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Interim Lead Counsel for Plaintiffs and the [Proposed] Class

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

14	GOOD MORNING TO YOU)	Lead Case No. CV 13-04460-GHK (MRWx)
15	PRODUCTIONS CORP., <i>et al.</i> ,)	
16	Plaintiffs,)	OPPOSITION TO REQUEST OF
17	v.)	NATIONAL MUSIC PUBLISHERS'
18	WARNER/CHAPPELL MUSIC,)	ASSOCIATION FOR LEAVE TO FILE
19	INC., <i>et al.</i>)	AMICUS BRIEF; MEMORANDUM OF
20	Defendants.)	POINTS AND AUTHORITIES IN
21)	SUPPORT THEREOF
22)	Date: November 16, 2015
23)	Time: 9:30 a.m.
24)	Room: 650
25)	Judge: Hon. George H. King,
26)	Chief Judge
27)	
28)	

1 Plaintiffs, by and through their attorneys, hereby oppose the request of the
2 National Music Publishers' Association ("NMPA") for leave to file an amicus
3 curiae brief ("amicus brief") in support of Defendants' motion for reconsideration.
4 (ECF No. 247). NMPA's request is highly improper, and for the reasons that
5 follow, the Court should reject NMPA's proposed amicus brief.

6 NMPA¹ seeks leave to submit an amicus brief to add its own voice to
7 Defendants' already repetitive arguments, apparently believing that Defendants'
8 lengthy summary judgment briefing and subsequent motion for reconsideration
9 was deficient. As with Defendants' motion for reconsideration, NMPA's proposed
10 amicus brief makes *no new arguments*, it presents *no new evidence*, and it cites *no*
11 *new law* for the Court to reconsider. The proposed amicus brief adds nothing new
12 to the mountainous factual record and it cites no change in the law since the Court
13 decided the cross-motions for summary judgment; it merely repeats (for a third
14 time) the same shop-worn arguments that Defendants made on summary judgment
15 and again in their motion for reconsideration. Thus, just like Defendants' motion
16 for reconsideration, NMPA's proposed amicus brief –merely repeats the same oral
17 and written arguments Defendants already made twice before – and blatantly
18 violates L.R. 7-18. For that reason alone, NMPA should not be granted leave to file
19 its proposed amicus brief.² See *Henderson v. J.M. Smucker Co.*, No. 10-4524-GHK

20 ¹ NMPA is hardly disinterested in this matter. The Chairman of NMPA's
21 Board of Directors, Irwin Robinson, was Senior Vice President of Chappell and
22 Co. before it merged with Warner Music to become Defendant Warner; one of its
23 directors, Cameron Strang, is CEO of sister company Warner Bros. Records;
24 another director, Neil Gillis, was Senior Vice President of Defendant Warner; and
25 a fourth director, Chip McLean, was Vice President of Business and Legal Affairs
26 for Warner Bros. Records. Declaration of Mark C. Rifkin in Opposition to
27 NMPA's Request for Leave to File Amicus Brief, ¶ 5.

28 ² NMPA also failed to comply with L.R. 6-1 which required their motion to be
filed not later than twenty-eight (28) days before the hearing date as NMPA filed
their motion twenty-one (21) days before the hearing date.

1 2013 U.S. Dist. LEXIS 166061, at *5-6 (C.D. Cal. Nov. 20, 2013).

2 When NMPA sought Plaintiffs’ consent to file the proposed amicus brief, its
3 General Counsel, Danielle Aguirre, admitted that NMPA had nothing new to add
4 to the factual record and no new arguments to make. *See* Declaration of Mark C.
5 Rifkin in Opposition to NMPA’s Request for Leave to File Amicus Brief, ¶¶ 6-8
6 and Exhibit B thereto, filed together herewith. Since NMPA’s proposed amicus
7 brief plainly could not meet the demanding requirements of L.R. 7-18, Plaintiffs
8 refused to consent to NMPA’s request, and advised NMPA accordingly, both
9 orally and in writing. *See id.* Therefore, NMPA’s highly improper request never
10 should have been made because it does not comply with L.R. 7-18.

11 In addition, under Federal Rule of Appellate Procedure 29, an amicus brief
12 may be filed “only by leave of court or if the brief states that all parties have
13 consented to its filing.” Fed. R. App. P. 29(a). According to the 1998 Advisory
14 Committee Notes to Rule 29, an amicus brief should only address matters not
15 adequately addressed already by a party. In the Central District, courts generally
16 follow this requirement in deciding whether to accept an amicus brief. For
17 example, in *Gingery v. City of Glendale*, No. 14-1291 PA (AJWx) 2014 U.S. Dist.
18 LEXIS 107598, *5-6 (C.D. Cal. Aug. 4, 2014), the Court denied an *ex parte*
19 request for leave to submit an amicus brief because the information provided was
20 not necessary for the disposition of the motions before it.

21 The Court did not, as Defendants argued (and as NMPA seeks permission to
22 repeat), reject the general legal principle that an *immaterial mistake* does not
23 deprive a copyright owner of the limited presumption it is entitled to under a
24 copyright registration certificate. Instead, the Court rejected Defendants’ purely
25 speculative argument that Summy left Patty Hill’s name off the 1935 registration
26 for E51990 *by mistake*, and that the omission of her name from the registration
27 application – which was expressly limited on its face to the new matter added by
28 Summy’s employee-for-hire, Preston Ware Orem (who, by Defendants’ own

1 admission, did not write the *Happy Birthday* lyrics) – was *immaterial*.

2 That purely speculative argument was thoroughly considered and properly
3 rejected by the Court. (ECF 244 at 14-16 & n.6).³ Neither Defendants nor NMPA,
4 as would-be amicus, have added anything to the record for the Court to reconsider.
5 As Plaintiffs have explained in opposing Defendants’ motion for reconsideration,
6 there is not a scintilla of evidence in the voluminous summary judgment record,
7 and no new evidence for the Court to reconsider, that the omission of Patty’s name
8 from the registration application for E51990 was a mistake at all, rather than an
9 accurate description of the work-for-hire covered by that limited copyright. *See*
10 ECF 251 at 12-13.

11 NMPA’s proposed amicus brief, which (like Defendants’ motion for
12 reconsideration) adds no new evidence (or cites any evidence already in the record
13 that the Court supposedly overlooked), merely echoes Defendants’ speculative
14 argument that Summy “made a mistake” eighty years ago when it did not put Patty
15 Hill’s name on registration application for the work-for-hire copyright covering
16 only Mr. Orem’s new matter. The Court should reject illogical and wholly
17 unsupported speculation (whether from Defendants or NMPA) about why Summy
18 left Patty Hill’s name off the copyright application for new matter done by a
19 *different* person, Mr. Orem, as its employee-for-hire. It was no mistake that
20 Summy did so, and there is not a shred of evidence in the record that suggests
21 otherwise.

22 Finally, in granting partial summary judgment for Plaintiffs, the Court
23 reviewed a detailed factual record and determined that there was no genuine
24 dispute of fact regarding whether Defendants’ limited work-for-hire copyright
25

26 ³ As the Court noted, “It would be accurate to characterize the failure to
27 identify Patty as an author as a ‘mistake’ only if E51990 was a registration of the
28 lyrics.” (ECF No. 244 at 14 n.6).

1 covered the familiar *Happy Birthday* lyrics. The Court's Summary Judgment Order
2 did not change the law, nor did it disregard any settled legal principles. NMPA's
3 professed fear that the Court's decision will thrust many other works into the
4 public domain or set off "a flood of litigation" (ECF No. 253 at 17-18) is entirely
5 unwarranted. This peculiar factual dispute, between parties already capably
6 represented by highly skilled counsel, was aired before the Court on summary
7 judgment (and re-aired by Defendants in their motion for reconsideration). NMPA
8 has nothing substantive to add to this dispute, and nothing to fear from the Court's
9 highly fact-specific findings in this case.

10 For all these reasons, the Court should deny NMPA's highly improper
11 request for leave to file an amicus brief.

12
13 Dated: October 27, 2015

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