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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.

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

**DEFENDANTS' REPLY
 MEMORANDUM IN SUPPORT OF
 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

1 **I. Introduction**

2 Warner/Chappell requests that the Court consider on summary judgment two
3 documents from the British Museum that Warner/Chappell recently obtained. This
4 new evidence confirms that Ex. 106—sheet music with the “familiar” lyrics to
5 *Happy Birthday to You!*—is identical or substantially identical to the work that
6 Clayton F. Summy Co. (“Summy”) deposited in the U.S. Copyright Office with the
7 copyright application that issued as E51990. Plaintiffs do not dispute this point.
8 Nor do they dispute that the evidence is properly authenticated and admissible under
9 the hearsay exception for public records. In truth, Plaintiffs simply do not want the
10 Court to consider the evidence, even though they have made a similar request to
11 supplement the record with documents of their own. That is because the evidence
12 resolves beyond any dispute an issue that Plaintiffs have raised—what “text” was
13 claimed and thus granted federal copyright protection—in a manner that is unhelpful
14 to Plaintiffs. Plaintiffs object to Warner/Chappell’s new evidence on two grounds,
15 neither of which is persuasive.

16 First, Plaintiffs challenge the weight of the evidence. They attempt to
17 discount Ex. 106 because it does not (and the application for E51990 does not)
18 contain Patty Hill’s name. But this is immaterial. The application expressly
19 claimed copyright in the “text” of the work deposited and the only copyrightable
20 “text” on Ex. 106 is the familiar lyrics to *Happy Birthday to You!* The undisputed
21 evidence proves that Patty Hill wrote those lyrics. Plaintiffs also argue that the
22 scope of the E51990 deposit copy does not matter, because a 1922 publication,
23 which is the subject of Plaintiffs’ recent *ex parte* application, purportedly forfeited
24 the common law copyright for the familiar lyrics to *Happy Birthday to You!* held by
25 Patty and Jessica Hill. There is no evidence, however, that the 1922 publication of
26 “Good Morning and Birthday Song” was actually authorized by Patty or Jessica
27 Hill. Indeed, the 1921 deposit copy of that publication bears no indication that the
28 song was authorized by *anyone*. A publication of *Happy Birthday to You!* that was

1 not authorized by the owners of the common law copyright for the familiar lyrics
2 could not have forfeited the copyright for those lyrics.

3 Second, Plaintiffs ask the Court to sanction Warner/Chappell by refusing to
4 consider its newly obtained evidence. Plaintiffs claim that this sanction is
5 appropriate because Warner/Chappell allegedly “hid” from Plaintiffs that in 2013, it
6 had conducted unsuccessful inquiries for the deposit copy in the British Library. No
7 sanction would be appropriate here. Plaintiffs rely exclusively on the response of
8 Warner/Chappell’s Rule 30(b)(6) designee to a question that (1) was outside the
9 scope of Plaintiffs’ 30(b)(6) designated topics, (2) was properly objected to by
10 Warner/Chappell on that ground, and (3) did not even relate to Warner/Chappell’s
11 inquiries at the British Library. Plaintiffs cannot show that Warner/Chappell has
12 ever acted in “bad faith” or committed “conduct tantamount to bad faith,” as would
13 be necessary to justify this sanction under the Court’s inherent powers. *SalesBrain,*
14 *Inc. v. AngelVision Techs.*, No. C 12-05026 LB, 2013 WL 2422762, at *3 (N.D. Cal.
15 June 3, 2013) (citations and internal quotation marks omitted). Finally, Plaintiffs
16 claim that Warner/Chappell delayed producing the British Museum deposit copy
17 and that Plaintiffs would be prejudiced by the admission of this document. But
18 Warner/Chappell produced the document shortly after the British Library located
19 and authenticated it. Plaintiffs offer no reason for the Court to believe they actually
20 would suffer prejudice from the admission of the document.

21 The Court should consider the evidence as part of the summary judgment
22 record.

23 **II. The British Museum Deposit Copy Confirms That The E51990 Deposit**
24 **Included The Familiar Lyrics To *Happy Birthday To You!* And That Is**
25 **The Only “Text” In Which Summy Could Have Claimed Copyright**

26 The British Museum’s deposit copy of *Happy Birthday to You!* and December
27 6, 1935 copyright receipt (Klaus Decl., Exs. A-B) strongly corroborate the other
28 record evidence showing that Summy’s December 6, 1935 U.S. Copyright Office
deposit for E51990 was identical or substantially identical to Ex. 106 and contained

1 the familiar lyrics to *Happy Birthday to You!* Plaintiffs do not dispute this important
2 point. Instead—and even though their summary judgment briefs argued that
3 Warner/Chappell needed to establish the contents of the E51990 deposit copy in
4 order to prove the scope of its copyright—Plaintiffs claim that Ex. 106 would not
5 inform the Court as to the scope of the E51990 copyright even if it were identical to
6 the deposit copy of that work. Settled copyright law refutes Plaintiffs’ arguments.

7 Under the Copyright Act of 1909, applicants for a copyright registration were
8 required to deposit copies of the work claimed with the Copyright Office. 17 U.S.C.
9 §§ 11, 13, 209. The registration issued would cover the work as claimed in the
10 application for registration and deposited with the Copyright Office. Even when the
11 application for registration did not disclose everything contained in the deposit copy,
12 however, the registration would protect the copyrightable elements of the entire
13 work as deposited. “[T]he deposit copy or a comparable writing defines the scope
14 of what is protected.” *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004
15 JAK (AGR_x), 2014 WL 7877773, at *9 (C.D. Cal. Oct. 30, 2014); *see also Sylvestre*
16 *v. Oswald*, No. 91 Civ. 5060 (JSM), 1993 U.S. Dist. LEXIS 7002, at *3-6 (S.D.N.Y.
17 May 18, 1993) (concluding that a copyright in “Cherry Bomb,” a song on a cassette
18 tape, protected another song on the deposited tape that was not identified in the
19 copyright application, which described the “Nature of the Work” as “Words and
20 Music”).

21 Here, the E51990 application claimed copyright in an “Arrangement as easy
22 piano solo, *with text.*” Ex. 48 (emphasis added). As Warner/Chappell demonstrated
23 in its summary judgment papers, there can be no confusion as to which “text”
24 Summy claimed. Dkt. 182 at 6-7, 37-45. The only “text” in the deposit copy in
25 which Summy *possibly* could have claimed copyright is the familiar lyrics to *Happy*
26 *Birthday to You!* *See* Ex. 106. This is made even clearer when one considers the
27 application and deposit copy for E51988, which was submitted to the Copyright
28 Office on the same day as the application and deposit copy for E51990 and claimed

1 copyright in an “Arrangement for Unison Chorus and *revised text*.” Exs. 43-44
2 (emphasis added). The “revised text” claimed by that registration must be the lyrics
3 for the second verse, while the remaining (unrevised) text must be the lyrics for the
4 first verse; *i.e.*, the familiar lyrics, or “text,” Summy claimed protection for in the
5 application for E51990.

6 The undisputed evidence further demonstrates that Patty Hill wrote the
7 familiar lyrics to *Happy Birthday to You!* that Summy claimed in the E51990
8 application and deposited with the Copyright Office. Ex. 87 at 1006-08 (Patty Hill’s
9 testimony that she wrote the words of *Happy Birthday to You!*); *id.* at 1035-36
10 (Jessica Hill’s testimony that Patty wrote the words of *Happy Birthday to You!*).
11 The undisputed evidence also shows that Patty’s sister, Mildred Hill, composed the
12 melody to accompany Patty’s lyrics. Ex. 50 at 664 (Hill Foundation’s allegation
13 that *Happy Birthday to You!* was “written and composed by the said Patty S. Hill
14 and Mildred J. Hill”); Ex. 87 at 1006-08, 1012-13 (Patty’s testimony that Mildred
15 composed the melody for *Happy Birthday to You!* and alternate versions of the
16 song); Ex. 87 at 1030-32, 1035-36 (Jessica Hill’s testimony as to how her sisters,
17 Patty and Mildred, jointly created the different versions of *Happy Birthday to You!*).

18 Plaintiffs’ assertion that Warner/Chappell cannot tell what “text” was claimed
19 by the E51990 application because Ex. 106 contains other text—*e.g.*, a title, a
20 person’s name, a musical direction—is meritless on its face. Plaintiffs also argue
21 that the sheet music in Ex. 106 cannot instruct the Court as to the scope of the
22 E51990 copyright because it does not contain Patty Hill’s name. Plaintiffs cite no
23 legal authority for this proposition, because there is none. There is no requirement
24 that a copyright application or deposit copy identify any author of a work, let alone
25 *all* the authors of a work. Courts have repeatedly enforced copyrights even though
26 less than all of the authors—or none of the authors—or even the incorrect authors—
27 were identified in the copyright application and/or deposit copy. *Harris v. Emus*
28 *Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984); *Baron v. Leo Feist, Inc.*, 173

1 F.2d 288, 289 (2d Cir. 1949); *Urantia Found. v. Burton*, No. K 75-255 CA 4, 1980
2 WL 1176, at *4-5 (W.D. Mich. Aug. 27, 1980).¹ Accordingly, the fact that Preston
3 Ware Orem (the arranger of the music) was the only author listed on the application
4 for E51990 and Mildred Hill (the composer of the music) was the only author listed
5 on the deposit copy for E51990 in no way diminishes Warner/Chappell's rights in
6 the E51990 copyright.

7 Plaintiffs next contend that the E51990 copyright only could have covered
8 "the work done by Mr. Orem as Summy's employee-for-hire" because Orem was
9 the only author listed in the application for E51990. Dkt. 236 at 8.² Once again,
10 Plaintiffs ignore the undisputed evidence that Patty Hill wrote the familiar lyrics to
11 *Happy Birthday to You!* and ask the Court to do the same. That is not how
12 copyright law works. Even though the application for E51990 listed only Orem as
13 an author, Summy expressly claimed copyright in the lyrics (or "text") of *Happy*
14 *Birthday to You!* Ex. 48. The evidence shows that Patty Hill wrote those familiar
15 lyrics; that her sister, Jessica, allowed Summy to publish, sell, and copyright them in
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18 ¹ In the *Urantia* case, the court enforced the Urantia Foundation's copyright in *The*
19 *Urantia Book* even though the true author was unknown or intentionally concealed
20 by the Urantia Foundation, which listed *itself* as the author on the copyright
21 application and presumably the deposit copy. 1980 WL 1176, at *1-4.

22 ² To support their argument, Plaintiffs quote an excerpt of the Court's statements at
23 the initial summary judgment hearing. The Court's statements immediately after
24 Plaintiffs' excerpt are notable:

25 Question is, again, what words?

26 If we don't know whether 106, in fact, is the deposit copy, then for all
27 we know, it could include text by Mr. Orem relating to nothing about the
28 lyrics. If 106 is admissible and I were to believe it and accept it, then I
think you got a pretty strong argument that what other text is there other
than the lyrics? But what I'm suggesting is we got a few facts that we're
going to have to sort out.

Dkt. 208 at 24:21-25:3. The facts, once sorted out, show that Summy claimed
copyright in the familiar lyrics to *Happy Birthday to You!*, which Patty Hill wrote,
notwithstanding that Patty Hill's name did not appear on the E51990 application or
deposit copy.

1 1934-35; and that Patty and Jessica both profited from them for years afterward.³
2 Under the cases cited above—and numerous others that foreclose Plaintiffs’
3 hypercritical construction of the Copyright Office records at issue—Summy’s
4 identification of Orem as the author on the application is of no consequence. *See*
5 *also Nat’l Broad. Co. v. Sonneborn*, 630 F. Supp. 524, 531 (D. Conn. 1985)
6 (disregarding application errors including the mistaken claims that NBC was the
7 author of the “entire work” and that the work was a “work for hire”).

8 Finally, Plaintiffs repeat the argument of their recent *ex parte* application that
9 the scope of the E51990 copyright does not matter in light of a 1922 publication of
10 the *Everyday Song Book* by the Cable Company. This publication, according to
11 Plaintiffs, forfeited the common law copyright held by Patty and Jessica Hill in the
12 familiar lyrics to *Happy Birthday to You!* Warner/Chappell explained why this
13 argument fails in its opposition to the *ex parte* application, and will not repeat those
14 arguments here. Dkt. 226. The additional documents that Plaintiffs submitted with
15 their reply supporting their *ex parte* application further demonstrate why Plaintiffs’
16 forfeiture theory is unavailing. The 1921 deposit copy for the *Everyday Song Book*,
17 for example, does not indicate that “Good Morning and Birthday Song” was
18 authorized by *anyone*. Dkt. 233-5. Likewise, there is no evidence that the
19 subsequent publication of the book, which also included “Good Morning and
20 Birthday Song,” was authorized by any of the owners of the copyright in *Good*
21 *Morning to All* or the common law copyright in *Happy Birthday to You!*, Patty and
22 Jessica Hill. On the contrary, Patty Hill testified in 1942 that she was not aware of
23 any publication, other than by Summy, that contained *Good Morning to All* “[w]ith
24 [her] permission.” Ex. 87 at 1018.

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28 ³ *See, e.g.*, Ex. 48; Ex. 50 at 668-69; Ex. 60 at 755; Ex. 87 at 1006-08, 1035-36; Ex.
106; Ex. 126 at 1945-47; Klaus Decl., Ex. A.

1 **III. The Court Should Consider The Newly Discovered Evidence In Ruling**
2 **On Summary Judgment**

3 District courts within the Ninth Circuit routinely allow parties to supplement
4 the summary judgment record, particularly where the new evidence is directly
5 relevant to key issues and the party introducing the evidence did not act in bad faith
6 in failing to introduce the evidence earlier.⁴ Warner/Chappell explains the relevance
7 of the two documents from the British Museum above and also did so in its motion
8 for leave to supplement. That motion and the accompanying declaration likewise
9 explained that Warner/Chappell tried to obtain these records during fact discovery,
10 but was told that the British Library could not locate the deposit copy. Dkt. 223 at
11 1-2, 5; Dkt. 223-1. Warner/Chappell produced the deposit copy and copyright
12 receipt shortly after it received the authenticated materials. Dkt. 223-1 to -4.

13 Plaintiffs argue that the Court should exercise its inherent power to sanction
14 Warner/Chappell for allegedly (1) withholding information “[t]hroughout
15 discovery” about its 2013 effort to obtain the British Museum deposit copy and (2)
16 delaying production of the same. Dkt. 236 at 3-6. “[T]he Ninth Circuit has
17 concluded that sanctions are available under the court’s inherent power if ‘preceded
18 by a finding of bad faith, or conduct tantamount to bad faith,’ such as recklessness
19 ‘combined with an additional factor such as frivolousness, harassment, or an
20 improper purpose.’” *SalesBrain*, 2013 WL 2422762, at *3 (citations omitted).
21 Plaintiffs cannot demonstrate that Warner/Chappell has *ever* acted in “bad faith” or
22 committed “conduct tantamount to bad faith.”

23 Plaintiffs claim that Warner/Chappell had a duty to tell Plaintiffs it had gone
24 to the British Library—but not found what it was looking for—because Plaintiffs

25 ⁴ See, e.g., *George v. Nw. Mut. Life Ins. Co.*, No. C10-668-RSM, 2011 WL
26 3881476, at *4 (W.D. Wash. Sept. 1, 2011); *LimoStars, Inc. v. New Jersey Car &*
27 *Limo, Inc.*, No. CV-10-2179-PHX-LOA, 2011 WL 3471092, at *3 n.5 (D. Ariz.
28 Aug. 8, 2011); *Pepper v. JC Penney Corp.*, No. C07-1781-JCC, 2008 WL 4614268,
at *2-3 (W.D. Wash. Oct. 16, 2008). Plaintiffs relied on this precedent when they
recently asked the Court to consider their new evidence. Dkt. 224 at 6.

1 asked Warner/Chappell’s Rule 30(b)(6) designee a question that they contend called
2 for such information. Plaintiffs’ argument fails for several reasons. First, Plaintiffs
3 asked Warner/Chappell’s designee: “What did you do if anything to search the
4 records of either Warner/Chappell or Summy-Birchard or anyone to see if
5 somewhere there was a copy of the work deposited with E51990.” Kaplan Decl.,
6 Ex. A. Plaintiffs’ deposition notice included ten broad topics, and Warner/Chappell
7 agreed to produce a witness on some of those topics, which topics were redefined to
8 address vagueness, overbreadth, and other deficiencies. The topics included *Happy*
9 *Birthday to You!* copyright applications and registrations, assignments, authorship,
10 and the like. However, none of the topics covered Warner/Chappell’s efforts to
11 obtain the British Museum deposit copy of *Happy Birthday to You!* or copyright
12 receipt—let alone its search for the deposit copy for E51990 in the U.S. Copyright
13 Office. *Id.*, Exs. B-C. Second, Warner/Chappell properly objected to Plaintiffs’
14 question as outside the scope of the designated topics. It then noted that the witness
15 could testify to what he knew as a result of being prepared to address the limited
16 topics for which Warner/Chappell agreed to make him available. *Id.*, Ex. A. The
17 Rule 30(b)(6) designee was not required to testify as to Warner/Chappell’s
18 knowledge of everything it (or its affiliates) had done to identify the U.S. and
19 foreign deposit copies of *Happy Birthday to You!* Warner/Chappell in no way
20 suggested that the witness was offering such comprehensive testimony. Third,
21 disclosure of Warner/Chappell’s inquiries at the British Library would not even
22 have been responsive to Plaintiffs’ question. Warner/Chappell did *not* go to the
23 British Library in 2013 to find “a copy of the work deposited with E51990”—there
24 is no reason the U.S. deposit copy would have been there—but rather to find the
25 copy of *Happy Birthday to You!* that was deposited with the British Museum.⁵

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27 ⁵ Plaintiffs offer no other reason why Warner/Chappell purportedly was obliged to
28 tell Plaintiffs about its unsuccessful inquiries at the British Library.
Warner/Chappell had no such obligation, so it is both unsurprising and appropriate
(footnote continued on following page)

1 Plaintiffs next argue that Warner/Chappell delayed producing the British
2 Museum deposit copy for two years. That is incorrect. Warner/Chappell did not
3 obtain the authenticated deposit copy until June 2015. It produced this document in
4 early July 2015, just one day after it finally obtained related materials from the
5 British Library (which now houses the British Museum’s collection of deposits).
6 Dkt. 223-1 to -4.⁶

7 Finally, Plaintiffs contend that they would be unfairly prejudiced if the Court
8 were to consider the British Museum records, because they could have conducted
9 their own investigation of international sources had they known that
10 Warner/Chappell had done so. Plaintiffs offer no reason for the Court to believe
11 they would be unfairly prejudiced by the admission of these materials.⁷ Plaintiffs
12 speculate that if they had known of Warner/Chappell’s failed attempt to obtain the
13 British Museum deposit copy, they “may have uncovered evidence questioning the
14 scope of the British copyright.” Dkt. 236 at 6. The scope of the British copyright is
15 irrelevant. What matters is the fact that Summy deposited sheet music in the British
16 Museum containing the familiar lyrics to *Happy Birthday to You!* on the same day
17 that it applied in the U.S. Copyright Office for the copyright in *Happy Birthday to*
18 *You!* that issued as E51990—and also deposited sheet music in the U.S. Copyright

19 _____
20 that Warner/Chappell “never disclosed any attempt to obtain the British Library
21 copy of this hotly disputed document at any time during discovery” (Dkt. 236 at
22 4)—that is, until it actually obtained the document, at which point it promptly
23 produced the document and explained where it came from.

24 ⁶ Plaintiffs’ brief references documents that Warner/Chappell mistakenly did not
25 produce earlier in this litigation. This motion does not concern those documents,
26 which Warner/Chappell addressed in its opposition to Plaintiffs’ *ex parte*
27 application. Dkt. 226. Warner/Chappell produced the documents at issue here
28 promptly after it obtained them from the British Library. Plaintiffs’ complaints of
intentional delay ring hollow. Plaintiffs obtained copyright registrations for E51988
and E51990 in June 2014—which they relied on in moving for summary judgment
and which were responsive to Warner/Chappell’s earlier document requests—and
yet they did not produce these registrations until October 2014, several months after
the close of fact discovery. Dkt. 200 at 5 n.7.

⁷ The damage the new evidence causes to Plaintiffs’ case does not constitute
“prejudice” that would preclude the admission of these documents. *See United*
States v. Bowen, 857 F.2d 1337, 1341 (9th Cir. 1988).

1 Office that, according to the Copyright Office’s deposit records, matched the
2 corresponding description of the British Museum deposit copy.⁸ Nothing prohibited
3 Plaintiffs from making inquiries at the British Library if they thought it might be
4 relevant to their claims. Plaintiffs’ illogical suggestion—that the summary
5 judgment record would be *less* complete if the Court were to admit the documents at
6 issue—should be rejected.

7 **IV. Conclusion**

8 For the reasons shown in Warner/Chappell’s motion for leave to supplement
9 and in this reply, Warner/Chappell respectfully requests that the Court order
10 Exhibits A and B to the Klaus Declaration filed as part of the record on the motions
11 for summary judgment.

12
13 DATED: August 17, 2015

MUNGER, TOLLES & OLSON LLP

14
15 By: /s/ Kelly M. Klaus
16 KELLY M. KLAUS

17 Attorneys for Defendants Warner/Chappell
18 Music, Inc. and Summy-Birchard, Inc.
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25 _____
26 ⁸ See Ex. 105 (U.S. Copyright Office record describing the E51990 deposit copy as
27 a “Piano Solo with words”); Ex. 106 (*Happy Birthday to You!* sheet music described
28 on its cover as a “Piano Solo with words”); Klaus Decl., Exs. A (British Museum
deposit copy of *Happy Birthday to You!*, described on its cover as a “Piano Solo
with words”) & B (British Museum receipt for the *Happy Birthday to You!* deposit
copy, which describes the work as a “Piano Solo with Words”).