

1 FRANCIS M. GREGOREK (144785)
 2 gregorek@whafh.com
 3 BETSY C. MANIFOLD (182450)
 4 manifold@whafh.com
 5 RACHELE R. RICKERT (190634)
 6 rickert@whafh.com
 7 MARISA C. LIVESAY (223247)
 8 livesay@whafh.com
 9 **WOLF HALDENSTEIN ADLER**
 10 **FREEMAN & HERZ LLP**
 11 750 B Street, Suite 2770
 12 San Diego, CA 92101
 13 Telephone: 619/239-4599
 14 Facsimile: 619/234-4599

Attorneys for Plaintiffs

15 **UNITED STATES DISTRICT COURT**
 16 **CENTRAL DISTRICT OF CALIFORNIA**
 17 **WESTERN DIVISION**

18	GOOD MORNING TO YOU	)	Case No. CV 13-04460-GHK (MRWx)
19	PRODUCTIONS CORP., <i>et al.</i> ,)	
20		)	REPLY IN FURTHER SUPPORT OF
21	Plaintiffs,	)	PLAINTIFFS' EX PARTE
22		)	APPLICATION TO HAVE THE COURT
23	v.	)	CONSIDER NEWLY DISCOVERED
24		)	EVIDENCE "MISTAKENLY"
25	WARNER/CHAPPELL MUSIC,	)	WITHHELD BY DEFENDANTS
26	INC., <i>et al.</i>,	)	DURING DISCOVERY AND ENTER
27		)	SUMMARY JUDGMENT IN
28	Defendants.	)	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
)		

1 **I. INTRODUCTION**

2 Defendants’ response to Plaintiffs’ *ex parte* motion concedes two important
3 points: *first*, that the 1922 publication of *Happy Birthday* without a copyright notice
4 extinguished any copyright to the work if the publication was authorized; and
5 *second*, since whether Summy was authorized to permit the 1922 publication is at
6 most a disputed factual question, they are not entitled to summary judgment in their
7 favor. Dkt. 226 at 2:13-22, 6:16-17. Defendants’ “own dirty hands” argument that
8 Summy may not have been authorized to permit Cable to publish *Happy Birthday* in
9 1922 and their hypothetical suggestion that Summy may not have done so defy
10 common sense. *Id.* at 1-2. More importantly, both arguments are completely
11 inconsistent with all the evidence before the Court. They should be rejected without
12 any more delay.

13 Defendants’ desperate attempt to avoid the preclusive effect of the 1922
14 publication rings hollow. Had Summy tried to enforce a copyright to *Happy Birthday*
15 – something it never did – after permitting Cable to publish the song without a
16 copyright notice in 1922, it never would or could have denied possessing the
17 authority to do so. Summy, which was economically benefiting from the 1922
18 publication (and presumably sharing that economic benefit with Patty and Jessica),
19 was estopped to deny it was authorized by Patty and Jessica to use the song.
20 Defendants, who obtained whatever limited rights they may have to the song when
21 they acquired Summy (as it then existed) in 1988, have no greater rights than Summy
22 had. Defendants cannot credibly make an argument that Summy itself could not have
23 made.

24 All the evidence, including the 1922 smoking gun, overwhelmingly and
25 conclusively proves that Defendants do not own a copyright to the *Happy Birthday*
26 song, but merely to specific piano arrangements. By no later than 1922, there no
27 longer was any question that the song belonged to the public. The Court should
28 declare *Happy Birthday* to be in the public domain, just as Patty Hill recognized that

1 her ditty was common property of the nation.

2 **II. LEGAL ARGUMENT**

3 **A. Defendants’ Response Makes Two Important Concessions**

4 In opposing Plaintiffs’ *ex parte* application, Defendants have conceded two
5 critically important points. *First*, they concede Plaintiffs’ *legal* argument that the
6 1922 publication of *Happy Birthday*, which did not include the requisite copyright
7 notice, extinguished the copyright to the song (if Summy was authorized to permit
8 Cable to publish the song in 1922). *See* Dkt. 226 at 1-2. 17 U.S.C. § 9.¹ Section 18
9 of the 1909 Copyright Act unquestionably required the notice to include the word
10 “Copyright” or its equivalent as well as the year of first publication and the name of
11 the author of the copyrighted work. 17 U.S.C. § 18. The 1922 publication of *Happy*
12 *Birthday* unquestionably did not include any of the required information. *See* Exhibit
13 C, page 20 to the Declaration of Betsy C. Manifold in Support of Plaintiffs’ *Ex Parte*
14 Application (“Manifold Decl.”) [Dkt. 225-3]. Because the strict notice requirements
15 of the 1909 Copyright Act were not met when the song was published in 1922, as a
16 legal matter it “was *interjected irrevocably into the public domain.*” *Twin Books*
17 *Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165 (9th Cir. 1996) (emphasis added).
18 Defendants do not dispute that legal principle.

19 *Second*, Defendants now concede that in light of the 1922 publication of
20 *Happy Birthday* without a copyright notice, the Court cannot enter summary
21 judgment in *their* favor. Dkt. 226 at 6. According to Defendants, the 1922
22 publication extinguished any copyright to *Happy Birthday* if Summy was authorized
23 to permit Cable to publish it. *See id.* at 1. On that dispositive *factual* question,
24 Defendants do not offer any evidence to support their speculation that Summy may
25 not have had authority from Patty Hill and Jessica Hill to permit Cable to publish the

26 ¹ As Defendants have conceded, a copyright was not obtained unless the work
27 was published with the requisite notice: “What was necessary was publication *with*
28 *notice.*” Dkt. 208 at 7:24 (emphasis added).

1 song in 1922. According to Defendants, the record is “at most” inconclusive on the
2 factual question they have tried to raise. *See id.* at 1. Thus, even if the Court were to
3 accept Defendants’ hypothetical argument, it cannot grant summary judgment in
4 Defendants’ favor. *See* L.R. 56-3 (material facts must be controverted “by
5 declaration or written evidence”).

6 In light of Defendants’ concession that the 1922 publication without the
7 required copyright notice would have extinguished the copyright if Summy was
8 authorized to license the song to Cable, the one-sided factual record now before the
9 Court entitles Plaintiffs to judgment in their favor. *See* Supplemental Declaration of
10 Betsy C. Manifold in Further Support of Plaintiffs’ *Ex Parte* Application (“Supp.
11 Decl.”), ¶¶ 6, 7.

12 **B. Summy Was Authorized to Permit Cable to Publish the**
13 ***Good Morning and Birthday Song in 1922***

14 Defendants theorize that Summy may not have been authorized to license
15 *Good Morning* after Jessica renewed the original 1893 copyright for *Song Stories*,
16 which included *Good Morning*, in 1921. Dkt. 226 at 1:23-2:11. To support their
17 argument, Defendants contend that Summy did not own the copyright to *Happy*
18 *Birthday* in 1922. *Id.* But the relevant question is who had the right to publish the
19 song, not who (if anyone) owned the copyright in 1922.² On that relevant question,
20 the record belies Defendants’ idle speculation: it is abundantly clear that Summy had
21 authority to publish *Good Morning* – both the melody and the lyrics of that song –
22 after Jessica renewed the copyright.

23 Most importantly, when the Hill Foundation sued Summy on behalf of Patty

24 ² As Plaintiffs explained in their opening brief, the author of a compilation such
25 as the *Everyday Song Book* forfeits the copyright of another author’s individual work
26 by including that work in the compilation without a copyright notice. Dkt. 224 at 9
27 (citing *New York Times Co. v. Tasini*, 533 U.S. 483, 494-95 (2001), and *Milton H.*
28 *Green Archives, Inc., v. BPI Communs., Inc.*, 378 F. Supp. 2d 1189, 1195-97 (C.D.
Cal. 2005)). Defendants have not cited any contrary authority.

1 and Jessica in 1942, they alleged that Summy continued to publish *Song Stories*,
2 including *Good Morning*, with their consent after Jessica renewed the copyright in
3 1921. Ex. 50 at 665³ (Patty and Jessica “acquiesced in the continued publication and
4 sale by said Summy of the books [*Song Stories for the Kindergarten* and *Song*
5 *Stories for the Sunday School*] . . . ***under the renewals of copyrights***”) (emphasis
6 added). Summy – Defendants’ predecessor – admitted as much in its answer; indeed,
7 Summy claimed to own the song both before and after Jessica renewed the copyright.
8 Ex. 51 at 681 (“***subsequent to the renewal of the several copyrights***” by Jessica Hill,
9 Summy “by agreement with the said Patty S. Hill and Jessica M. Hill, received from
10 said Patty S. Hill and Jessica M. Hill at least all of the right, title and interest in
11 respect of said books or works . . . ***as had theretofore been granted***” in 1893 and
12 1899) (emphasis added). Having admitted that it owned the works both before and
13 after Jessica renewed the copyrights in 1921, Summy could not possibly have denied
14 being authorized to permit Cable to publish *Good Morning*.

15 Defendants also theorize that Summy may not have been authorized to license
16 the *Happy Birthday* lyrics in 1922. Dkt. 226 at 3:5-7. The record belies that
17 speculation as well. As Plaintiffs have demonstrated many times already, there was
18 no copyright to the *Happy Birthday* lyrics in 1922, since Patty had given ***those*** lyrics
19 to the public by teaching them to her students and fellow teachers many years earlier.
20 There ***never*** has been a claim – not by Patty, not by Jessica, not by Summy, and not
21 by Summy’s successors – that ***any*** use or performance of *Happy Birthday* infringed
22 ***any*** copyright to those lyrics. That is equally true for actions commenced ***before*** the
23 copyrights in question were registered in 1935 and for actions commenced ***after***
24 those copyrights were registered.⁴ Since the lyrics – Patty’s derivative work that she

25
26 ³ All numeric exhibit references are to the Joint Appendix filed by the parties in
support of the cross-motions for summary judgment. See Dkts. 187-194.

27 ⁴ The 1935 action over unauthorized use of *Happy Birthday* was *Jessica M. Hill*
28 *v. Sam H. Harris*, Equity No. 78-350 (S.D.N.Y. 1935) (Exs. 32 & 36). Jessica did
(continued...)

1 later created using the *Good Morning* melody – was in the public domain, Summy
2 did not need authorization from Patty or Jessica to permit Cable to include those
3 lyrics in the *Good Morning and Birthday Song*.⁵

4 As the song’s publisher (or, if Summy is to be believed, its owner), Summy
5

6 (...continued)

7 not allege that singing the *Happy Birthday* lyrics infringed any copyright, only that
8 playing the *Good Morning* melody infringed the 1893 copyright.

9 The post-1935 actions include *The Hill Foundation, Inc. v. Clayton F. Summy*
10 *Co.*, Civil No.19-377 (S.D.N.Y. 1942) (Ex. 50); *The Hill Foundation, Inc. v. Postal*
11 *Telegraph-Cable Co.*, Civil No. 20-439 (S.D.N.Y. 1943) (Ex. 52); *Clayton F. Summy*
12 *Co. v. McLoughlin Brothers, Inc.*, Civil No. 30-284 (S.D.N.Y. 1945) (Ex. 55);
13 *Clayton F. Summy Co. v. Louis Marx & Company, Inc.*, Civil No. 30-285 (S.D.N.Y.
14 1945) (Ex. 56); and *Clayton F. Summy Co. v. Paul Feigay and Oliver Smith*, Civil
15 No. 34-481 (S.D.N.Y. 1946) (Ex. 57). *See* Dkt. 190. In all those later actions, claims
16 were asserted only under the 1893 copyright to the *Good Morning* melody. None of
17 the later actions asserted any claim under the 1935 copyrights or that any other
18 copyright was infringed by performing or using the *Happy Birthday* lyrics.

19 If, as Defendants insist, the 1935 copyrights covered the *Happy Birthday*
20 lyrics, it defies logic that no infringement claim was asserted *after* those copyrights
21 were registered when *Happy Birthday* was used or performed without permission.

22 ⁵ Even if the Court were to accept Defendants’ theoretical argument that Summy
23 was not authorized to use the *Happy Birthday* lyrics in 1922, it still must grant
24 summary judgment in Plaintiffs’ favor. There is no evidence in the record that
25 Summy later obtained any rights to those lyrics from Patty or Jessica. To the
26 contrary, the rights conferred by Jessica in 1934 and 1935 were limited only to piano
27 arrangements of the common melody shared by *Good Morning* and *Happy Birthday*
28 – the musical composition variously known by either of those titles – and did *not*
include the *Happy Birthday* lyrics that distinguished the two songs. *See* Ex. 50 at 668
 (“granted to [Summy] a number of licenses for the publication, sale, and performance
of various piano arrangements of the song variously entitled ‘GOOD MORNING TO
ALL’ or ‘HAPPY BIRTHDAY TO YOU’); and Ex. 51 at 684 (“Jessica . . . sold,
assigned and transferred to [Summy] various piano arrangements of the said musical
composition “Good Morning to All”). Jessica’s limited transfers – covering *only*
piano arrangements of the common melody – did not give Summy any rights to
Patty’s lyrics.

1 was fully authorized to permit Cable to publish the *Good Morning* melody in
2 combination with the *Happy Birthday* lyrics – which were already in the public
3 domain – in the *Everyday Song Book* in 1922. Summy certainly claimed the right to
4 do so, and Defendants have no reason to deny their predecessor’s own claim.

5 **C. Other Evidence Confirms That Summy Did Permit**
6 **Cable to Publish the Song**

7 Finally, Defendants observe that Summy *may or may not* have given Cable
8 permission to publish the song in 1922. Their equivocal speculation on this point
9 consists of these six words: “whether with Summy’s authorization or not.” Dkt. 226
10 at 3:25-4:1. Defendants also theorize that Cable’s copyright applications or the
11 deposit copies for *The Everyday Song Book* might shed additional light on the
12 question. *Id.* at 4:15-17.⁶ All of that speculation is easily swept aside by even more
13 evidence that Plaintiffs have collected in the short time since they first learned of the
14 1927 publication.

15 To begin, Cable’s copyright applications include no relevant information. True
16 and correct copies of the applications for Cable’s two copyrights are attached as
17 Exhibits I and J to the Supplemental Declaration of Betsy C. Manifold filed
18 concurrently herewith. The *Good Morning and Birthday Song* is not mentioned or
19 described in either of them. They do not provide any basis for Defendants to deny or
20 refute what the 1922 publication says: that Summy permitted Cable to publish the
21 song in 1922.⁷

22 In addition, Plaintiffs recently obtained copies of the second, fifth, and sixth
23 editions of *The Everyday Songbook*. Those editions are convincing evidence that
24 Summy authorized Cable to publish the *Good Morning and Birthday Song* in 1922.

25 ⁶ Defendants offer no relevant evidence on this question. *Id.* at 4.

26 ⁷ It is unknown why Defendants did not obtain these copyright records for
27 themselves in the two years they have had the 1927 publication of *The Everyday*
28 *Song Book*.

1 As Plaintiffs noted in their opening brief, the first edition of *The Everyday Song*
2 *Book*, published in 1916, did not include the *Good Morning and Birthday Song*.
3 Plaintiffs now know that the song appeared for the first time in the second edition of
4 the songbook, which was published in 1921. *See* Supp. Decl., Ex. K.⁸ Cable included
5 the song in the 1921 second edition *without* Summy’s permission to do so. *Id.*
6 Thereafter, Summy granted Cable permission to use the *Good Morning and Birthday*
7 *Song*, and therefore it appeared in the fourth edition, published in 1922, with the
8 legend “Special permission through courtesy of The Clayton F. Summy Co.” *See*
9 *Manifold Decl., Ex. C.* The song was included in the fifth and sixth editions of *The*
10 *Everyday Song Book*, published in 1922 and 1927, with the same legend. *See* Supp.
11 *Decl., Exs. G, H.* And it also appeared in the fifteenth edition of *The Everyday Song*
12 *Book*, again with the same legend. *None* of these editions of *The Everyday Song*
13 *Book* included a copyright notice for the *Good Morning and Birthday Song*. *Id.*

14 That the *Good Morning and Birthday Song* appeared in the second edition of
15 *The Everyday Song Book* without the legend but later appeared in the fourth and
16 subsequent editions with the legend is convincing proof that Summy authorized
17 Cable to publish *Good Morning and Birthday Song* (and to do so without a copyright
18 notice) in 1922 and thereafter. As publisher of *Song Stories*, Summy apparently
19
20

21 ⁸ As identified in the *Manifold Supp. Decl., Ex. K* is the deposit copy of the
22 1921 edition of *The Everyday Song Book*, the work covered by Reg. No. A624750.
23 The copyright stamp for A624750 appears on the third page of Ex. K. The deposit
24 copy is the *second* edition of that work, published in 1921 but without the “special
25 permission” legend. In their response to Plaintiffs’ *ex parte* application, Defendants
26 speculated that the deposit copy might be informative on whether Summy permitted
27 Cable to publish the song. They were correct, but not in the way they thought. The
28 change from the second edition (without permission) in 1921 in the deposit copy to
the fourth edition (with permission) in 1922 cuts off Defendants’ speculative
argument.

1 learned of Cable’s original inclusion of *Good Morning* in 1921.⁹ Shortly thereafter,
2 Summy permitted Cable to publish the song, presumably for a licensing fee, which
3 Summy would have shared with Patty and Jessica as their publisher. Summy, Patty,
4 and Jessica had a strong incentive to permit *Good Morning* to be published together
5 with the *Happy Birthday* lyrics, as sheet music with the immensely popular *Happy*
6 *Birthday* lyrics (which already were in the public domain) would be far more
7 valuable than sheet music with only the *Good Morning* lyrics.

8 Beginning in 1922, the *Good Morning and Birthday Song* was included in *The*
9 *Everyday Songbook* with the legend indicating Summy’s permission. The change
10 from the second edition to the fourth edition by the inclusion of the “special
11 permission” legend eliminate all doubt whether Summy, in fact, gave permission to
12 Cable to publish the *Good Morning and Birthday Song*, in the fourth edition of *The*
13 *Everyday Song Book* in 1922. Significantly, Summy never objected to publication of
14 the song *without a copyright notice*, and it was included that way in multiple
15 editions of *The Everyday Song Book* published over many years.

16 Indeed, *The Everday Song Book* was not the first time Summy permitted
17 another publisher to use *Good Morning*. In 1923, Summy authorized Hall &
18 McCreary Co. (“H & M”) to include *Good Morning* in *The Golden Book of Favorite*
19 *Songs* (rev. ed.) with the legend “Used by permission. Copyright by Clayton F.

20
21 _____
22 ⁹ Patty relied upon Summy not just to publish *Good Morning*, but also to
23 monitor for unauthorized publication of the song. When Patty was asked in the *Hill v.*
24 *Harris* litigation if she was aware of any other publication of *Good Morning*, she
deferred to Summy to the answer the question:

25 With my permission, no – I should think you would have to refer that to the
26 publishers [Summy] because they kept a very close track on it personally so
that I can’t tell you that.

27 Ex. 87 at 1018. As they have done other times, Defendants paraphrased only the first
28 part of Patty’s answer out of context. See Dkt. 226 at 4:9.

1 Summy Co.”¹⁰ Supp Decl., Ex. L. Summy was profiting from other publishers’ used
2 of the work. Notably, Summy, Cable, and H & M were all Chicago music
3 publishers. It is simply implausible that two different Chicago music publishers
4 would falsely claim to have Summy’s permission to publish *Good Morning*. The
5 obvious conclusion to draw is that both had Summy’s permission to do so.

6 **III. CONCLUSION**

7 For the reasons stated above, Plaintiffs respectfully submit that this *Ex Parte*
8 Application should be granted. The Court should: (i) enter an Order permitting
9 Plaintiffs to supplement the record with the newly-discovered evidence that
10 Defendants “misktakenly” withheld during discovery; (ii) consider the newly-
11 discovered evidence in ruling on the pending cross-motions for summary judgment;
12 and (iii) enter summary judgment in Plaintiffs’ favor on the basis of the newly-
13 discovered evidence that proves conclusively that *Happy Birthday* has been in the
14 public domain since no later than 1922.

15 Dated: August 5, 2015

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

17 By: /s/ Betsy C. Manifold
18 Betsy C. MANIFOLD

19 FRANCIS M. GREGOREK
20 gregorek@whafh.com
21 BETSY C. MANIFOLD
22 manifold@whafh.com
23 RACHELE R. RICKERT
24 rickert@whafh.com
25 MARISA C. LIVESAY
26 livesay@whafh.com

26 ¹⁰ The copyright “notice” in *The Golden Book of Favorite Songs* did not include
27 the date of first publication, and therefore would not have protected any copyright to
28 that work. See 17 U.S.C. § 18 (required notice must include, *inter alia*, year of first
publication of the copyrighted work).

1 750 B Street, Suite 2770
2 San Diego, CA 92101
3 Telephone: 619/239-4599
4 Facsimile: 619/234-4599

5 **WOLF HALDENSTEIN ADLER**
6 **FREEMAN & HERZ LLP**

7 MARK C. RIFKIN (*pro hac vice*)
8 rifkin@whafh.com

9 JANINE POLLACK (*pro hac vice*)
10 pollack@whafh.com

11 270 Madison Avenue
12 New York, NY 10016
13 Telephone: 212/545-4600
14 Facsimile: 212-545-4753

15 *Interim Lead Counsel for Plaintiffs*

16 **RANDALL S. NEWMAN PC**

17 RANDALL S. NEWMAN (190547)
18 rsn@randallnewman.net

19 37 Wall Street, Penthouse D
20 New York, NY 10005
21 Telephone: 212/797-3737

22 **HUNT ORTMANN PALFFY NIEVES**
23 **DARLING & MAH, INC.**

24 ALISON C. GIBBS (257526)
25 gibbs@huntortmann.com

26 OMEL A. NIEVES (134444)
27 nieves@huntortmann.com

28 KATHLYNN E. SMITH (234541)
smith@ huntortmann.com

301 North Lake Avenue, 7th Floor
Pasadena, CA 91101

Telephone 626/440-5200
Facsimile 626/796-0107
Facsimile: 212/797-3172

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DONAHUE FITZGERALD LLP
WILLIAM R. HILL (114954)
rock@donahue.com
ANDREW S. MACKAY (197074)
andrew@donahue.com
DANIEL J. SCHACHT (259717)
daniel@donahue.com
1999 Harrison Street, 25th Floor
Oakland, CA 94612-3520
Telephone: 510/451-0544
Facsimile: 510/832-1486

GLANCY BINKOW & GOLDBERG LLP
LIONEL Z. GLANCY (134180)
lglancy@glancylaw.com
MARC L. GODINO (188669)
mgodino@glancylaw.com
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: 310/201-9150
Facsimile: 310/201-9160

Attorneys for Plaintiffs

WARNER/CHAPPELL:22002.reply.exparte