't know.
12 We really don't. And by "we" I mean none of us here. Not the
13 plaintiffs, not the defendants, and respectfully I don't think
14 Your Honor yet has the ability to decide what was the deposit
15 copy for 51990.

16 THE COURT: Of course, you underestimate my powers.

17 MR. RIFKIN: I may well and perhaps at my peril,
18 Your Honor; so I won't suggest that. But we -- we do know
19 this: We know that the deposit copy is missing. It may or it
20 may not contain the familiar lyrics to the song *Happy Birthday*
21 *to You*. We think that there's a strong line of cases that says
22 that, without the deposit copy, the defendant can't prove the
23 scope of the copyright.

24 THE COURT: But as a matter of evidence law, if the
25 original is unavailable through no fault of the party

1 proffering it in this case, the defendants, then we can receive
2 evidence on the issue as to what that deposit copy might have
3 been.

4 MR. RIFKIN: I agree, and that's with a couple of
5 provisos. The first proviso is that the evidence is properly
6 authenticated and properly identified with a witness who has
7 some relevant knowledge, that it is otherwise admissible, and
8 that it is supported by testimony that it is a replica of the
9 work that's deposited.

10 Mr. Klaus said -- and I took careful notes, but he also
11 says it in a brief. He says they are no longer claiming that
12 Exhibit 106 is an exact copy of what was deposited with the
13 copyright office. He says it's close to what was deposited
14 with the copyright office. There's no testimony that that's
15 correct, but at least we now know --

16 THE COURT: In all fairness to Mr. Klaus, I don't
17 believe that he meant that in a way that you're interpreting
18 it. I think he meant it in a way that there certainly would be
19 no material difference between the two and that he certainly is
20 not conceding that, gee, maybe the lyrics were there or not
21 there. I don't think it would be a fair interpretation of his
22 argument. I didn't take it that way.

23 MR. RIFKIN: If he intends to mean that this is a
24 representation of what was deposited, it would still be
25 inadmissible for a couple of reasons, as we briefed in our

1 motion to exclude the evidence, the principal reason of which
2 is it can't be authenticated under any of the rules.

3 The defendants claim that the photocopy is an ancient
4 document, but there's no attempt whatsoever to satisfy the
5 requirements for admissibility of an ancient document. To be
6 admissible as an ancient document, someone has to identify what
7 condition it was in when it was found, where it was found, that
8 it would be found where it's expected.

9 For example, we purchased a number of fairly old editions
10 of some of the books that were published in the early part of
11 the 20th century. This happens to be a unique one. This is a
12 1921 printing of the book *Song Stories for the Kindergarten*,
13 and it is obvious from its condition that it is an ancient
14 document. I couldn't date it, but I know -- with certainty I
15 know it's more than 20 years old. But someone who is an expert
16 in dating documents certainly could.

17 The only thing we have for Exhibit 106 is a photocopy
18 which could have been made last year, a decade ago, or
19 yesterday. We simply don't know. We don't know who found it,
20 where it was found, or anything about it.

21 THE COURT: According to Rule 803.16 --

22 MR. RIFKIN: Yes, Your Honor.

23 THE COURT: -- which talks about statements in
24 ancient documents, a statement in a document that is at least
25 20 years old and whose authenticity is established, those are

1 the only requirements of the rule. So is it 20 years old or
2 not?

3 And the authenticity, you don't need somebody, I would
4 think, to say I was there in 1935 and I saw this thing print up
5 and that's what it was. You could have other circumstantial
6 indicia tending to show that it may, in fact, be that document
7 and was generated back in 1935, among other things, the
8 testimony regarding the publication numbers.

9 MR. RIFKIN: And I want to come to that in a moment,
10 but before we get to Exhibit 803, there's a predicate for that,
11 which is to establish the authenticity of the document as an
12 ancient document. In other words, there's two criteria that
13 have to be met. There's the criteria of Rule 901(b)(8), which
14 we discuss in our motion to strike, which says that an ancient
15 document is not a self-authenticating document. You can't
16 simply say here it is, it looks like it is old, and you can
17 accept it for that. It must be authenticated under Rule
18 901(b)(8), and we cite Columbia First Bank v. United States.
19 It's a federal claims court decision from 2003.

20 Independent of that, once the document is authenticated by
21 a witness who can describe its condition when it was found,
22 where it was found, and that it's at least 20 years old -- all
23 three of those conditions have to be met by a witness with
24 knowledge, not self-authenticated. The evidence must be
25 provided by a witness with knowledge under Rule 901(b)(8).

1 Then we look at whether the hearsay exception of Rule 803.13
2 applies.

3 And respectfully, Your Honor, we don't get past Rule
4 901(b) for Exhibit 106 at all. So I just want to make sure we
5 put the cart behind the horse. I think, before we look at the
6 hearsay exception, the ancient document itself has to be
7 authenticated by a witness with knowledge.

8 And even after we moved to exclude it, no one came forward
9 and said this was the condition I found it in. This is where I
10 found it. I found it where I would expect to find it if it was
11 an authentic document, and it's at least 20 years old. All
12 we're asked to do is assume from the fact that it has a
13 copyright date on it, that it must be at least 20 years old.

14 But as we explained, Your Honor, the copyright date is
15 neither the date of printing nor the date of publication.
16 It's -- by law, it must be the date on which the earliest
17 copyright in the work is claimed.

18 And so if this particular sheet music was printed in 1993,
19 for example -- and I'm not suggesting that it was. I don't
20 know. But if it was printed in 1993, if the earliest copyright
21 was 1935, the copyright date would have to be 1935.

22 THE COURT: You're arguing in terms of admissibility
23 as to the weight issue. That's different. Admissibility is
24 only whether or not there's some evidence upon which one could
25 infer the satisfaction of the foundational facts.

1 And in this case, among other things -- I'm sure Mr. Klaus
2 would point to that publication number, the -- I forget the
3 numbers now, 3075 and 3076, and using that as circumstantial
4 evidence for purposes of admissibility, which is not the same
5 as whether or not it must be given the weight that is asserted
6 it ought to be given. So I think we need to make a distinction
7 there.

8 MR. RIFKIN: And I will -- well, Your Honor, we
9 briefed this. I don't want to take up any more of the Court's
10 time on the question of the need for an authenticating witness
11 to provide authenticating facts. But I will make one comment
12 about the engraving number, 3075 --

13 THE COURT: Yes.

14 MR. RIFKIN: -- which precedes the engraving number
15 for 51988, 3076. No doubt they were sequentially engraved.
16 The problem is there's no one who's able to say at all that a
17 print was made from that engraving plate, 3075, in the case of
18 Exhibit 106, much less when it was made. We don't know when it
19 was printed.

20 Even if we knew when it was printed, publication is a very
21 specific term under the copyright law, and it requires a
22 demonstration of dissemination, widespread dissemination, which
23 again is completely absent from 30- -- from Exhibit 106. There
24 simply isn't any evidence of -- of where that work was
25 published, to whom it was published, how many copies of it were

1 published, or anything. It is -- it is simply a document that
2 exists quite frankly in a vacuum. But now --

3 THE COURT: What if it were included as a deposit
4 copy?

5 MR. RIFKIN: Even if it were included in a deposit
6 copy, that would satisfy the requirement for --

7 THE COURT: I'm not saying that that's what it is,
8 but if it were, you admit that that would be sufficient?

9 MR. RIFKIN: That would certainly satisfy the
10 requirement for publication, yes, it would, Your Honor.

11 THE COURT: All right.

12 MR. RIFKIN: But now turning to the substance of
13 Exhibit 106, which I think is a more pertinent question and one
14 I think Your Honor wanted to address, it seems to me that
15 Exhibit 106 is not really all that significant because -- and
16 let's assume again -- let's assume that 106 is a copy of what
17 was deposited with 51990 or a copy of what was published.

18 It includes the lyrics. Okay. Fine. We know a few
19 things about the lyrics. Now, we know that Orem didn't write
20 them. We know that Orem's name isn't anywhere on the document.
21 We know that Orem is the author of whatever the copyrighted
22 work was under 51990. We know that Mildred, whose name is on
23 106, we know that Mildred didn't write the lyrics. We know
24 that Patty -- the defendants claim that Patty wrote the lyrics,
25 but Patty's name isn't on 106. So 106 doesn't prove --

1 THE COURT: You're willing to -- you're willing to
2 admit that Patty wrote the lyrics?

3 MR. RIFKIN: No. I think there is evidence that
4 Patty wrote the lyrics.

5 THE COURT: Okay.

6 MR. RIFKIN: I suspect that the lyrics were written
7 by lots of folks. There is -- as Your Honor notes from reading
8 the briefs, there is a statement that was attributed to Jessica
9 in a magazine, in a 1950 edition of American Family, in which
10 she tells the story of sitting around the hearth one evening at
11 the family home. Mildred was at the piano, playing the piano.
12 And Jessica says to her sister, Mildred, play that slowly. I'm
13 going to sing a new song. And she says she performed it for
14 the very first time in the family's living room right in --

15 THE COURT: It doesn't say she created it. She says
16 she sang it for the first time. I know at some point the
17 briefing said she created it, and I tried to look for that
18 practically until my eyeballs fell out because the printing was
19 so bad I had trouble reading it, but I didn't see anything
20 about creating it.

21 MR. RIFKIN: She's the first -- she said she told
22 Mildred to play it slowly because apparently she was creating
23 it then and there. But Mildred --

24 THE COURT: You are reading into that.

25 MR. RIFKIN: I am reading into that, but I do also

1 want to say one other thing about Jessica. In -- in
2 Exhibit 87, which is the transcript of the deposition that was
3 given by Patty and Jessica in Jessica's lawsuit against
4 Sam Harris over the song *As Thousands Cheer*, which for the
5 longest time I thought was *Thousand Cheers*, but now I know is
6 *As Thousands Cheer*, which I think is being remade on Broadway
7 as we speak, I understand Jessica testifies in that
8 deposition -- and now I'm referring to pages 35 and 36 of the
9 deposition transcript -- that Patty wrote the words and Mildred
10 wrote the music to the song *Good Morning to All*.

11 I think that that's consistent with Patty's testimony
12 elsewhere in the deposition that generally Mildred was the
13 composer and Patty was -- the word she used was the poetess.
14 Patty says that she wrote the words to *Happy Birthday to You*;
15 so I think that there is at least conflicting evidence there.
16 The strongest evidence there is appears to us to be that Patty
17 claimed to write the words "Happy Birthday to You, Happy
18 Birthday to You."

19 THE COURT: I don't mean to have sort of knocked you
20 off your point.

21 MR. RIFKIN: No, no, no.

22 THE COURT: I understand that now. You can go back
23 and finish up your point.

24 MR. RIFKIN: But -- but there's no evidence
25 anywhere -- none, zero, none -- of an assignment by Patty, or

1 for that matter Mildred, of the song *Happy Birthday* to Summy,
2 ever.

3 There is a statement in the brief on page 38, and I was
4 looking for it. I thought I brought the brief with me because
5 I wanted to read it.

6 THE COURT: Page 38?

7 MR. RIFKIN: On page 38 of the brief, this is in the
8 defendant's section of one of the arguments. And on page 38
9 the defendants say a few things. They say that -- this is
10 where in the brief they say that Forman and Orem did not write
11 the words. They say that Forman and Orem were their employees
12 for hire. And I'm reading in the -- in the first full
13 paragraph which begins on line 7 of page 38.

14 They say that the -- Mildred and Patty were not employees
15 for hire. They say it's undisputed that neither was. And then
16 they say this. They say Summy was entitled to Mildred and/or
17 Patty's rights in the work. And by "the work," they're
18 referring to the song *Happy Birthday*.

19 As a result of the license he had received from them, them
20 being Mildred and Patty, not because they were employees for
21 hire. There's no citation to any evidence. There's no
22 citation to anything at all. It simply goes on to say that
23 plaintiff's argument that Summy was entitled only to the text
24 that Orem performed and wrote fails.

25 THE COURT: Slow down. Slow down. You're reading.

1 I'm reading with you. But my reporter has to actually write
2 all of this.

3 MR. RIFKIN: I apologize.

4 In line 14 they just simply go on to dispute the
5 plaintiff's argument that Summy was entitled only to the text
6 that Orem or Forman wrote.

7 But they say that Summy was entitled to Mildred or Patty's
8 rights in *Happy Birthday* as a result of the license it received
9 from Mildred and Patty. Your Honor, I know of no evidence in
10 the record anywhere of any license from Mildred or Patty,
11 period.

12 We have never disputed that sometime before 1893 Mildred
13 and Patty together transferred their rights to a collection of
14 songs they wrote called *Song Stories for the Kindergarten*, so
15 Summy could publish in connection with the 1893 Chicago World's
16 Fair in response to popular demand from elementary
17 schoolteachers for this apparently very, very well-known work.
18 And Summy, of course, published it, and that work includes *Good*
19 *Morning to All*, which as everybody knows has the melody but not
20 the words for *Happy Birthday*.

21 Everyone also knows there's no dispute that the melody
22 itself, the copyright to the melody expired in 1949. So
23 there's no dispute that, if somebody played on a stage for all
24 the money in the world, the melody that Mildred wrote in *Good*
25 *Morning to All*, it would not be protected by any copyright.

1 We -- we know that that work was republished in 1896
2 presumably pursuant to some rights that Summy had, although
3 there's no evidence of it, but it's not disputed.

4 And then it was published again in 1899 in another group
5 of songs called *Song Stories for the Sunday School*. This time
6 again *Good Morning to All*, Mildred's melody, Patty's words.
7 "Happy Birthday" isn't in any of them. None of it.

8 The next assignment of rights that we know of is the
9 assignment in 1934 and 1935 as to which we have no evidence
10 except what Patty says in the Complaint -- I'm sorry. What
11 Jessica says in the Complaint and more importantly what Summy
12 says in the Answer, that the transfer of rights -- whether it
13 was a license or a sale, is immaterial -- that the transfer of
14 rights was limited to various piano arrangements of the said
15 musical composition *Good Morning to All*.

16 The dispute in that case was not over the song *Happy*
17 *Birthday to You*. The dispute in that case was over the use of
18 that transfer, whether it could be used, as the plaintiff
19 understood, for sheet music to be sold, or it could be used for
20 public performances. That was the essence of the dispute in
21 nineteen -- in the lawsuit that was filed in 1942, in that
22 lawsuit, which is Exhibit 50, and the Answer is Exhibit 51.

23 We know of no other assignment until 1944 when the
24 Hill Foundation assigned to Summy whatever rights it acquired
25 from Mildred and -- I'm sorry -- from Patty and Jessica.

1 There's one too many Hill sisters to remember. Like you,
2 Your Honor, I'm getting older, and my memory isn't as good as
3 it used to be.

4 But I believe Your Honor asked the question or made a
5 comment about how the assignments appeared to be, and we agree.
6 The assignments appear to be an assignment of whatever interest
7 Patty and Jessica had in certain enumerated copyrights which
8 they then assigned to the Hill Foundation. The Hill Foundation
9 then assigned those interests to -- to Summy.

10 But it doesn't fix the problem with the 1935 copyrights
11 because it doesn't claim that they had any interests in the
12 copyrights. But more importantly we cite the Konigsberg case,
13 the Ninth Circuit case which talks about the need for a writing
14 in order to transfer a copyright.

15 And what the Court says there is that, in order to protect
16 not only the author but also the public, which would obviously
17 include the plaintiffs, transfer of copyrights have to be in
18 writing. And the Ninth Circuit also said in that case that a
19 writing which purported to confirm a prior oral agreement that
20 was made three and a half years earlier was too late in time to
21 be valid.

22 So we know two things from the Ninth Circuit's decision in
23 Konigsberg. We know that an assignment has to be in writing,
24 and there's no evidence, other than the '44 assignments, of any
25 assignments that are in writing. And we know that an

1 assignment can't relate back more than three and a half years.
2 In fact, if it were only three and a half years, it would
3 already be untimely. There is nine years after the fact.

4 There is no evidence in any of the briefings which
5 suggests that a written assignment can be given some
6 retroactive effect. The Ninth Circuit says, if the writing is
7 more than three and a half years old and it purports to confirm
8 a prior oral assignment, which the '44 assignments did not do,
9 it's already too late and invalid.

10 So when we put all of that together, there is no
11 assignment of any rights from Patty or Jessica to the lyrics
12 that, if you accept Patty's testimony as proof of her
13 authorship of the lyrics, transferred her rights, whatever
14 rights she may have had in this song, to Summy, ever.

15 And, in fact, that's consistent not only with what Summy
16 said in the copyrights it registered in 1935, and I believe the
17 question Your Honor asked suggested in my mind the right
18 approach. It certainly seems to me that you can't infer
19 anything from what they say, knowing what we now know about
20 Preston Ware Orem not writing the lyrics, that they did not
21 claim a copyright in the lyrics that the author identified
22 their employee for hire, Orem, did not write.

23 It is also consistent with what happened after 1935 when
24 both the Hill sisters and Summy filed a series of lawsuits over
25 unauthorized performances of the song *Happy Birthday to You* in

1 which they only ever asserted the copyright to the melody from
2 *Good Morning to All*, the 1893 copyright and its renewal which
3 expired in 1949. In those lawsuits by both the Hill sisters
4 and by Summy, after the copyrights were registered, there was
5 never a claim that performing *Happy Birthday to You* or
6 publishing it in a song book without Summy's permission or
7 without the Hill sisters' permission violated 51988 or 51990.

8 And, finally, when the copyright to *Good Morning to All*
9 expired in 1949, there hasn't been another lawsuit filed.

10 So when we look at that entire trail of facts that are now
11 undisputed, we know that Summy says it acquired rights to
12 various piano arrangements to a musical composition. We know
13 that it published -- it copyrighted works that were done by two
14 employees for hire who they admit -- that is, the defendants
15 admit -- did not write the lyrics to *Happy Birthday*. And we
16 know that they've never, ever, ever sued anybody for violating
17 the copyright to *Happy Birthday to You* even when the song *Happy*
18 *Birthday to You* was used without permission. It all relates
19 back to *Good Morning to All*.

20 And finally on that point, not to belabor it, but the
21 testimony that Patty gives in the Hill v. Harris case is
22 particularly instructive there. She says, when asked to
23 identify the -- the work, she only talks about *Good Morning to*
24 *All* and a series of arrangements -- a series of adaptations
25 until she's reminded by her lawyer, "What about *Happy Birthday*

1 to You?" And she says, "Oh, yes, that one too." It was an
2 afterthought. *Happy Birthday to You* simply was not a work that
3 she regarded as her own.

4 And as she said in the two exhibits that we've also
5 provided to the Court, the 1950 publication which I apologize
6 for, the American Family publication. Admittedly, it's
7 terrible print. It's the best we could find. But she says
8 there and then she says again in an article that appeared in
9 Time Magazine in 1935, she said the song *Happy Birthday*
10 belonged to the world. And what she said in her deposition,
11 which we now know is admitted -- or at least there's no
12 objection to its admission -- she said I taught this song to
13 the kids to be used at every birthday celebration in the
14 school. There's no indication that she limited that in any
15 way. There's no indication that she told the children not to
16 sing it outside the school and outside her classroom.

17 In fact, to the contrary, we can -- we can say that she
18 knew that the kids sang it all the time. And we can say
19 without fear or any trepidation that the kids went home and
20 sang it at their own birthday parties outside the school and
21 long after they graduated from that elementary school.

22 THE COURT: Are you now getting into the issue of
23 divestive publication?

24 MR. RIFKIN: I am, Your Honor. And I'm happy to
25 answer any other questions first.

1 THE COURT: I don't think you need to get into that.
2 I don't really need your explanation on that, and I have a
3 clear view of that. Let me just ask you one last question, and
4 we have to wrap this up.

5 MR. RIFKIN: Your Honor, before -- before then,
6 there is one case that I'd like to just mention. It's
7 discussed in the -- in the American -- in the Academy of Music
8 case. We frankly didn't have room to brief it, but I will
9 mention it only by name to refer to it, if Your Honor has any
10 interest in this at all. There's a case called Brown v. Tubb,
11 T-u-b-b, an Eleventh Circuit case that's cited in the Academy
12 of Motion Pictures case, which is fully consistent with the
13 position I've taken. I won't elaborate more. We've already
14 been here long enough trying your patience.

15 THE COURT: Let me ask this one question --

16 MR. RIFKIN: Yes.

17 THE COURT: -- which was the same question I asked
18 to Mr. Klaus. You folks are in agreement, at least right now
19 without further briefing, that you believe that the question of
20 the scope is going to be a question of law for the Court to
21 decide regardless of whether it may involve extrinsic factual
22 record?

23 My next question to you is, beyond that, to the extent if
24 needed for -- and if it is needed that we go beyond the scope
25 and go into inquiries of issues of divestive publication,

1 abandonment, authorship, transfers, and so forth, that would
2 also be raised within the context of the declaratory relief
3 claim but -- and I haven't thought this totally through -- may
4 or may not have some connection to your other coercive claims.

5 Are you willing to have that -- and if I determine there
6 is a factual dispute so that we need a trial, are you willing
7 to allow a court trial of that to precede that of whatever jury
8 trial on the remaining coercive claims?

9 MR. RIFKIN: Your Honor, I would -- I would ask for
10 a moment to confer with my colleagues.

11 THE COURT: Of course.

12 MR. RIFKIN: And while I do, before I just take a
13 very brief moment to confer with them, I was asked to remind
14 the Court of one other thing which bears on the presumption.
15 We mention it in the brief, but there was a prior copyright --
16 actually, two prior copyrights -- of the song *Happy Birthday to*
17 *You*, both the music and the words.

18 There was a publication in 1911 which does not attribute
19 authorship to Mildred or Patty or anybody associated with Summy
20 at all. And there was a subsequent publication in 1924 of the
21 sheet music with the song, the words, again which didn't
22 attribute authorship to Mildred or Patty or anyone associated
23 with Summy at all. Both of those publications, by obtaining
24 copyrights, 1911 and 1924, would be superseding presumptions of
25 authorship.

1 But we frankly don't think the Court needs to resolve that
2 question to resolve the question of the scope of 51990 because
3 I think it's clear.

4 THE COURT: By preceding presumption, are you
5 suggesting that, if there was a copyright to which there is a
6 presumption of validity as to the lyrics back in 1911, that
7 therefore ergo there cannot be a valid copyright claim to the
8 lyrics in 1935?

9 MR. RIFKIN: No, no, no.

10 THE COURT: That would not be the case.

11 MR. RIFKIN: I know. There's a difference between
12 originality and --

13 THE COURT: And novelty.

14 MR. RIFKIN: And uniqueness. I recognize that.
15 That wasn't what I was saying. All I'm saying is this: If the
16 Court were inclined to draw a presumption from either 51988 or
17 51990 that Mildred, whose name is mentioned in the catalog of
18 copyrights but not in 51988 or 51990, at least the evidence we
19 have so far in the record, except for Exhibit 106 which is in
20 dispute, there are two prior copyrights which claimed
21 authorship somewhere else. So it would undermine the
22 presumption that Mildred wrote the words.

23 But again, as I said, Your Honor, I don't think we need to
24 go there because I think we've addressed the fact that the
25 presumption is so overwhelmingly rebutted by our evidence.

1 THE COURT: Why don't you confer with your --

2 MR. RIFKIN: I will.

3 THE COURT: -- colleagues.

4 (Counsel confer sotto voce.)

5 MR. RIFKIN: Your Honor, we are prepared to accept
6 that as well, that Your Honor would decide these issues before
7 a jury would be asked to hear the other parts of the case.

8 THE COURT: Okay. All right. Very good.

9 MR. RIFKIN: And thank you for letting me confer
10 with my colleagues.

11 THE COURT: Thank you very much, Counsel. I do
12 appreciate your very fine argument.

13 You know, I've always said it's always a pleasure to have
14 good lawyers argue before you rather than less good lawyers.
15 So I really appreciate it, and I think you have helped me, both
16 sides, in crystallizing the issue.

17 Mr. Klaus wants to say something else. I can feel it.

18 MR. KLAUS: Your Honor, may I just -- thank you.
19 With the Court's indulgence, may I make just a few brief --

20 THE COURT: Of course.

21 MR. KLAUS: -- just a few brief --

22 THE COURT: Yes, of course.

23 MR. KLAUS: Thank you, Your Honor.

24 Couple of points with respect to -- I'm working backwards
25 from my notes. With respect to the 1911 and 1924

1 registrations, I don't think there's any dispute. I think I
2 heard counsel agree with this. This is not like a patent
3 system where the first person to register the patent gets the
4 copyright.

5 Also, the fact that those were published in 1911 and 1924,
6 to the extent they claim that that creates some sort of issue
7 of fact about whether the Hill sisters copied the lyrics to
8 *Happy Birthday to You* from someone else, I point out that the
9 evidence from Patty's deposition testimony, which they have no
10 objection to, says that she created the lyrics while she was
11 teaching at the school in Louisville, Kentucky.

12 And if Your Honor looks at Exhibit 87, which is the
13 deposition, pages 3 through 4 make it clear that Patty's time
14 at that school was from 1887 until either 1905 or 1906 when she
15 moved to New York City to teach at the Columbia University
16 Teachers College.

17 The second point, there was a lot of discussion by
18 Mr. Rifkin about there being some confusion about what was
19 transferred, what was not transferred, where is the assignment
20 in 1934 and '35. There was a discussion of the Konigsberg case
21 which is, as always, an entertaining opinion by Judge Kozinski.
22 I think that's the one that said lawyers deal with contracts,
23 not lunch, something along those lines.

24 But what I'd ask Your Honor to look at is the Magnuson v.
25 Video Yesteryear case, the Lenny Bruce case, which in

1 conjunction with the Second Circuit's decision in Eden Toys, a
2 long line of authority, stands for the proposition that where
3 there is no disagreement between the assignor, the assignee,
4 the licensor, licensee, that a -- that it would be anomalous to
5 allow a third party, as in the -- in the position of the
6 plaintiffs, to object.

7 And, in fact, footnote number 1 of the Magnuson decision
8 specifically distinguishes Konigsberg on that basis on the
9 ground that in that case there was a dispute between Anne Rice
10 and the producers she had met with over lunch to discuss the
11 movie project in question. And what Judge Nelson's opinion for
12 the Court says in the Magnuson case is there no dispute between
13 the transferor and the transferee whether --

14 THE REPORTER: Your Honor, he's reading too fast.

15 THE COURT: Slow down.

16 MR. KLAUS: -- whether the transfer actually
17 occurred or the terms on which it occurred. There is no
18 dispute in this case between my client, any of my client's
19 predecessors, and anyone representing the Hill sisters as to
20 whether or not Summy had -- Summy was entitled to make the
21 registration in 1935 or not.

22 And I think under the logic of Eden Toys and the Magnuson
23 case, that would plainly -- that would plainly say that they
24 have no standing to -- to object on that ground.

25 Mr. Rifkin suggested that Your Honor look not just at the

1 Complaint in the Hill Foundation against Summy case but also
2 the Answer which was Exhibit 51. We agree that Your Honor
3 should look at the Answer.

4 I'd just point out that I believe Mr. Rifkin said there
5 was no mention of *Happy Birthday to You* or lyrics of *Happy*
6 *Birthday to You*. In fact, paragraph 6, which is of Exhibit 51,
7 said, referring to the allegations in paragraph 10th, that was
8 one of the ones I talked about during my presentation, Summy
9 admitted and averred that one of the songs that was contained
10 within the licensed works was *Good Morning to All*, which with
11 different words later became entitled *Happy Birthday to You*.

12 So I don't think that there is -- I think that, when
13 counsel said that there was an admission by Summy in the Answer
14 that somehow the only thing that was covered were the -- were
15 musical notes in arrangements, simply is not borne out.

16 On a couple of evidentiary points, Your Honor, Mr. Rifkin
17 said that he'd like the opportunity to submit the Catalog of
18 Copyright Entries from 1962 because he says it doesn't say
19 anything about the text. In fact, the copy, which we'd be
20 happy to submit it if the Court would like, with supplemental
21 briefing, the 1962 Catalog of Copyright Entries, which the
22 plaintiffs have -- they have both the 1935 and 1962 because
23 they produced them to us in discovery.

24 The 1962 one says it's an arrangement with text, which
25 matches precisely, Your Honor, Exhibit No. 68, which is the

1 application.

2 THE COURT: I'm at a disadvantage because I don't
3 have that document. I will ask counsel to submit that
4 document, and I will look at it myself.

5 MR. KLAUS: Okay.

6 MR. RIFKIN: We will, Your Honor.

7 THE COURT: That's fine.

8 MR. KLAUS: If Your Honor had any questions about
9 the ancient document Exhibit 106 with respect to the
10 authenticity argument, we'd point out in addition to the fact
11 that the document is self-authenticating and it matches the
12 deposit copy records, that you have the -- the sequential
13 numbering, which has nothing to do with engraving plates,
14 Your Honor. It's the publication number which is what their
15 expert admitted in his deposition. It's a publication number.
16 It's not a matter of simple engraving plates.

17 I would also point Your Honor to their expert,
18 Professor Sachs's report, which is Exhibit 111 in the record,
19 paragraph number 28 where Professor Sachs relied on what is now
20 Exhibit 106, and he didn't question its -- its authenticity.

21 And in light of all the other evidence showing the
22 publication of sheet music, including Exhibits C and D to
23 Mr. Rifkin's declaration on the motion to strike which are
24 simply later publications of the same sheet music with the same
25 lyrics from later years, we'd submit there can't be any dispute

1 as to the authenticity of the document.

2 THE COURT: Do you still want to have an opportunity
3 to further brief the Court on the issue as to whether or not
4 the question of scope is to be decided by the Court even if
5 there are factual issues? Because you sort of said that at the
6 beginning when we talked about it, and I didn't know whether
7 you had intended to reserve that point.

8 I think Mr. Rifkin -- I don't think Mr. Rifkin necessarily
9 wants to brief any further. He's willing to say that that's
10 what ought to happen. But I want to give you that opportunity.
11 If you want to brief it, I'll give you an opportunity to do
12 that.

13 MR. KLAUS: I don't believe we need to brief it,
14 Your Honor.

15 THE COURT: Okay. All right. Very good.

16 MR. RIFKIN: Your Honor, I'll be very brief.

17 THE COURT: I hope you will, because otherwise we
18 will be here with no end.

19 MR. RIFKIN: With respect to Magnuson, Your Honor,
20 this was a case that had to do with a transfer from John
21 Magnuson, who was president of one company, to himself as
22 president of another company. They sued over the copyright.
23 The John Magnuson plaintiff sued over the copyright in
24 question, and the Court found not that the defendant didn't
25 have standing to challenge the validity of the assignment but

1 rather that the assignment confirmed -- even though it was a
2 later writing, it confirmed the prior oral assignment, and it
3 doesn't inform any of the issues here.

4 THE COURT: All right, counsel. Thank you very
5 much. I appreciate your time, appreciate your arguments. I'll
6 take the matter under submission. Thank you.

7 THE CLERK: This Honorable Court is in recess.

8 (Matter adjourned at 11:48 P.M.)

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CERTIFICATE OF OFFICIAL REPORTER

I, KHOWOONSUN CHONG, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 25TH DAY OF MARCH, 2015.

/s/ KHOWOONSUN CHONG

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