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

13	GOOD MORNING TO YOU	)	Case No. CV 13-04460-GHK (MRWx)
14	PRODUCTIONS CORP., <i>et al.</i> ,)	
15		)	PLAINTIFFS' EX PARTE
16	Plaintiffs,	)	APPLICATION SEEKING LEAVE TO
17		)	FILE RESPONSE UNDER L.R. 7-10
18	v.)	
19	WARNER/CHAPPELL MUSIC,	)	Judge: Hon. George H.
20	INC., <i>et al.</i>,	)	King, Chief Judge
21		)	Courtroom: 650
22	Defendants.	)	Fact Discovery Cutoff: July 11, 2014
23		)	MSJ Hearings March 23, 2015
24		)	and July 29, 2015
25		)	Pretrial Conference: N/A
26		)	Trial: N/A
27)	
28)	

1 **I. INTRODUCTION**

2 Plaintiffs make this *ex parte* application under L.R. 7-10 seeking leave to file a
3 response to Defendants’ Reply (“the Reply”) in Support of Motion for Leave to File
4 Supplemental Evidence in Support of Motion for Summary Judgment (“Defendants’
5 Motion”). Dkt. 237. A copy of Plaintiffs’ proposed response is attached as Exhibit
6 A to the Declaration of Betsy C. Manifold in Support of Plaintiffs’ *Ex Parte*
7 Application (“Manifold Declaration”). Defendants’ Motion is currently set for
8 August 31, 2015, prompting the need for *ex parte* relief so the Court may consider
9 the response before the hearing date.

10 Pursuant to L.R. 7-19.1, Plaintiffs orally notified Adam Kaplan, Defendants’
11 counsel, by leaving a message in his voicemail on August 20, 2015 at 4:22 p.m.
12 about this *ex parte* application. Further details are provided both below and in the
13 Manifold Declaration.

14 **II. CONTACT INFORMATION FOR OPPOSING COUNSEL**

15 Pursuant to Local Rule 7-19, Plaintiffs provide the following contact
16 information for opposing counsel:

17 Kelly M. Klaus	Glen Pomerantz
18 Adam I. Kaplan	Melinda E. LeMoine
19 MUNGER TOLLES & OLSON LLP	MUNGER TOLLES & OLSON LLP
20 560 Mission St., 27th Floor	355 South Grand Ave., 35th Floor
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24 adam.kaplan@mto.com	melinda.lemoine@mto.com

25
26 Pursuant to Local Rule 7-19.1, on August 20, 2015 at 4:22 p.m., Plaintiffs
27 informed counsel for Defendants (Adam Kaplan) by leaving a voice mail message
28 that they intended to file this *ex parte* application on August 21, 2015. Shortly

1 thereafter at 4:49 p.m. on the same day, Plaintiffs sent a detailed e-mail to all
2 Defendants' counsel identified on Defendants' Motion. Manifold Decl., ¶ 3. A copy
3 of the e-mail is attached as Exhibit B to the Manifold Declaration. In response to the
4 e-mail, Plaintiffs received an automated message that Mr. Klaus was out of the
5 country until August 21st and Ms. LeMoine was traveling with limited availability
6 until September 8, 2015. *Id.*, ¶ 4. At 5:32 p.m. the same day, I received an e-mail
7 from Glenn Pomerantz also advising me that Adam Kaplan was out of the office, that
8 Mr. Klaus was out of the country, and that Defendants would contact Plaintiffs'
9 counsel on August 21, 2015. On August 21, 2015, Defendants' counsel (Adam
10 Kaplan) contacted plaintiff's counsel via electronic mail and advised them that the
11 Defendants would oppose this application. On the same day, I advised Mr. Kaplan
12 that Plaintiffs would serve their application on August 24, 2015.

13 On August 24, 2015, Plaintiffs electronically served a copy of this *ex parte*
14 application and supporting papers on Defendants' counsel *prior* to filing. *Id.*, ¶ 5.
15 No hearing date is requested, but, if the Court determines that a hearing would be
16 helpful, Plaintiffs could appear at any time convenient for the Court.

17 **III. PROCEDURAL BACKGROUND**

18 On July 23, 2015, Defendants filed their Motion and asked the Court to
19 consider some British copyright records as support for their argument that Ex. 106 is
20 a copy of the work deposited with the registration for E51990. *See* Dkt. 223 at 3-
21 5. On August 10, 2015, Plaintiffs opposed Defendants' Motion. *See* Dkt. 236. In
22 their opposition, Plaintiffs explained that the British Library records, which Plaintiffs
23 were only given access to on July 10, 2015, are irrelevant to whether E51990 covers
24 the *Happy Birthday* lyrics.¹ Dkt. 236 at 2, 7-10. In Defendants' reply filed on
25

26
27 ¹ The initially set fact discovery deadline of June 27, 2014 (Dkt. 92) was
28 extended by Magistrate Judge Wilner, in consultation with this Court, and at the
request of both parties, to July 11, 2014. (Dkt. 106).

1 August 17, 2015 (Dkt. 237), Defendants added a new argument that the scope of the
2 copyright covered by E51990 is *broad*er than the application or the registration
3 certificate and covers work not done by Mr. Orem and cited, for the first time, two
4 cases that supposedly support their argument that the copyright covers work not done
5 by Mr. Orem. See Dkt. 237 at 4 (citing *Sylvestre v. Oswald*, No. 91 Civ. 5060
6 (JSM), 1993 U.S. Dist. LEXIS 7002, at *3-6 (S.D.N.Y. May 18, 1993) and *Williams*
7 *v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGR_x), 2014 U.S. Dist.
8 LEXIS 182240, at *25 (C.D. Cal. Oct. 30, 2014)). Under L.R. 7-10, Plaintiffs are
9 not entitled to respond to the Reply “[a]bsent prior written order of the
10 Court.” Plaintiffs now seek leave to file a short three-page response, attached as
11 Exhibit A to the Manifold Declaration, in order to address Defendants’ *new*
12 arguments and case law.

13 **IV. LEGAL STANDARD**

14 An application for *ex parte* relief is granted when: (1) the moving party would
15 be “irreparably prejudiced if the underlying motion is heard according to regular
16 noticed motion procedures” and (2) the moving party is without fault in creating the
17 situation requiring *ex parte* relief. *Mission Power Engineering Co. v. Continental*
18 *Casualty Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995).

19 Plaintiffs meet the requirements for *ex parte* relief. If Plaintiffs’ response to
20 Defendants’ new arguments and case law are not considered before Defendants’
21 Motion is either heard or taken under advisement on August 31, 2015, then Plaintiffs
22 will be prejudiced by their inability to have a full and fair opportunity to respond to
23 the ‘new’ evidence Defendants have proffered. The need for this *ex parte* application
24 was not the fault of Plaintiffs as the new arguments and case law were first raised by
25 the Reply. Plaintiffs respectfully request that the Court grant this application and
26 allow Plaintiffs to file their response under L.R. 7-10.

1 **V. LEGAL STANDARD RE: CONTENT OF REPLY BRIEFS**

2 Under Local Rule 7-10, “[a] moving party may, not later than fourteen (14)
3 days before the date designated for the hearing of the motion, serve and file a reply
4 memorandum, and declarations or other rebuttal evidence. *Absent prior written*
5 *order of the Court*, the opposing party shall not file a response to the reply.”
6 (Emphasis added.) However, it is “improper for the moving party to ‘shift gears’ and
7 introduce new facts or different legal arguments in the reply brief than [those that
8 were] presented in the moving papers.” James M. Wagstaffe, et al., FEDERAL CIVIL
9 PROCEDURE BEFORE TRIAL, § 12:107 (Rutter Group 2015). For this reason, the court
10 has discretion to decline to consider new facts or arguments raised in a reply. See
11 *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (“This court does not ordinarily
12 review issues raised for the first time in a reply brief. . . . The reasons are obvious. It
13 robs the appellee of the opportunity to demonstrate that the record does not support
14 an appellant’s factual assertions and to present an analysis of the pertinent legal
15 precedent that may compel a contrary result”); *Burnham v. City of Rohnert Park*, No.
16 C 92-1439 SC, 1992 U.S. Dist. LEXIS 8540, at *2, n.2 (N.D. Cal. May 18, 1992)
17 (“[R]eply briefs are limited in scope to matters either raised by the opposition or
18 unforeseen at the time of the original motion”); *Scott v. R.J. Reynolds Tobacco Co.*,
19 No. 99-3091, 2001 U.S. Dist. LEXIS 10014, at *15 (E.D. La. July 12, 2001) (same).

20 Conversely, the “district court ha[s] discretion to consider [a new] issue even if
21 it was raised in a reply brief.” *Glenn K. Jackson, Inc. v. Roe*, 273 F.3d 1192, 1202
22 (9th Cir. 2001). If the court elects to consider new material included in a reply,
23 however, it must afford the opposing party an opportunity to respond. *Provenz v.*
24 *Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (“We agree with the Seventh Circuit,
25 which held that ‘where new evidence is presented in a reply to a motion for summary
26 judgment, the district court should not consider the new evidence without giving the
27 [non-]movant an opportunity to respond”); *Black v. TIC Inv. Corp.*, 900 F.2d 112,
28 116 (7th Cir. 1990) (“Where new evidence is presented in a reply to a motion for
summary judgment, the district court should not consider the new evidence without

1 giving the movant an opportunity to respond”); *see El Pollo Loco, Inc. v. Hashim*,
2 316 F.3d 1032, 1040-41 (9th Cir. 2003) (indicating that the court may consider new
3 issues raised on reply if it gives the opposition an opportunity to respond).

4 **VI. DEFENDANTS’ OFFERED NEW MATERIALS IN THE REPLY**

5 In their opposition, Plaintiffs argued that Defendants should not be permitted
6 to supplement the summary judgment record with the British Library documents
7 because they failed to disclose in discovery that they had searched for those records;
8 as a result, Plaintiffs were unable to conduct their own search of the British Library
9 records for other pertinent evidence. Plaintiffs also explained that the British Library
10 records are irrelevant to whether E51990 covers the *Happy Birthday* lyrics because,
11 whether or not those lyrics were included in whatever work was deposited with the
12 application for that copyright, Clayton F. Summy Co.’s work-for-hire copyright
13 could not extend to work that was not done by its employee, Preston Ware Orem.
14 Dkt. 236 at 8-10. Defendants admit that Mr. Orem did not write the lyrics. Dkt. 208
15 at 15:23-24. Therefore, the work-for-hire copyright E51990 cannot cover the *Happy*
16 *Birthday* lyrics any more than it covers the common melody shared with *Good*
17 *Morning*, which also appears on the British Library record, simply because they may
18 be on the deposit copy.

19 In their reply brief filed on August 17, 2015 (Dkt. 237), Defendants, having
20 argued throughout the case that the registration certificate entitles them to a
21 presumption that they own the copyright to *Happy Birthday*, not just Mr. Orem’s
22 piano arrangement, now insist for the first time that the scope of the copyright
23 covered by E51990 is **broader** than the application or the registration certificate and
24 covers work not done by Mr. Orem simply because the lyrics purportedly were
25 included on the deposit copy. Dkt. 237 at 4:10-20. In support of this argument,
26 Defendants also cite, for the first time in the extensive summary judgment briefing
27 (Dkts. 179, 181, 182), two cases that supposedly support their argument that the
28 copyrights cover work not done by Mr. Orem. Plaintiffs do not believe that the issue

1 was decided in either of those cases, and the cases do not support Defendants'
2 argument that the deposit copy can expand the scope of a copyright beyond what was
3 included in the application or registration certificate. See Dkt. 237 at 4 (citing
4 *Sylvestre v. Oswald*, No. 91 Civ. 5060 (JSM), 1993 U.S. Dist. LEXIS 7002, at *3-6
5 (S.D.N.Y. May 18, 1993) and *Williams v. Bridgeport Music, Inc.*, No. LA CV13-
6 06004 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at *25 (C.D. Cal. Oct. 30,
7 2014)). That is an incorrect statement of the law. Those cases hold only that the
8 scope of a copyright may be *limited* by what is deposited, but not expanded by the
9 deposit copy. Plaintiffs wish to file a short response to the Reply, which is attached
10 as Exhibit A to the Manifold Declaration, in order to address this new argument and
11 case law.

12 To ensure that Plaintiffs have a full and fair opportunity to respond to the
13 evidence Defendants have proffered, the Court should allow Plaintiffs to file a
14 response addressing the new argument and cases cited in the Reply. *See* L.R. 7-10
15 (permitting a party a file a response to a reply on written order of the court).

16 **VII. CONCLUSION**

17 For the reasons stated above, Plaintiffs respectfully submit that this *Ex Parte*
18 Application should be granted for Plaintiffs to file their response.

19 Dated: August 24, 2015

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