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

14 GOOD MORNING TO YOU  
 PRODUCTIONS CORP.; et al.,

15 Plaintiffs,

16 v.

17 WARNER/CHAPPELL MUSIC, INC.,  
 18 et al.,

19 Defendants.

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

**DEFENDANTS' OPPOSITION TO  
 PLAINTIFFS' EX PARTE  
 APPLICATION**

Judge: Hon. George H. King,  
 Chief Judge

Courtroom: 650

Fact Disc. Completion: July 11, 2014  
 MSJ Hearings: March 23 and  
 July 29, 2015  
 Pretrial Conference: N/A  
 Trial: N/A

1           There are no “extraordinary circumstances” that justify Plaintiffs’ *ex parte*  
2 request for leave to file a surreply. Dkt. No. 14 (“This court entertains *ex parte*  
3 applications only in extraordinary circumstances[.]”); *In re Intermagnetics Am., Inc.*,  
4 101 B.R. 191, 193 (C.D. Cal. 1989) (“opportunities for legitimate *ex parte*  
5 applications are extremely limited”).<sup>1</sup> Plaintiffs simply want to have the last word  
6 on an issue that they raised in their opposition to Warner/Chappell’s motion, and to  
7 which Warner/Chappell responded in its reply. There is nothing “extraordinary”  
8 about that situation, and it is not grounds for filing a surreply. *Heil Co. v. Curotto*  
9 *Can Co.*, No. 04-1590 MMC, 2004 WL 2600134, at \*1 (N.D. Cal. Nov. 16, 2004)  
10 (denying leave to file surreply), *aff’d*, 163 F. App’x 908 (Fed. Cir. 2006).

11           The instant motion is simple and straightforward. Warner/Chappell asks to  
12 supplement the record with further evidence confirming that the “text” and “words”  
13 for which Clayton F. Summy Co. (“Summy”) claimed copyright protection in the  
14 E51990 application—and for which the Copyright Office granted protection in the  
15 corresponding certificate—are the “familiar” lyrics to *Happy Birthday to You!* In  
16 opposing this motion, Plaintiffs have grudgingly given up their prior contention that  
17 it is impossible to know what work Summy deposited with the E51990 application.<sup>2</sup>  
18 Plaintiffs instead opposed the motion substantively on the grounds that, even if the  
19 copy deposited with the British Museum on December 6, 1935 (Klaus Decl. Ex. A)

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21 <sup>1</sup> See also *Sims v. Paramount Gold & Silver Corp.*, No. CV 10-356-PHX-MHM,  
22 2010 WL 5364783, at \*8 (D. Ariz. Dec. 21, 2010) (“Surreplies ... are highly  
23 disfavored, as they usually are a strategic effort by the nonmoving party to have the  
24 last word on a matter... [C]ourts will not allow surreplies except in the most  
25 extraordinary circumstances.”) (internal citations and quotation marks omitted);  
26 *Bohn v. Pharmavite, LLC*, No. CV 11-10430-GHK (AGRx), 2013 WL 4517895, at  
27 \*1 n.2 (C.D. Cal. Aug. 7, 2013) (“we view Defendant’s apparent habit of filing sur-  
28 replies ... with great disfavor”); *Moore’s Federal Practice – Civil* § 56.84 (“[A]  
request for leave to file a sur-reply typically will be denied when no new issues are  
raised in the reply or the party has already addressed the issue in earlier briefings.”).

<sup>2</sup> See Dkt. 182 at 25-30 (arguing that Warner/Chappell could not establish the scope  
of its copyright in E51990 because it did not offer the deposit copy into evidence);  
see also Dkt. 197-1 at 2-3, 12-14 (Plaintiffs’ motion to exclude Ex. 106).

1 were identical to the copy that Summy deposited on the same date in the U.S.  
2 Copyright Office, that fact would be irrelevant. According to Plaintiffs' opposition,  
3 Warner/Chappell's copyright in E51990 could not cover the "familiar" lyrics to  
4 *Happy Birthday to You!*, because the application for E51990 identified Preston Ware  
5 Orem, an employee-for-hire, as the author of the work. Dkt. 236 at 1, 6-9  
6 (opposition to motion to supplement); *see also* Dkt. 239 at 2, 5 (*ex parte*  
7 application's description of Plaintiffs' opposition). Warner/Chappell's reply  
8 responded to this exact argument.

9 As Warner/Chappell explained in its reply, the undisputed evidence shows  
10 that Patty Hill wrote the familiar lyrics to *Happy Birthday to You!* When Summy  
11 was asked in the application to "State exactly on what new matter copyright is  
12 claimed," Summy responded, "Arrangement as easy piano solo, *with text.*" Dkt.  
13 189-3, Ex. 48, at 654 (emphasis added). The British Museum deposit confirms—  
14 indeed, makes it irrefutable—that the only "text" Summy could have claimed  
15 copyright protection for in the copyright application (and for which copyright  
16 protection was granted by the E51990 copyright) consisted of the "familiar" lyrics.  
17 Dkt. 237 at 2-5. Under settled copyright law, the fact that the E51990 application  
18 listed Orem's name as the author *did not* mean that Summy was entitled to claim  
19 copyright protection for "text" only if Orem wrote that text. *Id.* at 4-6.

20 Plaintiffs' initial summary judgment papers also asked the Court to limit the  
21 scope of Warner/Chappell's copyright in *Happy Birthday to You!* based on the  
22 reference to Orem in the E51990 application. Dkt. 182 at 1-2, 23-30. When  
23 Plaintiffs' recent opposition reiterated this argument, Warner/Chappell's reply cited  
24 the same cases that Warner/Chappell had cited in its summary judgment papers.<sup>3</sup>

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26 <sup>3</sup> Compare Dkt. 237 at 4-6 (recent reply brief, citing *Harris v. Emus Records Corp.*,  
27 734 F.2d 1329 (9th Cir. 1984); *Baron v. Leo Feist, Inc.*, 173 F.2d 288 (2d Cir.  
1949); *Nat'l Broad. Co. v. Sonneborn*, 630 F. Supp. 524 (D. Conn. 1985); and  
28 *Urantia Found. v. Burton*, No. K 75-255 CA 4, 1980 WL 1176, at \*4-5 (W.D. Mich.  
(footnote continued on following page)

1 Accordingly, Warner/Chappell’s reply not only responded to Plaintiffs’ opposition,  
2 but it also addressed an issue (and cited authority) that Plaintiffs already have  
3 briefed. *Moore’s Federal Practice – Civil* § 56.84 (“[A] request for leave to file a  
4 sur-reply typically will be denied when no new issues are raised in the reply *or the*  
5 *party has already addressed the issue in earlier briefings.*”) (emphasis added).  
6 Again, the cases Warner/Chappell cited in its reply and on summary judgment  
7 foreclose Plaintiffs’ hypercritical—and counterfactual—construction of the  
8 Copyright Office records at issue.

9 Warner/Chappell’s reply raised no new issues. While Warner/Chappell’s  
10 reply cited two additional cases, those cases pertain to issues that already have been  
11 briefed extensively. As such, there is nothing “extraordinary” about the inclusion of  
12 those two cases in Warner/Chappell’s reply. *Sims*, 2010 WL 5364783, at \*8.  
13 Plaintiffs cite no authority to the contrary. The cases that Plaintiffs cite instead say  
14 that raising new issues or citing new evidence in some cases may justify a surreply.  
15 As demonstrated, Warner/Chappell did not raise new issues or cite new evidence in  
16 its reply. The fallacy of Plaintiffs’ position is demonstrated by the fact that their  
17 proposed surreply relies on two cases that *Plaintiffs* never cited before. Manifold  
18 Decl. Ex. A, at 2-3. Under Plaintiffs’ logic, this would entitle Warner/Chappell to a  
19 sur-surreply. Briefing on a motion must come to an end at some point.

20 The two additional cases cited by Warner/Chappell stand for the  
21 uncontroversial legal principle that the contents of a deposit copy define the scope  
22 of the copyright. Dkt. 237 at 3. Plaintiffs themselves relied on this very principle  
23 when they argued that Warner/Chappell could not establish the scope of its  
24 copyright in E51990 because it could not prove the contents of the deposit copy.  
25 *See, e.g.*, Dkt. 182 at 27-28 (seeking to exclude Ex. 106 and arguing that this would

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26  
27 Aug. 27, 1980)), *with* Dkt. 182 at 16-17, 38 (initial summary judgment papers,  
28 citing these same cases).

1 “leav[e] Defendants with nothing whatsoever to prove the scope or subject-matter of  
2 E51990”). As a result, the parties spent a significant portion of the summary  
3 judgment papers addressing the weight and admissibility of the evidence of the  
4 contents of the E51990 deposit copy.<sup>4</sup>

5 In sum, Plaintiffs arguments are unavailing and there is “no reason to extend  
6 briefing beyond that contemplated in the federal rules and local rules governing civil  
7 procedure.” *PageMasters, Inc. v. Océ-Technologies B.V.*, No. Civ.05 1519 PHX  
8 RCB, 2006 WL 753164, at \*1 (D. Ariz. Mar. 23, 2006).<sup>5</sup>

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10 DATED: August 25, 2015

MUNGER, TOLLES & OLSON LLP

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13 By:           /s/ Kelly M. Klaus          

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23 <sup>4</sup> Dkt. 182 at 25-30, 38-45 (joint summary judgment papers); *see also* Dkt. 197-1 at  
24 2-3, 12-14 (Plaintiffs’ motion to exclude Ex. 106); Dkt. 200 at 8-12  
(Warner/Chappell’s opposition to Plaintiffs’ motion to exclude Ex. 106); Dkt. 202 at  
25 6-11 (Plaintiffs’ reply supporting their motion to exclude Ex. 106).

26 <sup>5</sup> Plaintiffs submitted their proposed surreply, even though an *ex parte* “application  
27 ought properly to be addressed to the *need* to [file a surreply], rather than to the  
28 substance of the [surreply] itself.” *Intermagnetics Am.*, 101 B.R. at 194.  
Warner/Chappell will not similarly avail itself of a sur-surreply by responding to  
Plaintiffs’ proposed filing beyond noting that Plaintiffs’ mischaracterization of  
Warner/Chappell’s arguments and of apposite precedent is unpersuasive.