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

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

14 Plaintiffs,

15 v.

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

17 Defendants.

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

) **[PROPOSED] ORDER GRANTING**
) **PLAINTIFFS' EX PARTE**
) **APPLICATION TO HAVE THE COURT**
) **CONSIDER NEWLY DISCOVERY**
) **EVIDENCE "MISTAKENLY"**
) **WITHHELD BY DEFENDANTS**
) **DURING DISCOVERY AND ENTER**
) **SUMMARY JUDGMENT IN**
) **PLAINTIFFS' FAVOR**

) Judge: Hon. George H. King, Chief Judge
) Courtroom: 650

) Fact Discovery Cutoff: July 11, 2014
) MSJ Hearings: March 23, 2015
) and July 29, 2015
) Pretrial Conference: N/A
) Trial: N/A

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1 production of documents would be provided nearly one year after the
2 close of fact discovery. Plaintiffs were unable to access the secure
3 production link until July 13, 2015.

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5 6. Defendants' supplemental late production included blurred copies of
6 scanned pages from *The Everyday Song Book* (1927 edition)
7 containing the *Good Morning and Birthday Song*. On July 23, 2015,
8 Plaintiffs, through their own investigation, were able to locate a clear
9 copy of the same 1927 edition which stated that the *Good Morning*
10 *and Birthday Song* had been published with "Special permission
11 through courtesy of The Clayton F. Summy Co." Upon further
12 investigation, on July 24, 2015, Plaintiffs obtained a 1922 edition
13 with the same identical page.

14 7. On July 21, 2015, Plaintiffs requested an opportunity to review
15 Defendants' originals of the supplemental production because certain
16 copies were blurred or illegible. On July 22, 2015, Defendants again
17 produced a blurred page from *The Everyday Song Book* (1927
18 edition) containing the *Good Morning and Birthday Song*.

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20 8. This Court has broad discretion to permit a litigant to supplement the
21 factual record on the cross-motions for summary judgment with
22 newly discovered evidence. *Bell v. City of Los Angeles*, 835 F. Supp.
23 2d 836, 848 (C.D. Cal. 2011) (Matz, J.) (citing *Betz v. Trainer*
24 *Wortham & Co.*, 610 F.3d 1169, 1171 (9th Cir. 2010)); Fed. R. Civ.
25 P. ("Rule") 56(e). See, e.g., *George v. Northwestern Mut. Life Ins.*
26 *Co.*, 2011 U.S. Dist. LEXIS 99454, *9-10 (W.D. Wash. Sept. 1,
27 2011).

28 9. Although the Court previously directed the Parties not to supplement

1 the summary judgment record, Plaintiffs completed their briefing
2 before they learned of the publication of *The Everyday Song Book*,
3 which Defendants “mistakenly” withheld from production during
4 discovery. This was through absolutely no fault of Plaintiffs, who
5 acted diligently immediately after obtaining access to the blurred
6 1927 edition of that compilation. The Court will allow Plaintiffs to
7 supplement the record and will consider the newly-discovered
8 evidence.

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10 10. Based on this evidence, the Court concludes that there is no copyright
11 to the *Happy Birthday* lyrics and grants summary judgment in
12 Plaintiffs’ favor based upon this newly-discovered evidence.

13 11. Under Section 9 of the 1909 Copyright Act, “any person entitled
14 thereto by this Act may secure copyright for his work by publication
15 thereof with the notice of copyright required by this Act” affixed to
16 all copies of the work. 17 U.S.C. § 9. At a minimum, Section 18 of
17 the 1909 Copyright Act required the notice to include the word
18 “Copyright,” the abbreviation “Copr.,” or the “©” symbol as well as
19 the year of first publication and the name of the author of the
20 copyrighted work. 17 U.S.C. § 18.

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22 12. If the strict notice requirements of the 1909 Copyright Act were not
23 met, the “published work was *interjected irrevocably into the public*
24 *domain.*” *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165
25 (9th Cir. 1996) (emphasis added). None of these notice requirements
26 was met for the *Good Morning and Birthday Song* included in the
27 fourth edition of *The Everyday Song Book* published in 1922.

28 13. Forfeiture occurs for individual works included with the author’s

1 permission in a compilation published by another person. With few
2 exceptions, none of which apply here, when an individual work is
3 included in a compilation and the copyright notice includes only the
4 compilation publisher's name, the author of the individual work loses
5 his copyright and the author's work falls into the public domain. *See*
6 *New York Times Co. v. Tasini*, 533 U.S. 483, 494-95 (2001).

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8 14. Plaintiffs submitted copyrights for the various editions of *The*
9 *Everyday Song Book* including Reg. No. A453345, for the first
10 edition, filed on Aug. 5, 1916 (which did not include the *Good*
11 *Morning and Birthday Song*); and Reg. No. A624750 for a revised
12 edition, filed on Oct. 6, 1921 (which included the *Good Morning and*
13 *Birthday Song*).

14 15. Neither of those two copyrights was ever renewed. Thus, for
15 A453345, the copyright expired 28 years later on Aug. 5, 1944, and
16 for A624750, the copyright expired on Oct. 6, 1949.

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18 16. This evidence moots the consideration of all other issues presently
19 before the Court.

20 17. Plaintiffs meet the requirements both for *ex parte* relief and for the
21 underlying request to have the Court consider the newly discovered
22 evidence submitted and to grant summary judgment in Plaintiffs'
23 favor.

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25 **ORDER**

26 **THEREFORE**, based upon the foregoing Findings of Fact and Conclusions
27 of Law, Plaintiffs' *Ex Parte* Application is hereby **GRANTED**, as follows:
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1. Plaintiffs acted diligently in submitting this *ex parte* application.
2. The only prejudice to Defendants is created by their own conduct.
3. Plaintiffs are not at fault in the need for this *ex parte* relief and good cause exists for consideration of newly discovered evidence “mistakenly” withheld from discovery by Defendants.
4. Summary Judgment is hereby granted in Plaintiffs’ favor.

IT IS SO ORDERED.

Dated: _____

HON. GEORGE H. KING, CHIEF JUDGE
UNITED STATES DISTRICT COURT JUDGE