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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GOOD MORNING TO YOU PRODUCTIONS CORP., *et al.*, Plaintiffs, v. WARNER/CHAPPELL MUSIC, INC., *et al.*, Defendants.	Case No. CV 13-04460-GHK (MRWx) **PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL EVIDENCE** 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

I. INTRODUCTION

In a last-ditch attempt to prove they own the copyright to *Happy Birthday*, not just specific piano arrangement of *Good Morning* done by Preston Ware Orem, an employee-for-hire of Clayton F. Summy Co. ("Summy"), Defendants have asked the Court to consider some British copyright records as support for their argument that Ex. 106 is a copy of the work deposited with the registration for E51990. Notwithstanding that discovery closed over a year ago on July 11, 2014, Plaintiffs were only recently given access to the British copyright records on July 13, 2015, along with approximately 200 pages of additional documents that Defendants claim to have failed to produce by "mistake."

If the Court accepts Defendants' explanation that they originally sought the British copyright records in 2013 but were unsuccessful in obtaining them until after the summary judgment hearing two years later, their desperate, thirteenth-hour argument is irrelevant and insufficient for at least three reasons. *First*, even if the Court were to consider the British records and accept the new evidence as proof of what was deposited in the United States Copyright Office with E51990, it cannot inform the Court's determination of the scope of that copyright (regardless of what "words" or "text" may have been printed on the sheet music) because, like Ex. 106, the British copy does not include Patty Hill's name on it, and she is ***the person who Defendants insist wrote the lyrics***. *Second*, the evidence Defendants now offer to prove that E51990 covered the *Happy Birthday* lyrics is squarely contradicted by other evidence already in the record, including Defendants' own prior admission that Mr. Orem (whose name also is not on Ex. 106 or the British copy) did not write them. Whatever "text" may have been included in the deposit copy, E51990 – the copyright for the piano arrangement done as a work-for-hire by Mr. Orem as Summy's employee – could not possibly have covered the lyrics since they were ***not written by him***. Offering more evidence to prove what "text" was printed on the sheet music is merely a distracting sideshow.

Third, and most importantly, the scope of E51990 (as well as the abandonment issue on which the Court recently ordered supplemental briefing) is rendered moot by the 1922 publication of the *Good Morning and Birthday Song* in *The Everyday Song Book*, which is presently the subject of Plaintiffs' *ex parte* application.[1] Dkts. 224, 225. For the reasons explained in Plaintiffs' *ex parte* application, the publication of the *Good Morning and Birthday Song* in 1922, with permission from Summy but ***without the mandatory copyright notice*** (*see* Dkt. 225-3 at 20), extinguished any possible copyright.[2] *See Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165 (9th Cir. 1996). Thus, regardless of the scope of E51990, and whether or not Patty Hill abandoned any copyright she may have had to the *Happy Birthday* lyrics before that narrow copyright was registered, when the *Good Morning and Birthday Song* was published with Summy's permission but without a copyright notice in 1922, the lyrics entered the public domain forever, leaving nothing for Summy to copyright in 1935 except the specific piano arrangement done by Mr. Orem. Indeed, the 1922 publication of the *Happy Birthday* lyrics, as authorized by Summy, without a copyright notice conclusively ends the case in Plaintiffs' favor.

II. LEGAL ARGUMENT

A. Defendants Should Not be Permitted to Supplement the Record Because They Hid Their Search of the British Copyrights

No party has a *right* to supplement the summary judgment record. Rather, whether to permit a party to supplement the factual record on summary judgment is a matter in the Court's discretion. *See Bell v. City of Los Angeles*, 835 F. Supp. 2d 836, 848 (C.D. Cal. 2011) (Matz, J.) (citing *Betz v. Trainer Wortham & Co.*, 610 F.3d

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[1] The Court heard oral argument on the supplemental briefing on July 29, 2015 and has taken the matter under submission. Dkt. 229.

[2] In the interest of brevity, Plaintiffs will not repeat their argument here. The Court is respectfully referred to Plaintiffs' *Ex Parte* Application and Plaintiffs' Reply in Further Support of Their *Ex Parte* Application. Dkts. 224, 225, 232, and 233.

1169, 1171 (9th Cir. 2010)). Because Defendants hid their efforts to obtain the British Library records throughout discovery, the Court should exercise its discretion to preclude them from supplementing the record now.

In the Declaration of Kelly M. Klaus in Support of Defendants' Motion for Leave to File Supplemental Evidence, Dkt. 223-1, submitted on July 23, 2015 (more than a year after the close of discovery on July 11, 2014), Mr. Klaus describes Defendants' effort "in the fall of 2013" "to request an official copy of the deposit copy of *Happy Birthday to You!* that the Clayton F. Summy Co. deposited [in Great Britain] in 1935" from the British Library. Dkt. 223-1 at 1:11-15. According to Mr. Klaus, in November of 2013, Defendants were informed that the British Library staff was "unable to locate the British Library's deposit copy of *Happy Birthday to You!*" *Id*. at 1:18-20.

Throughout discovery, Defendants withheld information about their newly-disclosed effort to obtain the British Library deposit copy of *Happy Birthday*. On June 3, 2014, Plaintiffs took the deposition of Thomas J. Marcotullio, Esquire, Vice President of Mergers and Acquisitions for Warner Music Group, whom Defendants designated as the person most knowledgeable on the copyright applications for E51988 and E51990, including the work deposited with the Copyright Office for those two copyrights. Mr. Marcotullio testified for approximately seven hours. He was asked, in particular, what efforts Defendants made to obtain a copy of the deposit copy for E51990. Although he had no first-hand knowledge of the search, he answered as follows:

> I spoke with Jeremy Blietz and others at Warner/Chappell. I understand, I think, I believe we may have received this in connection with our request from the Copyright Office. In any case they conducted an extensive investigation of their records, including microfiche files that they had, hard copy files that were retained by Warner/Chappell, and other digital files that they had already copied and pdf'd into a digital file. So they went through a fairly extensive review of those materials including with respect to the copyrights, the Hills, Summy-Birchard and otherwise, in

addition as I mentioned earlier the requests to the Copyright Office.

Dkt. 192-1 at 1368 (Tr. Marcotullio, at 144:5-22). The effort described by Mr. Klaus in his declaration allegedly took place approximately seven months ***before*** Mr. Marcotullio was deposed, but Mr. Marcotullio did not mention the British Library or the British Copyright Office at any time during his seven-hour deposition. In fact, Defendants ***never disclosed any attempt to obtain the British Library copy*** of this hotly disputed document at any time during discovery.

The Court should exercise its discretion by refusing to supplement the record when doing so would reward discovery abuse. Here, Defendants were asked to identify their efforts to locate a copy of the work deposited with the application for E51990. When asked point-blank to describe Defendants' effort to locate the deposit copy, Mr. Marcotullio, their only Rule 30(b)(6) designee, never mentioned the British Library search.[3]

The Court has wide latitude in responding to such discovery abuses. *Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996). That discretion includes the power to exclude evidence that "would unfairly prejudice an opposing party." *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (excluding testimony for failure to provide discovery) (citing *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir. 1980)). The failure to timely provide documents or information prejudices the propounding party's ability to prepare its case.

That Defendants ***eventually*** produced the British copyright records and

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[3] Unfortunately, this is not Defendants' only discovery abuse. As the Court is aware, Defendants failed to disclose the 1927 publication of the *Good Morning and Birthday Song* in *The Everyday Song Book* (15th ed.) until July 13, 2015. Dkt. 226 at 5-7. Defendants claim it was a "mistake" to withhold that smoking gun ***for two years***. *Id*. Defendants have not explained why that crucial evidence was not included on a privilege log if they "mistakenly" believed it to be subject to the work product doctrine. *Id*. at 6-7. Plaintiffs have reserved all their rights in that respect.

information about the British Library searches does not cure the prejudice to Plaintiffs. A last-minute tender of documents (such as here) does not cure the prejudice to the party seeking discovery. *North American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) (citing *G-K Properties v. Redevelopment Agency*, 577 F.2d 645, 647-48 (9th Cir. 1978)). As the Ninth Circuit has held, "[t]he longer the delay, the more likely prejudice becomes." *Pearson v. Dennison*, 353 F.2d 24, 28 (9th Cir. 1965).[4] Here, the delay was two years, and more than a year after discovery closed. Discovery tendered as the discovery period is about to close, or (as here) after it has closed, deprives the party seeking discovery from any meaningful opportunity to follow up on that information or incorporate it into its litigation strategy. *See Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997) (affirming dismissal of claim for untimely discovery).

Here, Plaintiffs will be unfairly prejudiced if Defendants are permitted to supplement the record with the British Library copy. Plaintiffs have not been able to follow up on the documents and information by conducting their own search of British or international copyright documents for additional relevant evidence that might shed more light on the scope of the American copyright, E51990, on which Defendants rely. Had Plaintiffs known that Defendants requested the British Library deposit copy, they would have expanded their own investigation to include those

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[4] The cases that Defendants cite are easily distinguished. Dkt. 223 at 6. The party who ***receives*** newly discovered evidence at the last minute is routinely allowed to supplement the record, not the party who has delayed producing the discovery. For example, in *Point Ruston LLC v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, No. C09-5232BHS, 2010 U.S. Dist. LEXIS 19883, at *3 (W.D. Wash. Mar. 4, 2010), the plaintiffs were permitted to supplement the record based on documents ordered to be produced by the defendants. Likewise, in *George v. Northwestern Mut. Life Ins. Co.*, No. C10-668-RSM, 2011 U.S. Dist. LEXIS 99454, at *7 (W.D. Wash. Sept. 1, 2011), permission to supplement the record was granted because discovery of an arbitration award by the defendants was delayed by the plaintiff's failure to produce it in discovery.

British and international documents. For example, Plaintiffs may have uncovered evidence questioning the scope of the British copyright, whatever the scope of that copyright may be. Nor were Plaintiffs permitted to incorporate that information into their summary judgment arguments or their litigation strategy. If the Court believes the British deposit copy is at all relevant to the scope of E51990 – and Plaintiffs explain below why it is not relevant at all – then it would have had a complete factual record on this question had Defendants timely disclosed their efforts regarding the British deposit copy when Plaintiffs asked direct questions about their efforts during discovery. Put another way, should Defendants be allowed to submit this additional evidence so late in the game, the Court would be left with the paradoxical and prejudicial result of a ***less*** complete summary judgment record.

Moreover, the Court need not consider additional evidence at summary judgment if the party seeking to supplement the record fails to prove that the new evidence would preclude granting summary judgment. *See Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (movant must show how additional discovery would preclude summary judgment). Defendants have not met, and cannot meet, that heavy burden here. To the contrary, as set forth in Plaintiffs' *ex parte* request for relief (Dkt. Nos. 224-25 & 232-33), and as discussed below, all the relevant evidence in this case entitles Plaintiffs to summary judgment in their favor. Exhibit 106 and the British copyright records do not change that outcome.

In the exercise of discretion, the Court should decline to allow Defendants to supplement the record in this one-sided and potentially misleading fashion.

B. <u>Patty Hill's Name Is Not On Ex. 106</u>

Defendants urge the Court to accept the British copyright records to corroborate their argument that Ex. 106 or the British version is an accurate copy of the work that was deposited in the United States Copyright Office with the registration for E51990, which covers the "easy piano solo" arrangement done by Mr. Orem. Defendants argue that the "text" in E51990 must have referred to the

Happy Birthday lyrics, because those lyrics appear in Ex. 106 and the British version. Other text also appears in both versions of the sheet music, including "Happy Birthday to You!" "Vocal or Instrumental," and "Brightly." Defendants do not claim to own a copyright to the universal birthday wish, to the phrase "vocal or instrumental," or to the word "brightly." Certainly, Defendants could not claim a copyright simply because that text also appears on the sheet music, but that is the ***entire*** basis for their superficial argument regarding the *Happy Birthday* lyrics: they own the lyrics because they are printed on the sheet music.

Importantly, only Mildred Hill's name appears on Ex. 106. Patty Hill's name does not appear anywhere on Ex. 106; nor is Mr. Orem's name on Ex. 106. However, Defendants themselves insist that Patty, not her sister Mildred or Mr. Orem, wrote the *Happy Birthday* lyrics. *See*, *e.g.*, Dkt. 208 at 19:17-19 ("the lyrics were written by Patty Hill"); 20:18 ("Patty says she did it"); and 33:18-25 (admitting that Patty, not Mildred, wrote the lyrics). Defendants admit that Mildred did not write the lyrics. Nothing in Ex. 106, or anywhere else, links the *Happy Birthday* lyrics to Mildred or Patty.

Thus, whether or not the Court accepts Ex. 106 as proof of what was in the deposit copy for E51990, it cannot inform the Court's determination of the scope of that copyright because it ***does not include the name of the person who defendants insist wrote the work in question***. According to Defendants, the omission of Patty's name from the sheet music may have been a mistake. Whether the omission was a mistake or not, even if the Court were to accept Ex. 106 as the deposit copy for E51990, whatever "words" or "text" E51990 referred to, the simple fact is that Ex. 106 does not provide a basis for the Court to find that the copyright covers the lyrics Defendants claim Patty wrote, any more than it gives them a copyright in the "Happy Birthday to You!" wish.

C. <u>Other Record Evidence Contradicts Defendants' Argument</u>

Even if the Court were to accept Ex. 106 as proof of what was in the deposit

copy for E51990, other evidence directly contradicts Defendants' argument that the copyright covered the lyrics. The most significant evidence is Defendants' own admission that neither Mildred Hill nor Mr. Orem wrote the lyrics. As the Court stated during the first summary judgment hearing on March 23, 2015, whatever presumption Defendants may be entitled to under E51990 must be viewed in light of their "admission that ***Mr. Orem did not author the lyrics***." Dkt. 208 at 15:23-24 (emphasis added).

As the Court noted during the hearing on March 23, 2015:

> . . . even if I accept this [Ex. 106] as evidence, what it does say is Mildred J. Hill wrote *Happy Birthday to You*, and the evidence also seems to show that she wrote the music to it. There's no question ***she didn't write the words***. In fact, you assert Patty did. You don't even assert that Mildred did.
>
> So if that's true in combination, then *Happy Birthday to You* by Mildred Hill refers to the music as to which there was an arrangement for piano forte, with text or with words.

Dkt. 208 at 24:13-20 (emphasis added).

Since that copyright covered only new work done by Mr. Orem as Summy's employee-for-hire (*see* Ex. 48), it could not have covered work done by someone who was not Summy's employee, such as Patty Hill, no matter what "words" or "text" had been included on the sheet music deposited with the application for E51990. And since Mr. Orem did not write the *Happy Birthday* lyrics, the copyright could not cover them even if they were included on the sheet music. The copyright conferred under E51990 was no broader than the claim made in the application, which was limited to the work done by Mr. Orem as Summy's employee-for-hire. *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415, 418 (D. Mass. 1936) (copyright covers nothing more than what is claimed in application). The claim in the application for E51990 was limited to the new work that Mr. Orem did as Summy's employee-for-hire. *See* Ex. 40. That could not include writing the *Happy Birthday* lyrics, no matter what "text" was printed on the sheet music.

In light of Defendants' admission that Mr. Orem – the employee who composed the piano arrangement covered by E51990 – did ***not*** write the *Happy Birthday* lyrics,[5] together with the fact that only Mildred's name is on Ex. 106 (again, Defendants concede that Mildred did not write the lyrics) and the fact that Patty's name is not on Ex. 106, it simply proves ***nothing*** about what is covered by the copyright even if it is accepted as proof of the deposit copy. Whatever the "text" may have been – a fact Defendants seem intent on proving – in light of Defendants' admission that Mr. Orem did ***not*** write the *Happy Birthday* lyrics, E51990 – which covered only new matter added by Mr. Orem – cannot include lyrics written by anyone else, including Patty Hill, who was never employed by Summy.

D. The Scope of E51990 and Patty's Abandonment of Any Copyright to the Lyrics is Moot Because the Lyrics Were Irrevocably Interjected Into the Public Domain in 1922

In Plaintiffs' *ex parte* application, they ask the Court to consider the 1922 publication of the *Good Morning and Birthday Song* in the fourth edition of *The Everyday Song Book*, by The Cable Co. ("Cable"), a Chicago music publisher, with permission from Summy as definitive proof that there is no copyright in *Happy Birthday*. Dkt. 224. That publication is by far the most important evidence recently produced by Defendants. As Plaintiffs explain in their *ex parte* application, *id*. at 8-11, the 1922 publication of the *Good Morning and Birthday Song*, with Summy's permission but without a copyright notice, is conclusive proof that the "work was ***interjected irrevocably into the public domain***." *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165 (9th Cir. 1996) (emphasis added). To save the Court's time, Plaintiffs will not repeat their thorough and detailed argument here. *See* Dkt. Nos. 224-25 & 232-33.

The question of the scope of E51990 (*i.e.*, what work was covered by that narrow copyright) now before the Court is rendered moot by the 1922 publication of

[5] Dkt. 208 at 5:19-22.

Good Morning and Birthday Song in *The Everyday Song Book* with Summy's permission but without the required copyright notice. No matter what anyone tried to copyright in 1935, the song had been irrevocably interjected into the public domain thirteen years earlier. The 1922 publication likewise renders moot the question whether Patty abandoned any copyright in the *Happy Birthday* lyrics, which is also before the Court. Whether or not Patty abandoned any copyright she may have had in the lyrics, they were unquestionably ***irrevocably interjected into the public domain*** in 1922, leaving Defendants with nothing to copyright in 1935 except for the specific piano arrangements done by their employees-for-hire, Mrs. Forman and Mr. Orem, and the second verse written by Mrs. Forman. This explains why Summy admittedly obtained only copyrights to "various piano arrangements of the said musical composition 'Good Morning to All'" from Jessica Hill in 1934 and 1935. *See* Ex. 51 at 684.

III. CONCLUSION

Whatever text may have been included in the deposit copy of the work submitted with the application for E51990, the scope of that copyright does not and cannot extend to work that was ***not*** done by Summy's employee-for-hire, Mr. Orem. Defendants admit that Mr. Orem did ***not*** write the *Happy Birthday* lyrics. Whether those lyrics were on the sheet music deposited with E51990 is irrelevant. Moreover, the 1922 publication of *Good Morning and Birthday Song* with Summy's permission but without the requisite copyright notice ends this case in Plaintiffs' favor.

Therefore, the Court should end this dispute and promptly enter summary judgment in Plaintiffs' favor on the basis that *Happy Birthday*, including the song's familiar lyrics, entered the public domain no later than 1922.

Dated: August 10, 2015

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