GLENN D. POMERANTZ (State Bar No. 112503)
glenn.pomerantz@mto.com
KELLY M. KLAUS (State Bar No. 161091)
kelly.klaus@mto.com
MELINDA E. LeMOINE (State Bar No. 235670)
melinda.lemoine@mto.com
ADAM I. KAPLAN (State Bar No. 268182)
adam.kaplan@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for Defendants
Warner/Chappell Music, Inc. and
Summy-Birchard, Inc.

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 [1] FOR RECONSIDERATION OF COURT'S MEMORANDUM AND ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT (DKT. NO. 244) OR, ALTERNATIVELY, [2] TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

Date: November 16, 2015
Time: 9:30 a.m.
Courtroom: 650
Judge: Hon. George H. King, Chief Judge

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I. Introduction

Plaintiffs apparently believe that if they just say repeatedly—and vociferously—that Warner/Chappell's reconsideration motion "echoes" its summary judgment arguments and cites "no evidence," that will make it all so. *See, e.g.*, Opp. at 1:20, 2:20, 7:9, 8:5. Plaintiffs' table-pounding rhetoric, however, cannot overrule legal precedent or make material evidence disappear from the record. The Order clearly erred in refusing to give evidentiary weight to the E51990 registration; and it failed to consider material evidence showing that, even if Patty Hill retained a common law copyright to the *Happy Birthday* lyrics, the 1944 Assignment transferred that common law copyright to Summy.

Plaintiffs' cry that Warner/Chappell filed this motion to delay the case rings hollow. If the Court grants reconsideration on the ground that there are material fact issues precluding summary judgment, that will not affect the existing schedule at all. The parties can easily fit any such issues into the December 15-16 bench trial the Court has scheduled. If the Court orders that Warner/Chappell was entitled to summary judgment, the case is over. Warner/Chappell would not have moved for reconsideration if it did not believe the Court was committed to correctly resolving the summary judgment motions. We respectfully submit that the Court should grant reconsideration or certify the Order for interlocutory appeal.

II. Argument

A. Plaintiffs Ignore Controlling Ninth Circuit Precedent On The Standard For Reconsideration

Contrary to Plaintiffs' characterization, Civil Local Rule 7-18 does not and cannot set the exclusive terms for reconsideration. Under Ninth Circuit law, reconsideration "is appropriate if the district court … committed clear error or the initial decision was manifestly unjust." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *Thomas v. Hous. Auth. of Cnty. of Los Angeles*, No. CV 04-6970 MMM (RCX), 2005 WL 6136322, at *8 (C.D. Cal.

Sept. 19, 2005); *see also Berish v. Richards Med. Co.*, 937 F. Supp. 181, 182-83 (N.D.N.Y. 1996) ("A court is justified in reconsidering its previous ruling if ... it becomes necessary to remedy a clear error of law or to prevent obvious injustice"). Plaintiffs have no response to this authority, so they simply ignore it.

Civil Local Rule 7-18 also supports this motion. The Rule provides that a motion for reconsideration may be based on "a manifest showing of a failure to consider material facts presented to the Court before such decision." Civ. L.R. 7-18(c). Warner/Chappell has shown that, as well as clear error.[1]

B. The Order Clearly Erred In Refusing To Accord Any Evidentiary Weight To The E51990 Registration

Warner/Chappell showed that the Order was clearly wrong in (1) giving registration E51990 no evidentiary weight and (2) failing to consider the material facts proving (or at least creating a triable issue) that the registration claimed copyright in the *Happy Birthday* lyrics. Plaintiffs' contrary arguments are meritless.

First, Plaintiffs are wrong that Warner/Chappell must cite intervening legal precedent to show clear error. Opp. at 4:27-5:14. "A district court may reconsider and reverse a previous interlocutory decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of

[1] Plaintiffs are wrong that Warner/Chappell's motion simply renews arguments previously made, which is why Plaintiffs include a misleading "table" rather than actually analyzing the substance of Warner/Chappell's arguments on summary judgment and in this motion. This motion is directed to what the Order says and what law and material evidence the Order failed to apply or consider. The circumstances here are nothing like those in *Henderson v. J.M. Smucker Co.*, No. CV 10-4524-GHK (VBKx), 2013 U.S. Dist. LEXIS 166061, at *1 (C.D. Cal. Nov. 20, 2013), which Plaintiffs cite. In that case, the movant indiscriminately asserted nine bases on which the Court allegedly failed to consider "material facts." *Id*. at *6-7. Although a number of those bases were plainly legal in nature, the movant improperly characterized them as factual. *Id*. at *7-8.

controlling law." *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000).

Second, Plaintiffs argue that the Court did not refuse to grant Warner/Chappell any benefit from the presumption, but instead "simply reached a different conclusion than Defendants wanted regarding whether the presumption of validity had been rebutted or overcome." Opp. at 6:3-5. Plaintiffs are making things up. The Order clearly states:

- "Defendants contend that this registration [E51990] entitles them to a presumption of validity. We disagree." Order at 13:15-16.
- "Given this facial and material mistake in the registration certificate, we cannot presume (1) that Patty authored the lyrics or (2) that Summy Co. had any rights to the lyrics at the time of the E51990 registration. Accordingly, Defendants must present other evidence to prove their case." Order at 15:10-16:2.

Contrary to Plaintiffs' characterization, the Order did not apply the presumption and then find that Plaintiffs had *rebutted* it. Rather, the Order refused to give Warner/Chappell any evidentiary benefit from the presumption on these important issues.

Third, Plaintiffs argue that, to grant reconsideration, the Court would have to hold that a registration that "omits *important information*" constitutes "conclusive proof" of what was submitted in and omitted from the registration. Opp. at 6:22-7:3 (emphasis added). Plaintiffs are wrong in multiple respects. For one thing, the controlling legal standard is whether the omitted information was *material*, not whether a litigant later tries to characterize it as "important." "[A]n error is immaterial if its discovery is not likely to have led the Copyright Office to refuse the application." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1161 (1st Cir. 1994). As a matter of law, "[m]istakes such as … *failure to list all co-authors* easily qualify as *immaterial* because the Copyright Office's decision to

issue a certificate would not be affected by them." *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 158 (1st Cir. 2007) (emphasis added); *see also In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1099-1100 (N.D. Cal. 2002) (applying presumption notwithstanding errors as to authorship); *Nat'l Broad. Co. v. Sonneborn*, 630 F. Supp. 524, 531 (D. Conn. 1985) (same). Here, too, Plaintiffs have no response to this authority, so again they ignore it. The Order clearly erred in finding that it was a "material mistake" for the registration to "not list any Hill sister as the author" and refusing to accord any weight to the presumption. Order at 15:5-10.

Plaintiffs also are wrong in characterizing Warner/Chappell's argument about the presumption. Warner/Chappell does not argue that the presumption is irrefutable. While Plaintiffs claim there is evidence rebutting the presumption (a point as to which Warner/Chappell disagrees), the bottom line is that Plaintiffs' evidence did not and could not overcome the evidentiary effect of the presumption *at summary judgment*. At most, Plaintiffs' evidence creates a fact issue for trial.

Fourth, Plaintiffs make the incredible assertion that "[t]here is no evidence – ***none*** in the expansive summary judgment record and ***none*** on reconsideration" that Summy intended for registration E51990 to cover the *Happy Birthday* "text"—*i.e.*, the lyrics—as well as the arrangement. Opp. at 8:2-6. The record evidence shows overwhelmingly—and certainly enough to survive summary judgment—that Summy did intend for the registration to cover the *Happy Birthday* lyrics:

- The registration claimed copyright protection in "text." J.A. 48, 101.
- The summary judgment record shows (or at least allows the fact finder to conclude) that the E51990 deposit copy contained the *Happy Birthday* lyrics. J.A. 101; Defs.' Mot. to Supplement the Record, Exs. A & B; Order at 7.
- As there is no other copyrightable text in the E51990 deposit copy, the registration must have been intended to cover the *Happy Birthday*

lyrics. Defs.' Mot. to Supplement the Record, Ex. A; 37 C.F.R. § 202.1(a).

Again, the Order clearly erred in holding that it could not apply the presumption because the registration did "not list any Hill sister as the author or otherwise make clear that the *Happy Birthday* lyrics were being registered." Order at 15:5-10.

In sum, all of Plaintiffs' arguments on the first reconsideration issue fail.

C. The 1944 Assignment Shows—Or At A Minimum Raises A Fact Issue—That Patty And Jessica Hill And The Hill Foundation Transferred The *Happy Birthday* Lyrics To Summy At Least As Of 1944

Warner/Chappell's motion also establishes that the Order failed to consider material language from the 1944 Assignment showing that, even if Patty Hill retained the common law copyright to the *Happy Birthday* lyrics in 1935, she and her sister, Jessica, and their foundation, the Hill Foundation, transferred all interest in that common law copyright to Summy in 1944.[2]

First, Plaintiffs argue that reconsideration is inappropriate because the Court likely reviewed the 1944 Assignment. Opp. at 8:23-9:6. Warner/Chappell is not arguing that the Court failed to review the evidence put before it. Rather, Warner/Chappell respectfully submits that the Order failed to discuss, much less give the weight that is due, to the critical language in the 1944 Assignment. This includes language in Paragraph 2 of the "Third Agreement" ("Hill will … assign[] all its right, title and interest ... *in and to the aforementioned books and musical*

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[2] For ease of reference, Warner/Chappell uses the same defined terms here as in its motion for reconsideration. It refers to the three October 1944 agreements, collectively, as the "1944 Assignment." *See* J.A. 126 (Settlement Agreement among Patty and Jessica Hill, Hill Foundation, Inc. and Clayton F. Summy Co., Oct. 16, 1944) ("Third Agreement"); J.A. 113 (Patty and Jessica Hill Assignment to Hill Foundation, Inc., Oct. 16, 1944) ("Hills' Assignment to Hill Foundation"); J.A. 115 (Hill Foundation, Inc. Assignment to Clayton F. Summy Co., Oct. 16, 1944) ("Hill Foundation's Assignment to Summy").

compositions and arrangements thereof). J.A. 126 at 1942-43 (emphasis added). The Order also did not cite or discuss the Hill Foundation's Assignment to Summy.[3]

Second, Plaintiffs argue that Warner/Chappell cannot rely on the 1944 Assignment because Ninth Circuit law does not allow an agreement to retroactively create an assignment. Opp. at 9:7-10:4. This is a red herring. Warner/Chappell does not argue that the 1944 Assignment retroactively assigned a copyright registration. Rather, Warner/Chappell's argument is that in 1944, Patty and Jessica and the Hill Foundation transferred whatever interests they held at that time in the enumerated works that Summy published, including in *Happy Birthday*. If (contrary to the other record evidence), the Court determines that Patty and Jessica retained the common law copyright in 1935, the point is that the 1944 Assignment transferred it to Summy.

Third, as predicted in Warner/Chappell's motion, the Plaintiffs insist that the Hills' Assignment to the Hill Foundation—reviewed in isolation—shows as a matter of law that Patty and Jessica Hill did not transfer any common law copyright to the *Happy Birthday* lyrics. Opp. at 10:6-11:2. This argument fails to acknowledge the context in which the parties executed the Hills' Assignment to the Hill Foundation. It was one of three agreements executed on the same date, all of which comprise the 1944 Assignment. All were executed to effectuate the intent of Patty and Jessica Hill, the Hill Foundation, and Summy to resolve pending litigation; to transfer all rights that Patty and Jessica and the Hill Foundation had in works that the parties recited Summy was publishing (including "'Happy Birthday to You', Piano Solo with Words"); and to provide for payment back to the Hill Foundation for Summy's continued exploitation of those works. Plaintiffs offer no explanation—because

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[3] Plaintiffs are wrong that Warner/Chappell used its § 1292(b) motion to cite additional cases or raise new arguments. Opp. at 8:28-9:6. Warner/Chappell's argument in the portion of its motion dealing with § 1292(b) cites only cases applying the legal standard for certification.

there is none—why the parties would have structured the 1944 Assignment to grant Summy illusory rights in "books, *musical compositions* and arrangements, *including both the words and music thereof*" that the parties knew and recited Summy was publishing. J.A. 115 at 1665-66 (emphasis added); *see also* J.A. 126 at 1942-43. If the language in the Hills' Assignment to the Hill Foundation raises a question about the scope of the 1944 Assignment, this is just another issue for trial. It does not entitle Plaintiffs to summary judgment.

Fourth, Plaintiffs cryptically assert that Warner/Chappell's "final" argument is unavailing because it is circular. Assuming Plaintiffs are referring here to Section II.C.2 of Warner/Chappell's motion, the argument is unpersuasive because Plaintiffs offer no basis—principled or otherwise—on which to distinguish the authority Warner/Chappell has cited: *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1331-32, 1335 (9th Cir. 1984), *Machaty v. Astra Pictures, Inc.*, No. Civ. 48-394, 1951 WL 4631, at *1 (S.D.N.Y. May 2, 1951), *aff'd on other grounds*, 197 F.2d 138 (2d Cir. 1952); *JBJ Fabrics, Inc. v. Brylane, Inc.*, 714 F. Supp. 107, 110 (S.D.N.Y.1989); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 n.6 (2d Cir. 1982); *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 21 & n.5 (2d Cir. 1976).

III. Alternatively, The Court Should Certify The Order For Interlocutory Review Under 28 U.S.C. § 1292(b)

If the Court does not reconsider the Order, then the Court should certify it (or any amended Order) for interlocutory appeal under 28 U.S.C. § 1292(b). Plaintiffs do not refute Warner/Chappell's showing that the § 1292(b) standard is satisfied here.

First, Plaintiffs argue that there is no "controlling question of law" because the Order resolved cross-motions for summary judgment. Opp. at 12:1-27. This is another red herring. The issues that Warner/Chappell identified for certification present purely legal questions. The Ninth Circuit would not need to pore over the summary judgment record to decide whether (1) the omission of a co-author's name

from a copyright registration deprives the registration of the prima facie presumption or (2) third parties like Plaintiffs have standing to challenge Patty and Jessica's transfer of the *Happy Birthday* lyrics to Summy even though there is no evidence of a dispute between transferors, transferee, or any successor of either.

Second, Plaintiffs contend that there is not a substantial ground for difference of opinion because Warner/Chappell purportedly has not cited case law that conflicts with the Order's holding with respect to the legal issues suggested for certification. That is not true. Warner/Chappell cites numerous cases that directly conflict with the Order's findings (1) that registration E51990 is not entitled to a presumption of validity, because it does not include Patty Hill's name and (2) that Plaintiffs have standing to challenge the scope of the 1935 "Second Agreement" (in the Court's words) and/or the 1944 Assignment even though they are third-party strangers to the agreements and there is no dispute between the actual parties to the agreements. Mot. at 4:19-8:13, 14:5-15.

Third, Plaintiffs argue that an immediate appeal will not advance the ultimate determination of this litigation because it would delay resolution of the case. In every interlocutory appeal, the district court proceedings will be delayed pending appellate review. Interlocutory appeal is appropriate here given the expense and burden of litigating and resolving the class certification issues, the merits of Plaintiffs' state law claims, and proceedings relating to remedies.

IV. Conclusion

Plaintiffs' opposition does nothing to effectively refute the arguments in Warner/Chappell's motion. Warner/Chappell respectfully requests that the Court reconsider the Order. Alternatively, the Court should certify the Order for interlocutory appeal.

DATED: November 2, 2015

MUNGER, TOLLES & OLSON LLP

By: */s/ Kelly M. Klaus*
KELLY M. KLAUS

Attorneys for Defendants Warner/Chappell Music, Inc. and Summy-Birchard, Inc.