

1 GLENN D. POMERANTZ (State Bar No. 112503)
 glenn.pomerantz@mto.com
 2 KELLY M. KLAUS (State Bar No. 161091)
 kelly.klaus@mto.com
 3 MELINDA E. LeMOINE (State Bar No. 235670)
 melinda.lemoine@mto.com
 4 ADAM I. KAPLAN (State Bar No. 268182)
 adam.kaplan@mto.com
 5 MUNGER, TOLLES & OLSON LLP
 355 South Grand Avenue
 6 Thirty-Fifth Floor
 Los Angeles, California 90071-1560
 7 Telephone: (213) 683-9100
 Facsimile: (213) 687-3702

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

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

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

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

**DEFENDANTS' MOTION FOR
 LEAVE TO FILE SUPPLEMENTAL
 EVIDENCE IN SUPPORT OF
 MOTION FOR SUMMARY
 JUDGMENT**

Date: August 31, 2015
 Time: 9:30 a.m.
 Courtroom: 650
 Judge: Hon. George H. King,
 Chief Judge

22
23
24
25
26
27
28

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on August 31, 2015, at 9:30 a.m., or as soon
3 thereafter as this matter may be heard before the Honorable George H. King, Chief
4 Judge, in Courtroom 650 of the Edward R. Roybal Federal Building, located at 255
5 E. Temple Street, Los Angeles, California 90012, Defendants Warner/Chappell
6 Music, Inc. and Summy-Birchard, Inc. (jointly, “Warner/Chappell”) will and hereby
7 do move this Court, pursuant to Rules 56(e) and/or 60(b)(2) of the Federal Rules of
8 Civil Procedure, for leave to supplement the record in support of Warner/Chappell’s
9 motion for summary judgment.

10 This Motion is made following the conference of counsel pursuant to Civil
11 L.R. 7-3 that took place by exchange of correspondence on July 9, 14, and 15, 2015.
12 This Motion is based upon this Notice of Motion and Motion, the accompanying
13 Memorandum of Points and Authorities, the declaration of Kelly M. Klaus, all the
14 pleadings and documents on file herein, such other oral and documentary evidence
15 as may be presented at or before the time of the hearing on this Motion, and all facts
16 of which this Court may take judicial notice.

17 DATED: July 23, 2015

MUNGER, TOLLES & OLSON LLP

18
19
20
21
22
23
24
25
26
27
28

By: /s/ Kelly M. Klaus
KELLY M. KLAUS

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Warner/Chappell respectfully requests leave to supplement the summary
3 judgment record with two recently obtained documents that are highly relevant to an
4 issue raised in the pending motions for summary judgment. The issue concerns
5 what copy of *Happy Birthday to You!* Warner/Chappell’s predecessor, Clayton F.
6 Summy Co. (“Summy”), deposited with the U.S. Copyright Office on December 6,
7 1935, with the application for copyright that issued as E51990. The documents that
8 Warner/Chappell seeks to introduce are a notarized copy of the sheet music for
9 *Happy Birthday to You!* that Summy deposited with the British Museum on the
10 same day, December 6, 1935, along with a notarized copy of the British Museum’s
11 copyright receipt. Klaus Decl., Exs. A & B. The newly obtained deposit copy
12 contains the “familiar lyrics” to *Happy Birthday to You!* The fact that Summy
13 deposited in the British Museum the copy of *Happy Birthday to You!* with the
14 familiar lyrics on the same day that Summy made its application with the U.S.
15 Copyright Office for copyright in *Happy Birthday to You!* that issued as E51990
16 corroborates the other undisputed record evidence showing that the deposit copy
17 appended to Summy’s application included the familiar lyrics (or “text,” as stated in
18 the registration).

19 Warner/Chappell tried but was unable to obtain official copies of the British
20 Museum deposit copy in the fall of 2013. At that time, staff from the office of
21 Warner/Chappell’s U.K. affiliate, Warner/Chappell Music Limited, went to the
22 British Library (which houses the British Museum’s collection) to request an official
23 copy of the British Museum deposit copy. The British Library was unable to locate
24 the deposit copy. *Id.* ¶ 3. Following the summary judgment hearing,
25 Warner/Chappell Music Limited again contacted the British Library about renewing
26 the search for the British Museum deposit copy. This time, British Library
27 specialists were able to find the deposit copy, and provided Warner/Chappell with
28

1 certified copies of the deposit copy and registration receipt in June and July 2015.
2 *Id.* ¶¶ 4-7, Exs. A & B.

3 On July 9, Warner/Chappell produced to Plaintiffs the materials from the
4 British Library. At the same time, Warner/Chappell produced other documents it
5 had obtained from third-party sources following the summary judgment hearing,
6 along with other documents that Warner/Chappell had mistakenly not produced to
7 Plaintiffs while discovery was open. *Id.* ¶¶ 8-9, Ex. C. Warner/Chappell informed
8 Plaintiffs that it intended to seek the Court’s leave to supplement the summary
9 judgment record to include the British Library documents. *Id.* Warner/Chappell
10 told Plaintiffs that, if they wanted to supplement the record with one or more of the
11 other documents in Warner/Chappell’s supplemental production, Warner/Chappell
12 would work on a joint submission to supplement the record. *Id.* Plaintiffs declined
13 Warner/Chappell’s offer. *Id.* ¶ 10, Ex. D.

14 We respectfully submit that the Court should grant this motion to include the
15 recently obtained documents showing the contents of Summy’s December 6, 1935
16 deposit with the British Museum. The documents strongly corroborate the other
17 undisputed record evidence showing that Summy’s December 6, 1935 U.S.
18 Copyright Office deposit copy with E51990 contained the familiar lyrics to *Happy*
19 *Birthday to You!* Under English law, a publisher of sheet music “published in the
20 United Kingdom shall, within one month after the publication, deliver, at his own
21 expense, a copy of the [sheet music] to the trustees of the British Museum, who
22 shall give a written receipt for it.” Copyright Act, 1911, 1 & 2 Geo. 5, c. 46,
23 § 15(1), (7). Exhibits A & B to the Klaus Declaration show that, on the same day
24 that Summy filed the applications for E51990 and E51988 in the U.S. Copyright
25 Office, Summy’s agent, A. Weekes & Co. Ltd., deposited sheet music in the British
26
27
28

1 Museum, pursuant to English law, that contained the familiar lyrics.¹ The British
2 Museum records leave no doubt that Summy deposited the same version of *Happy*
3 *Birthday to You!* in the British Museum that Summy deposited in the U.S. Copyright
4 Office on the same date. That copy contained the familiar lyrics of the song.²

5 The supplemental exhibits are self-authenticating because they are public
6 records with apostille certifications. Fed. R. Evid. 902(3); *United States v. Vidrio-*
7 *Osuna*, 198 F. App'x 582, 583 (9th Cir. 2006). They also are authenticated by their
8 contents—including the blue date stamps on the sheet music, which identify the
9 sheet music as a legal deposit copy submitted to the British Museum on December
10 6, 1935. Fed. R. Evid. 901(b)(4); British Library, Help for Researchers,
11 <http://www.bl.uk/reshelp/findhelprestype/music/datingtracing/datingmusic.html> (last
12 visited July 23, 2015); British Library, A Guide to British Library Book Stamps
13 (Sep. 23, 2013), [http://britishlibrary.typepad.co.uk/collectioncare/2013/09/a-guide-](http://britishlibrary.typepad.co.uk/collectioncare/2013/09/a-guide-to-british-library-book-stamps.html)
14 [to-british-library-book-stamps.html](http://britishlibrary.typepad.co.uk/collectioncare/2013/09/a-guide-to-british-library-book-stamps.html) (last visited July 23, 2015) (explaining the
15 historical stamps and date abbreviations used by the British Museum and British
16 Library). The exhibits are admissible under the hearsay exceptions for public
17 documents and for ancient documents. Fed. R. Evid. 803(8), (16).

18 “A district court has wide discretion to grant a party leave to supplement the
19 record upon request in order that the court may obtain accurate information when
20 making its ruling.” *LimoStars, Inc. v. New Jersey Car & Limo, Inc.*, No. CV-10-
21 2179-PHX-LOA, 2011 WL 3471092, at *3 n.5 (D. Ariz. Aug. 8, 2011) (citations

22
23 ¹ Like the deposit record for E51990, the British Museum’s copyright receipt refers
24 to the work as a “Piano Solo with words,” says that the work is “[b]y Mildred J.
25 Hill,” and includes an exclamation mark at the end of “Happy Birthday to You.”
26 Joint Appendix Ex. 105 (Dkt. No. 192-1); Klaus Decl., Ex. B.

27 ² The British Museum’s copyright receipt also shows that on December 6, 1935,
28 Summy’s agent deposited the Unison Song version of *Happy Birthday to You!*
Klaus Decl., Ex. B. The British Museum’s deposit copy of this work is identical to
the deposit copy appended to Summy’s December 6, 1935, application for the U.S.
copyright that issued as E51988. We produced to Plaintiffs the British Museum’s
deposit copy of the Unison Song version of *Happy Birthday to You!*, and would be
pleased to lodge it with the Court if the Court would like to review it.

1 omitted), *report and recommendation adopted*, No. CV-10-2179-PHX-SMM, 2011
2 WL 4101100 (D. Ariz. Sept. 8, 2011). In particular, “Rule 56(e) gives this Court
3 discretion to permit a litigant to supplement the factual record in the context of a
4 motion for summary judgment.” *Bell v. City of Los Angeles*, 835 F. Supp. 2d 836,
5 848 (C.D. Cal. 2011) (Matz, J.) (citing *Betz v. Trainer Wortham & Co.*, 610 F.3d
6 1169, 1171 (9th Cir. 2010)); Fed. R. Civ. P. (“Rule”) 56(e). The Court has the same
7 discretion under Rule 60(b)(2). *Pepper v. JC Penney Corp.*, No. C07-1781-JCC,
8 2008 WL 4614268, at *2-3 (W.D. Wash. Oct. 16, 2008).

9 District courts within the Ninth Circuit routinely allow parties to supplement
10 the summary judgment record. *See, e.g., George v. Nw. Mut. Life Ins. Co.*, No. C10-
11 668-RSM, 2011 WL 3881476, at *4 (W.D. Wash. Sept. 1, 2011) (granting leave to
12 supplement a pending motion for summary judgment with newly discovered
13 evidence); *United States v. Maris*, No. 2:10-CV-1337-RCJ-RJJ, 2011 WL 468554,
14 at *5 & n.5 (D. Nev. Feb. 4, 2011) (granting leave to file supplemental briefing and
15 evidence after summary judgment motions were filed and a summary judgment
16 hearing was held); *Mitchel v. Holder*, No. C 08-00205 MEJ, 2010 WL 816761, at *1
17 n.1 (N.D. Cal. Mar. 9, 2010) (granting leave to file newly obtained evidence in
18 support of summary judgment); *cf. Point Ruston, LLC v. Pac. Nw. Reg’l Council of*
19 *United Bhd. of Carpenters & Joiners of Am.*, No. C09-5232BHS, 2010 WL 785899,
20 at *2 (W.D. Wash. Mar. 4, 2010) (“In the interest of judicial economy, the Court
21 should consider any theory that would support the granting of summary judgment
22 rather than leaving an issue for trial that might have been decided in advance.”).

23 Precedent supports granting Warner/Chappell’s request to supplement the
24 summary judgment record. First, as explained above, the exhibits are highly
25 relevant to a key issue currently before the Court. *George*, 2011 WL 3881476, at *4
26 (granting leave to supplement the summary judgment record where the new
27 evidence was “directly relevant to the central issues in th[e] matter”); *LimoStars*,
28 2011 WL 3471092, at *3 n.5 (emphasizing a district court’s “wide discretion to

1 grant a party leave to supplement the record upon request in order that the court may
2 obtain accurate information when making its ruling”). Second, Warner/Chappell did
3 not “act[] in bad faith in failing to bring [these exhibits] to the Court at an earlier
4 date.” *George*, 2011 WL 3881476, at *4; *Pepper*, 2008 WL 4614268, at *2-3
5 (granting the defendant’s motion for leave to supplement the summary judgment
6 record where there was no showing that the defendant failed to act with reasonable
7 diligence). On the contrary, Warner/Chappell tried to obtain the records from the
8 British Library in the fall of 2013, but the British Library said it could not locate the
9 deposit copy. Following the summary judgment hearing, Warner/Chappell asked
10 the British Library to search again, and this time the British Library was able to
11 locate the records.

12 As noted, Plaintiffs refused to stipulate to Warner/Chappell’s request, and
13 also declined Warner/Chappell’s invitation to discuss a joint submission including
14 any materials Plaintiffs might want to use to supplement the record. In their letter
15 refusing Warner/Chappell’s request, Plaintiffs stated that they read the Court’s
16 Order on supplemental briefing on the abandonment issue as indicating that the
17 Court did not want the parties to submit any additional evidence. Klaus Decl., Ex.
18 D. Warner/Chappell understands that the Court did not want the parties to interpret
19 the Order for supplemental briefing on the abandonment issue as an invitation to
20 submit additional evidence. Warner/Chappell did not understand the Court to say
21 that the parties could not submit additional evidence not previously available
22 through no fault of their own. As discussed above, Warner/Chappell did try to
23 obtain the British Museum deposit copy when discovery was open;
24 Warner/Chappell only obtained the attached deposit copy because it renewed its
25 request following the summary judgment hearing.

26 Plaintiffs also threatened that, if Warner/Chappell tried to supplement the
27 record, Plaintiffs would seek to take discovery concerning Warner/Chappell’s
28 supplemental production and would seek to supplement the record with evidence

1 from the supplemental production that Plaintiffs claim support their motion. As to
2 the former point, Warner/Chappell's production letter set forth the reasons for its
3 supplemental production. Warner/Chappell would be pleased to meet-and-confer
4 with Plaintiffs if they have questions in this regard, but Plaintiffs did not express any
5 interest in doing so. As for Plaintiffs' assertion that they would seek to supplement
6 the record: as indicated in our production letter, we would not oppose such a
7 request, and indeed we offered to work with Plaintiffs on a joint supplemental filing.
8 Plaintiffs, however, declined.

9 Because "disregard[ing] [the evidence at issue] simply because it was
10 discovered outside the discovery period would not serve the interests of justice nor
11 the Court's duty to provide a fair and full adjudication of this matter on the merits,"
12 *George*, 2011 WL 3881476, at *4, and "[i]n the interest of judicial economy," *Point*
13 *Ruston*, 2010 WL 785899, at *2, Warner/Chappell respectfully requests that the
14 Court grant leave to supplement the summary judgment record with Exhibits A & B
15 to the Klaus Declaration.

16 DATED: July 23, 2015

MUNGER, TOLLES & OLSON LLP

17
18
19 By: /s/ Kelly M. Klaus

20 KELLY M. KLAUS

21 Attorneys for Defendants Warner/Chappell
22 Music, Inc. and Summy-Birchard, Inc.
23
24
25
26
27
28