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8 UNITED STATES DISTRICT COURT
 9 CENTRAL DISTRICT OF CALIFORNIA

10 WESTERN DIVISION - ROYBAL FEDERAL BUILDING

11 GOOD MORNING TO YOU
 PRODUCTIONS CORP., et al.,
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 Plaintiffs,
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 v.
 14 WARNER/CHAPPELL MUSIC, INC.,
 15 et al.,
 16 Defendants.

CASE NO. CV 13-04460-GHK
**REQUEST FOR LEAVE TO FILE
 BRIEF OF AMICUS CURIAE
 NATIONAL MUSIC PUBLISHERS'
 ASSOCIATION**
 [(PROPOSED) BRIEF OF AMICUS
 CURIAE NATIONAL MUSIC
 PUBLISHERS' ASSOCIATION
 LODGED CONCURRENTLY
 HEREWITH]

18 Time: November 16, 2015
 19 Date: 9:30 a.m.
 Judge: Hon. George H. King,
 Chief Judge

28

Mitchell
 Silberberg &
 Knupp LLP

1 **INTRODUCTION**

2 Amicus Curiae National Music Publishers’ Association (“NMPA”)
3 respectfully requests leave to file the attached brief in connection with Defendants’
4 Motion for Reconsideration of the Court’s Memorandum and Order Re: Cross-
5 Motions for Summary Judgment, or Alternatively, to Certify Order for
6 Interlocutory Appeal (“Motion for Reconsideration”), in the above-captioned
7 matter. Counsel for Defendants Warner/Chappell Music, Inc., et al.,
8 (“Warner/Chappell”) has consented to the filing of this brief; counsel for Plaintiffs
9 Rupa Marya, et al. has refused to consent.

10 **DISCUSSION**

11 This court “has broad discretion to appoint amici curiae.” *Hoptowit v. Ray*,
12 682 F.2d 1237, 1260 (9th Cir. 1982). In deciding whether to accept an amicus
13 brief, “[t]he touchstone is whether the amicus is ‘helpful,’ and there is no
14 requirement ‘that amici must be totally disinterested.’” *Cal. v. U.S. DOL*, 2014
15 U.S. Dist. LEXIS 5439, at *3 (E.D. Cal. Jan. 14, 2014) (*quoting Hoptowit*, 682
16 F.2d at 1260).

17 Founded in 1917, NMPA is the largest music publishing trade association in
18 the United States, and the voice of music publishers and their songwriter partners.
19 Its mission is to protect, promote, and advance the interests of music’s creators and
20 music copyright holders on the legislative, judicial, and regulatory fronts.
21 NMPA’s music publisher members own and/or control millions of musical work
22 copyrights. Defendant Warner/Chappell Music, Inc. is a member company of
23 NMPA.

24 NMPA does not have a direct interest in the outcome of this lawsuit, but it
25 has a direct, specific, and tangible interest in the legal issues raised by the Motion
26 for Reconsideration. When a musical work is registered with the United States
27 Copyright Office, a presumption arises in favor of the validity of the facts set forth

1 in the registration, including facts supporting authorship and ownership claims.
2 See 17 U.S.C. § 209 (1909 Act); 17 U.S.C. § 410(c) (1976 Act). Federal courts
3 have recognized this presumption, and have consistently refused to shift the burden
4 to copyright owner plaintiffs even if the registration contains non-fraudulent and
5 immaterial errors or omissions. See *Urantia Found. v. Maaherra*, 114 F.3d 955,
6 963 (9th Cir. 1997); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir.
7 1984); *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 158 (1st Cir. 2007);
8 *One Treasure Ltd. v. Richardson*, 202 F. App'x 658, 660 (5th Cir. 2006); *Data*
9 *Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161 (1st Cir. 1994)
10 *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160
11 (2010); *Eckes v. Card Prices Update*, 736 F.2d 859, 861-62 (2d Cir. 1984); *Baron*
12 *v. Leo Feist, Inc.*, 173 F.2d 288, 289-90 (2d Cir. 1949); *In re Napster, Inc.*
13 *Copyright Litig.*, 191 F. Supp. 2d 1087, 1099-1100 (N.D. Cal. 2002); *Tiffany*
14 *Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1117 (D. Nev.
15 1999); *Dynamic Sol., Inc. v. Planning & Control, Inc.*, 646 F. Supp. 1329, 1341
16 (S.D.N.Y. 1986); *NBC v. Sonneborn*, 630 F. Supp. 524, 531 (D. Conn. 1985);
17 *Testa v. Janssen*, 492 F. Supp. 198, 201 (W.D. Pa. 1980). NMPA's interest in this
18 case—on behalf of its almost five hundred publisher members—is to ensure that
19 the presumption of validity of copyright registrations with non-fraudulent and
20 immaterial errors or omissions continues to be the rule of law applied in federal
21 courts.

22 Innumerable companies and individuals owning and/or controlling
23 copyrights, some decades old, and indeed the entire music publishing industry,
24 have relied and continue to rely on the principle that copyright registrations are
25 presumptively valid, even if the registrations contain non-fraudulent and
26 immaterial errors or omissions. Additionally, they rely on the presumption to
27 retain copyright protection for works even when errors or omissions exist on a

1 portion of the Copyright Office application. While this is important to all musical
2 work copyright owners, it is especially so for those owning works that are decades
3 old. In those cases, the copyright certificates may be the only surviving evidence
4 of creation and ownership and other facts stated on the registration application.
5 Clearly, denying the copyright owner this presumption will result, in some
6 instances, in an unjustified forfeiture of the copyright owner's property. NMPA
7 believes the Court should continue to apply the appropriate weight and
8 consideration to the validity of copyright registrations without material errors or
9 omissions, as the importance of accurately weighing this evidence will have a
10 significant impact on all copyright owners.

11 "District Courts frequently welcome amicus briefs from non-parties
12 concerning legal issues that have potential ramifications beyond the parties directly
13 involved or if the amicus has 'unique information or perspective that can help the
14 court beyond the help that the lawyers for the parties are able to provide.'" *NGV*
15 *Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D.
16 Cal. 2005) (citation omitted). Any ruling on the Motion for Reconsideration will
17 have far-reaching ramifications for all copyright owners, and in particular, music
18 publishers. In light of the importance of this issue, NMPA has prepared the
19 attached amicus curiae brief to provide the Court with its positions and perspective,
20 and to provide the Court with background information about United States treaties
21 and legislative history surrounding the issue of copyright registrations, which is
22 something the parties may have no interest in doing.

23 Plaintiffs will not suffer any prejudice if the Court accepts NMPA's brief.
24 NMPA is filing this motion on the same day that Plaintiff's opposition to
25 Warner/Chappell's Motion for Reconsideration is due. Thus, Plaintiff will have
26 ample time (three weeks) before the November 16, 2015 hearing to consider
27 NMPA's arguments.

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CONCLUSION

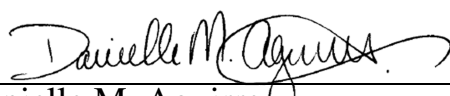
For the foregoing reasons, NMPA respectfully requests that this Court grant its request to appear as amicus curiae, accept the attached amicus curiae brief, and deem the brief filed as of the date of this Motion.

DATED: OCTOBER 26, 2015

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GOOD MORNING TO YOU
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1 **I. INTERESTS OF AMICUS CURIAE**

2 The National Music Publishers’ Association (“NMPA”) is the principal trade
3 association for music publishers in the United States. NMPA members own or
4 administer the vast majority of musical compositions registered for copyright
5 protection.¹ NMPA strives to protect and promote the interests of music creators
6 and music copyright holders by participating in the legislative and judicial
7 processes.

8 NMPA’s interest in this case is to help ensure the continued application of
9 the presumption of validity for non-fraudulent and immaterial errors or omissions
10 in copyright registrations. As the owners of millions of registered musical work
11 copyrights, NMPA members rely on the established and predictable standards of
12 copyright registration practices when registering their works and when licensing
13 and assigning copyrights to third parties. The often complicated nature of musical
14 composition authorship also renders the presumption of validity of copyright
15 registrations vital for the economic viability of all songwriters and music
16 publishers.

17 NMPA recognizes the broad implications that the seemingly new and harsh
18 treatment of previously registered works espoused by the Court could have for not
19 only music publishers, but for any individual or corporation owning or using
20 copyrighted works. Because of its involvement in protecting and advocating for
21 the copyrights of its member organizations, NMPA hopes to assist the Court in its
22 reconsideration of its summary judgment order by highlighting in this amicus
23 curiae brief certain issues compelling a contrary conclusion.

24 **II. SUMMARY OF ARGUMENT**

25 NMPA respectfully requests that the Court either reconsider its September
26 22, 2015 Memorandum and Order Re: Cross-Motions for Summary Judgment (the
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¹ Defendant Warner/Chappell Music, Inc. is a member company of NMPA.

1 “Order”) or, in the alternative, certify the Order for interlocutory appeal. NMPA
2 believes that reconsideration or certification for appeal is warranted for the
3 following reasons: First, the Court failed to properly apply the appropriate prima
4 facie presumption of validity that accompanies a copyright registration.
5 Specifically, the Court rejected Defendants’ statutory presumption by citing
6 otherwise non-material errors in the copyright registration(s). In fact, the “error”
7 was the omission of author and owner of lyrics on a 1935 application—which in
8 fact did identify “text” and thus lyrics as being part of that registration. This is a
9 critical factual component of this case. The Order adopted a harsh new rule that
10 invalidated any claim for protection for the lyrics accompanying the new musical
11 arrangement in that application, even though case law precedent explicitly stands
12 for the rule that minor flaws in a copyright registration, such as authorship errors or
13 omissions (as in the case of a co-author), if unaccompanied by fraud, do not affect
14 the statutory presumption of validity of the claim to copyright protection for the
15 work (in this instance, for the music and lyrics).

16 Second, the Court inappropriately rejected Defendants’ statutory
17 presumption of validity, thereby shifting the burden of proof on a summary
18 judgment motion. The Court did this despite the existence of several lingering
19 questions of material fact that should have been vetted at trial, suggesting that “the
20 factual and legal issues of this case are deeply interwoven and do not lend
21 themselves to a traditional analytical approach.” Order at 16. Virtually every
22 complicated copyright case, especially involving older works, is similarly situated
23 and only at trial can a court properly test and consider the facts with the burdens
24 properly ordered. This includes errors or omissions on an application that may be
25 proven or rebutted.

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1 **III. ARGUMENT**

2 **A. The Statutory Presumption of Validity That Attaches to a**
3 **Copyright Registration is Critically Important to a Functioning**
4 **Copyright System, and is Heavily Relied on by the Music**
5 **Industry.**

6 **1. A Certificate of Registration Provides a Copyright Owner**
7 **With a Statutory Presumption of Validity.**

8 As this Court in its Order correctly noted, the majority of courts, including
9 the Ninth Circuit, have ruled that both the Copyright Act of 1909 and the
10 Copyright Act of 1974 contain provisions providing that a certificate of registration
11 from the U.S. Copyright Office is prima facie proof that the claimed copyright is
12 valid.² See Order (Dkt. No. 244) at 11; accord *Acad. of Motion Picture Arts & Sci.*
13 *v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991); *Gaste v.*
14 *Kaiserman*, 863 F.2d 1061, 1064-65 (2d Cir.1988); 3 NIMMER ON COPYRIGHT
15 (“NIMMER”) § 12.11. This prima facie proof serves two functions. First, it creates
16 a rebuttable presumption that the holder of a copyright registration has met all
17 requirements for copyright validity; and second, it shifts the burden of proof to the
18 party seeking to invalidate the copyright. See *Entm’t Research Grp. v. Genesis*
19 *Creative Grp., Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997). Thus, the holder of a
20 copyright registration has no duty to prove the validity of the copyright unless and
21 until the opposing party has provided enough evidence to overcome the
22 presumption of validity. As explained below, courts in this jurisdiction have
23 consistently held that the bar for rebutting the statutory presumption of validity is
24 extremely high and that non-material errors (or omissions) in a registration
25 certificate, including those relating to authorship, do not shift the statutory
26 presumption.

26 ² See 17 U.S.C. § 209 (1909 Act) (a “certificate shall be admitted in any court as
27 prima facie evidence of the facts stated therein.”); 17 U.S.C. § 410(c) (1976 Act)
28 (“[i]n any judicial proceedings the certificate of registration made before or within
five years after first publication of the work shall constitute prima facie evidence of
the validity of the copyright ...”).

1 **2. The Presumption of Validity is Essential to a Functioning**
2 **Copyright System.**

3 A strong presumption of validity, including the key facts on a certificate
4 pertaining to the scope of protection (in this case music and lyrics), authorship and
5 ownership, is integral to a functioning copyright system and has helped to create
6 the Copyright Office database containing millions of entries.

7 Copyright registration, once mandatory (for a full term of copyright) for
8 older works, and now voluntary, serves several purposes. *See* Berne Convention
9 Implementation Act of 1988, H.R. Rep. No. 100-609 (1988). Most importantly,
10 for the courts, is the creation of a reliable database of information at the Copyright
11 Office and the ordering of evidence. The 1909 Copyright Act³ did not require
12 registration for the initial term of copyright (only publication with notice to secure
13 copyright), but it did require a “timely” registration and renewal for a full term of
14 copyright. *See generally* *Washingtonian Publ’g Co. v. Pearson*, 306 U.S. 30
15 (1939). The 1976 Copyright Act, with an eye on international treaties relaxing
16 formalities,⁴ made registration voluntary, but provided incentives to encourage
17 registrations⁵ in order to populate the registration database with valuable
18 information for claims of ownership and for licensing and use of works.⁶
19 Importantly, registrations also help the courts to sort, if only initially, through
20 presumptions, the facts of copyrightability and key issues of authorship, ownership

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23 ³ 17 U.S.C. §18 (1909 Act) (requiring only publication and notice of copyright to
24 receive federal protection).

25 ⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 5.2, Sept.
26 9, 1886, *as revised* July 24, 1971 and *as amended* Sept. 28, 1979, 102 Stat. 2853,
27 1161 U.N.T.S. 3.

28 ⁵ *See* 17 U.S.C. § 411(a) (providing standing); 17 U.S.C. § 412 (providing
additional remedies).

⁶ 17 U.S.C. § 102(a) (1976 Act) (requiring only “original works of authorship fixed
in any tangible medium of expression, now known or later developed, from which
they can be perceived, reproduced, or otherwise communicated, either directly or
with the aid of a machine or device” to receive federal protection).

1 and the scope of protection.⁷ It would thus be incongruent with the congressional
2 intent in Title 17 to encourage registrations, to now penalize authors and owners by
3 invalidating copyrights or diminishing the statutory presumption of validity simply
4 because a registration contains minor and insignificant errors or omissions.

5 Congress further demonstrated that non-fraudulent and immaterial errors
6 should not be given determinative weight (here, depriving Warner/Chappell of the
7 presumption of validity) in the Pro IP Act. Under this 2008 law—consistent with
8 long-standing copyright practice⁸— a certificate of registration is valid overall,
9 even if the certificate contains inaccurate information, unless 1) the error was
10 fraudulent, and 2) that fraudulent error is material to registration. *See* Prioritizing
11 Resources and Organization for the Intellectual Property Act of 2008, Pub. L. 110-
12 403 §101(b)(1), codified in 17 U.S.C. § 411; *accord* 2 NIMMER ON COPYRIGHT §
13 7.20(2).

14 This Court has noted that the presumption of validity is a function of judicial
15 deference to the Copyright Office’s expertise. That expertise includes making
16 initial determinations of copyrightability, and also populating the database with
17 information about the authors, owners, and scope of protection (“nature of
18 authorship”). *See* Order at 11 (citing *Russ Berrie & Co. v. Jerry Elsner Co.*, 482 F.
19 Supp. 980, 988 (S.D.N.Y. 1980) (“The presumption of validity attaching to

20 _____
21 ⁷ *See* Berne Convention for the Protection of Literary and Artistic Works (Sept. 9,
1886).

22 ⁸ *See* H.R. Rep. No. 110-617, at 24 (2008) (“It has also been argued in litigation
23 that a mistake in the registration documents, such as checking the wrong box on
24 the registration form, renders a registration invalid and thus forecloses the
25 availability of statutory damages. To prevent intellectual property thieves from
26 exploiting this potential loophole, the Act makes clear that a registration containing
27 inaccuracies will satisfy the registration requirements of the Copyright Act unless
28 the mistake was knowingly made and the inaccuracy, if known, would have caused
the Register of Copyrights to refuse the registration. And in cases where mistakes
in a copyright registration are alleged, courts will be required to seek the advice of
the Register of Copyrights as to whether the asserted mistake, if known at the time
of application, would have caused the Copyright Office to refuse registration.”)
(citing *In re Napster, Inc., Copyright Litig.*, 191 F. Supp. 2d 1087, 1099 (N.D. Cal.
2002)).

1 copyright registration is of course a function of judicial deference to the agency’s
2 expertise.”)). As such, it would be at odds with this deference policy if the
3 presumption were easily overcome without a full airing of the facts.

4 **3. The Presumption of Validity is Vital to Protecting Older**
5 **Copyrights.**

6 A high presumption of validity and the facts stated on the certificate of
7 registration are vital to protecting and enforcing copyrights and preventing
8 frivolous claims of either a lack of copyright protection, or invalid claims of
9 authorship and ownership, for registrations made many years ago, by parties no
10 longer in existence.⁹ This is especially true for much older works, as in this case,
11 where the registration certificates may be the only surviving evidence of creation,
12 the ordering of the parties (for authorship and ownership), and the scope of
13 protection (for example, music and lyrics (in this case, “text”)). *See Petrella v.*
14 *MGM*, 134 S. Ct. 1962, 1977 (2014) (relying heavily on registration materials for a
15 1963 work).

16 **4. The Presumption of Validity is Essential to a Functioning**
17 **Creative Community, Including Songwriters and Music**
Publishers.

18 Songwriters, music publishers, and many other industries in the creative
19 community rely on this presumption of validity of registration to protect their
20 copyrights, and to order the parties who authored and own works (including older
21 ones). Diminishing the rebuttable presumption standard would dramatically
22 disrupt business practices, suggesting that the data in the U.S. Copyright Office
23 database is not initially valid and is subject to either a loss of protection or unclear
24 chains of title. This could put significant numbers of musical works into the public
25

26 _____
27 ⁹ This is especially true in light of the 20 years extension of the term of Copyright
28 in 1998 for works published prior to 1978. *See Copyright Term Extension Act*,
Pub. L. 105-298, codified in 17 U.S.C. § 304 (providing 95 year terms for pre-
1978 published works).

1 domain or result in uncertainty that could lead to a flood of litigation as parties
2 attempt to reorder and re-determine their rights.

3 **B. Case Law Interpreting the Statutory Presumption of Validity**
4 **Requires the Court to Reconsider its Decision in the Case at Issue.**

5 **1. Case Law Dictates Application of a High Bar for Rebutting**
6 **the Statutory Presumption.**

7 Ninth Circuit district courts in California have consistently ruled that there is
8 a high burden for rebutting a statutory presumption of validity of a copyright
9 registration. *See Bibbero Sys. v. Colwell Sys.*, 731 F. Supp. 403, 404 (N.D. Cal.
10 1988) *aff'd*, 893 F.2d 1104 (9th Cir. 1990) (“the party opposing the copyright
11 ‘must meet a very high burden of proof to overcome that presumption.’”) (quoting
12 *Freedman v. Select Info. Sys., Inc.*, 221 U.S.P.Q. 848, 850 (N.D. Cal. 1983). Other
13 courts have ruled on similar grounds, stating that the “[d]efendants’ burden [in
14 overcoming the registration validity] is very high,” and that “[m]ere conjecture is
15 not sufficient to rebut the presumption of the validity of [a] copyright.”
16 *InstantCert.com, LLC v. Advanced Online Learning, LLC*, 2012 U.S. Dist. LEXIS
17 121103, at *11 (D. Nev. Aug. 27, 2012); *Imperial Toy Corp. v. Goffa Int’l Corp.*,
18 988 F. Supp. 617, 620 (E.D.N.Y. 1997).

19 **2. Errors or Omissions in Registration Certificates Will Not**
20 **Invalidate a Registration Unless the Errors or Omissions**
21 **are Material and Fraudulent.**

22 Consistent with section 411(b) of the Copyright Act, absent fraud that is also
23 material, a copyright registration and all of its elements pertaining to authorship,
24 ownership and the scope of protection should be presumed valid, and should not be
25 overridden by a court’s untraditional analytical approach.¹⁰ In addition to the
26 statutory language, case law also dictates such a conclusion. *Urantia Found. v.*
27 *Maaherra*, 114 F.3d 955, 963 (9th Cir. 1997)—a case wrongly dismissed by this
28 Court as inapposite—held that misstatement of authorship (work for hire) does not
invalidate a copyright. Here, the omission of the author of the “text” (lyrics) in the

¹⁰ See Order at 16.

1 1935 registration (E51990), when such lyrics were specified by the remitter of the
2 application as being part of the registration (“...with text”) is directly on point with
3 *Urantia*, and should not have resulted in a summary dismissal for the protection for
4 such lyrics. *See id.* (“[A] misstatement or clerical error in the registration
5 application if unaccompanied by fraud will not invalidate the copyright or render
6 the registration certificate incapable of supporting an infringement action.”)
7 (alteration in original). Additionally, the *Urantia* court noted that “these cases
8 generally do not require perfection, but instead base their analyses on principles of
9 fair and non-formalistic administration of the copyright laws.” *Id.*

10 In keeping with this line of precedent, other courts in both the Ninth and the
11 Second Circuits have applied similar tests for invalidating copyright registrations
12 based on both materiality and fraudulent behavior. *See Harris v. Emus Records*
13 *Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (“Absent intent to defraud and
14 prejudice, inaccuracies in copyright registrations do not bar actions for
15 infringement”); *Baron v. Leo Feist, Inc.*, 173 F.2d 288, 289-90 (2d Cir. 1949).
16 Further, the respected treatise Nimmer on Copyright endorses the “material” and
17 “fraudulent” standard for invalidating a copyright registration. *See* NIMMER §
18 7.20(B)(1) (“[A] misstatement or clerical error in the registration application, if
19 unaccompanied by fraud, should neither invalidate the copyright nor render the
20 registration certificate incapable of supporting an infringement action.”)

21 **3. Similarly, Errors or Omissions in Registration Certificates**
22 **Will Not Rebut or Diminish the Presumption of Validity**
23 **Unless Those Errors or Omissions are Material or**
24 **Fraudulent.**

25 Case law clearly supports the principle that rebutting or diminishing the
26 presumption of validity is a high burden, requiring materiality or fraudulent
27 behavior to overturn the presumption. For example, in *Eckes v. Card Prices*
28 *Update*, 736 F.2d 859, 861-62 (2d Cir. 1984), the copyright holder failed to
complete portions of the application, and in *NBC v. Sonneborn*, 630 F. Supp. 524,

1 531 (D. Conn. 1985), a registration contained four different errors. In both cases
2 the courts upheld the statutory presumption of validity absent either fraud or
3 material error. *See Eckes*, 736 F.2d at 861-62 (quoting *Russ*, 482 F. Supp. at 988
4 (“Only the ‘knowing failure to advise the Copyright Office of facts which might
5 have occasioned a rejection of the application constitute[s] reason for holding the
6 registration invalid and thus incapable of supporting an infringement action...”));
7 *NBC*, 630 F. Supp. at 531 (similar). Similarly, in *Tiffany Design, Inc. v. Reno-*
8 *Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1117-18 (D. Nev. 1999), the court
9 explained that “[i]naccuracies in a certificate are of significance only in situations
10 involving allegations of an intent to defraud or prejudice ... [o]therwise, a
11 certificate of registration will raise the presumption of valid copyright ownership.”

12 Additionally, in *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d
13 1147 (1st Cir. 1994) *abrogated on other grounds by Reed Elsevier, Inc. v.*
14 *Muchnic*, 559 U.S. 154 (2010), the court emphasized that “it is well established
15 that immaterial, inadvertent errors in an application for copyright registration do
16 not jeopardize the validity of the registration.” *Id.* at 1161. Further, the court
17 noted that “there is no support in law or reason for a rule that penalizes immaterial,
18 inadvertent errors in a copyright deposit,” and that such errors “do not impeach the
19 validity and effect of the registration.” *Id.* at 1163.

20 **4. The Registration Errors or Omissions Cited to Here Should**
21 **Not Have Invalidated or Diminished Defendants’ Statutory**
Presumption of Validity.

22 The registration error here (really, the *omission* of the author of the “text” –
23 lyrics) was not fraud, so the presumption of validity of the copyright should be
24 upheld, and the facts presumed, subject to rebuttal at trial. These facts should
25 neither be rebutted, diminished, nor invalidated, as they were by this Court on
26 summary judgment. The Court stated it is “unclear whether those lyrics were
27 being registered” in the E51990 registration in 1935. Order at 13. Because the
28 presumption favors validity and the facts as stated, any potential uncertainty should

1 be decided in *favor* of such a registration, subject to a full airing of the facts to
2 rebut that presumption, rather than invalidating any registration of those lyrics out
3 of hand. The missing element, *i.e.* the name of the author or owner of the “text”
4 (lyrics) was not a fraudulent or material error or omission. Material flaws are those
5 that would have “occasioned a rejection of the application” if known, and
6 “fraudulent” being a “knowing failure to advise the Copyright Office.” *See Eckes*,
7 736 F.2d at 861. This omission merely goes to the scope of the registration
8 covering a purported new musical arrangement and lyrics.

9 District courts in the Ninth Circuit as well as in other jurisdictions have ruled
10 that authorship errors or omissions on a registration are not material and therefore
11 do not defeat the statutory presumption of validity. *See In re Napster*, 191 F. Supp.
12 2d at 1099-1011 (finding that inaccuracies in the registration on which the
13 assignees were incorrectly listed as authors did not defeat the presumption of
14 validity); *see also Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 158 (1st
15 Cir. 2007) (“Mistakes such as an incorrect date of creation or failure to list all co-
16 authors easily qualify as immaterial because the Copyright Office’s decision to
17 issue a certificate would not be affected by them.”); *One Treasure Ltd. v.*
18 *Richardson*, 202 F. App’x 658, 660 (5th Cir. 2006) (“Immaterial, inadvertent
19 errors in an application for copyright registration do not jeopardize the registrations
20 validity Courts have repeatedly excused a wide range of errors, like those
21 complained of by the defendant including misidentification of copyright claimant,
22 misclassification of a work, *misstatement of work’s author*, misstatement of a
23 work’s creation and publication dates, and misstatement that a work is made for
24 hire.”) (emphasis added) (internal citation omitted); *Baron*, 173 F.2d at 289-90
25 (stating “[i]t is true that the copyright application did not name Belasco as the
26 author of the melodies of the published songs [...] But neither the statute nor the
27 rules of the Copyright Office require that the author be named,” and finding that
28 the omission did not affect the presumption of validity); *Testa v. Janssen*, 492 F.

1 Supp. 198, 201 (W.D. Pa. 1980) (“In our judgment, plaintiffs’ misrepresentations
2 here, with respect to authorship, are immaterial inasmuch as no prejudice has
3 accrued to defendants, and the transgression in no way affects the validity of
4 plaintiffs’ copyright.”).

5 In the present case, Plaintiffs allege no fraud or materiality with regard to the
6 omitted author of the lyrics, or whether the registration even covered lyrics in
7 1935. That should have resulted in the retention of the Defendants’ presumption of
8 validity.

9 However, the Court in the present case disregarded Defendants’ presumption
10 of validity. The Court claims to have relied on “material” flaws in the registration
11 to rebut the statutory presumption of validity;¹¹ however, controlling case law
12 suggests that the Court relied instead on errors or omissions that are immaterial.
13 Second, absolutely no evidence was presented alleging fraud. As such, the Court
14 erred in disregarding the statutory presumption of validity.

15 C. **Because the Court Invalidated Defendants’ Statutory**
16 **Presumption of Validity on Summary Judgment Despite Issues as**
17 **to the Materiality of the Registration Flaws, the Court Must**
18 **Reconsider or Allow for Immediate Appeal.**

19 In accordance with Federal Rule of Civil Procedure 56(a), summary
20 judgment is only appropriate when “there is no genuine issue as to any material
21 fact.” Fed. R. Civ. P. 56(a). Additionally, the moving party bears the initial burden
22 of proof, and must point to the absence of any genuine issue of material fact. *See*
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Finally, the court must
24 consider the facts in the light most favorable to the nonmoving party. *See*
25 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985).

26 In the case at issue, this standard was not adopted. Instead, the Court shifted
27 the burden of proof to the nonmoving party, reordering the burdens by suggesting
28 that the case at issue was more like a declaratory judgment. Order at 9-10 (citing

¹¹ Order at 11-13.

1 *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014)). In
2 doing so, the Court failed to recognize that *Medtronic* is inappropriate in the
3 present situation. The *Medtronic* case was a patent infringement case, and the
4 infringement burden, in that context, is properly placed on the rights holder; but in
5 this case the issues are both the validity of a copyright and the facts of authorship,
6 ownership and the scope of a registration made 80 years ago. That burden is
7 statutorily placed on the Plaintiff through a rebuttable presumption standard, so
8 that the evidence contemporaneous in time to the registration is given priority
9 status to rebuttals made decades later. Thus, the Court’s justification for shifting
10 the burden of proof based on the reasoning in *Medtronic* is improper.

11 Further, this issue is inappropriate for summary judgment as there remain
12 genuine issues of material fact. As discussed above, substantial law exists to
13 demonstrate that the bar for invalidating a copyright or depriving a copyright
14 registration of its statutory validity is very high and requires “material” or
15 “fraudulent” errors or omissions as a question of fact, issues best put before a jury.

16 **D. If the Decision Stands, It Will Negatively Impact the Entire**
17 **Creative Community, and will Further Create a Flood of**
18 **Litigation.**

19 “Courts have repeatedly excused a wide range of errors . . . including
20 misidentification of copyright claimant, misclassification of a work, misstatement
21 of work’s author, misstatement of work’s creation and publication dates, and
22 misstatement that a work is made for hire.” *One Treasure*, 202 F. App’x at 660.
23 Thus, a wide variety of immaterial errors should not alter the statutory presumption
24 of validity. Although the present case revolves around a single error (omitting or
25 miss-stating authorship of lyrics), by overturning long-standing presumptions, the
26 Order could, unintentionally, cause parties to challenge long-ago registered
27 copyrights for otherwise minor, but certainly non-fraudulent, non-material, errors
28 or omissions. Congress created these statutory presumptions both to assist the
construction of a reliable Copyright Office database, and to help courts with

1 preliminary (i.e. rebuttable presumptions) determinations. The statutory
2 presumptions should not be made irrelevant.

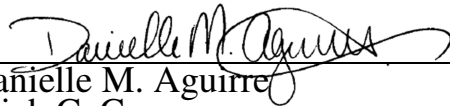
3 **IV. CONCLUSION**

4 There is significant and clear case law supporting strong presumptions of
5 copyright registration validity, and of the facts stated at the time of the making of a
6 registration including authorship, ownership, and the scope of protection. Absent
7 fraud or material errors or omissions, neither of which are at play in this case, the
8 presumptions should not be disturbed and this Court should reverse its holding,
9 which weakened the presumption rule, invalidating, without a full airing of the
10 facts, both claims by a party of authorship and, as a result, the validity of copyright
11 for the work in question. Because of the enormous legal and economic
12 implications of this Court’s decision on a number of creative industries, Amicus
13 respectfully submits that the Court should reconsider its decision or approve an
14 immediate appeal.

15 DATED: OCTOBER 26, 2015 MITCHELL SILBERBERG & KNUPP LLP

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