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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

THE HONORABLE GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE

RUPA MARYA, ET AL., )  
 )  
 ) PLAINTIFFS, )  
 ) VS. ) NO. CV 13-4460-GHK  
 )  
 ) WARNER CHAPPELL MUSIC, INC., )  
 ) ET AL., )  
 )  
 ) DEFENDANTS. )  
 )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, OCTOBER 7, 2013; A.M. SESSION  
MOTIONS HEARING

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1           **LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 7, 2013**

2                           **A.M. SESSION**

3                                   **--000--**

4           **THE CLERK:** PLEASE REMAIN SEATED AND COME TO  
5 ORDER. THIS UNITED STATES DISTRICT COURT IS NOW IN  
6 SESSION, THE HONORABLE GEORGE H. KING, CHIEF JUDGE,  
7 PRESIDING.

8                           CALLING ITEM 1 ON THE COURT'S CALENDAR,  
9 CIVIL 13-4460, RUPA MARYA, ET AL., VERSUS WARNER CHAPPELL  
10 MUSIC, INC., ET AL.

11                           COUNSEL, WOULD YOU PLEASE STATE YOUR APPEARANCES  
12 FOR THE RECORD.

13           **MR. RIFKIN:** GOOD MORNING. MARK RIFKIN OF WOLF  
14 HALDENSTEIN ON BEHALF OF THE PLAINTIFFS.

15           **THE COURT:** YES, GOOD MORNING.

16           **MS. MANIFOLD:** GOOD MORNING, YOUR HONOR.  
17 BETSY MANIFOLD, ON BEHALF OF THE PLAINTIFFS, ALSO FROM  
18 WOLF HALDENSTEIN.

19           **THE COURT:** YES, GOOD MORNING.

20           **MS. ODENBREIT:** GOOD MORNING, YOUR HONOR.  
21 KATHRINE ODENBREIT WITH HUNT ORTMANN ON BEHALF OF THE  
22 PLAINTIFFS.

23           **THE COURT:** GOOD MORNING.

24           **MR. NEWMAN:** GOOD MORNING, YOUR HONOR.  
25 RANDALL NEWMAN, RANDALL NEWMAN P.C., ON BEHALF OF THE

1 PLAINTIFFS.

2 **THE COURT:** YES, GOOD MORNING, COUNSEL.

3 **MR. KLAUS:** GOOD MORNING, YOUR HONOR.

4 KELLY KLAUS AND ADAM KAPLAN FROM MUNGER TOLLES AND OLSON  
5 FOR THE DEFENDANTS.

6 **THE COURT:** YES, GOOD MORNING, COUNSEL.

7 ALL RIGHT. COUNSEL, WE'RE HERE TO HEAR VARIOUS  
8 MOTIONS THAT HAVE BEEN PRESENTED TO ME.

9 I HAVE GIVEN THIS A LOT OF THOUGHT, FROM NOT  
10 ONLY A SUBSTANTIVE STANDPOINT, BUT ALSO FROM A PROPER  
11 PROCEDURAL STANDPOINT.

12 LET ME FIRST TALK TO THE PLAINTIFFS' SIDE ABOUT  
13 THE STATUTE OF LIMITATIONS ISSUE AS IT GOES TO THE  
14 DECLARATORY RELIEF PART OF THE ACTION ONLY.

15 AND THAT'S MR. RIFKIN. RIGHT?

16 **MR. RIFKIN:** YES, YOUR HONOR. GOOD MORNING  
17 AGAIN.

18 **THE COURT:** GOOD MORNING.

19 ALL RIGHT, WELL, COUNSEL --

20 **MR. RIFKIN:** IT SOUNDS TO ME THAT YOU HAVE  
21 QUESTIONS.

22 **THE COURT:** DON'T LAUNCH INTO ANYTHING.

23 **MR. RIFKIN:** OKAY.

24 **THE COURT:** I WILL ASK YOU SOME QUESTIONS, AND  
25 THEN WE CAN PERHAPS FOCUS OUR DISCUSSION THIS MORNING.

1           WHAT YOU ARE SAYING IS FOR THE DECLARATORY  
2 RELIEF PART OF THIS ACTION THERE IS NO SPECIFIC STATUTE OF  
3 LIMITATIONS UNDER THE DECLARATORY RELIEF STATUTE. TRUE  
4 ENOUGH.

5           **MR. RIFKIN:** CORRECT.

6           **THE COURT:** AND YOU SAY BECAUSE OF THAT ABSENCE,  
7 WHAT WE OUGHT TO DO IS THEN GO AHEAD AND, AS A MATTER OF  
8 FIRST PREFERENCE, BORROW FROM THE STATE LAW THAT IS  
9 PERHAPS MOST ANALOGOUS HERE. AND YOU RELY UPON THE NORTH  
10 STAR STEEL COMPANY CASE, A 1995 SUPREME COURT CASE.

11           CORRECT SO FAR?

12           **MR. RIFKIN:** CORRECT.

13           **THE COURT:** MY CONCERN WITH THAT ARGUMENT IS AS  
14 FOLLOWS.

15           IN THAT CASE, YOU ARE TALKING ABOUT THE *WARN*  
16 *ACT*, AND THE *WARN ACT* DID NOT HAVE AN EXPLICIT STATUTE OF  
17 LIMITATIONS. SO YOU GO INTO THE NORMAL DEFAULT OF LOOKING  
18 TO AN EQUIVALENT STATE LAW. FAIR ENOUGH.

19           IN THIS CASE, YOUR ACTION, AS FAR AS DECLARATORY  
20 RELIEF IS CONCERNED, IS NOT REALLY A SUBSTANTIVE CLAIM.  
21 IT'S A PROCEDURAL DEVICE FOR THE CLARIFICATION OF RIGHTS  
22 WHERE THERE IS AN ACTUAL CASE IN CONTROVERSY.

23           AND WHAT WE HAVE HERE IS YOU HAVE CONTROVERSY  
24 WITH RESPECT TO, ULTIMATELY, THE VALIDITY OF THE  
25 COPYRIGHTS AS CLAIMED BY THE DEFENDANT IN THE SONG,

1 WHETHER IT'S LYRICS AND THE MELODY, WHATEVER. WE DON'T  
2 NEED TO GET INTO ALL OF THAT TODAY.

3 **MR. RIFKIN:** RIGHT.

4 **THE COURT:** BUT IN ORDER TO DO THAT, WE HAVE TO  
5 INTERPRET AND APPLY VARIOUS ASPECTS OF COPYRIGHT LAW THAT  
6 GO TO THE VARIOUS CLAIMS THAT YOU HAVE THAT UNDERLIE YOUR  
7 ULTIMATE ARGUMENT THAT THERE IS NO VALID COPYRIGHT AND  
8 THEY ARE CLAIMING SOMETHING TO WHICH THEY HAVE NO  
9 COPYRIGHT.

10 **MR. RIFKIN:** THEY ARE CLAIMING A RIGHT THEY DO  
11 NOT HAVE. CORRECT.

12 **THE COURT:** IN ORDER TO DO SO, IT SEEMS TO ME,  
13 THEN, WHAT YOUR DECLARATORY RELIEF ASPECT OF YOUR CASE IS  
14 REALLY LOOKING TO WOULD REQUIRE US TO DO ALL OF THOSE  
15 THINGS, INTERPRET, APPLY COPYRIGHT LAW.

16 SO, IN EFFECT, IF WE WERE TO LOOK AT THIS CASE  
17 AS EFFECTIVELY WHAT THE COERCIVE CLAIMS MIGHT BE, HAD THIS  
18 NOT BEEN A DECLARATORY RELIEF ACTION, IT WOULD CLEARLY BE  
19 SOMETHING THAT WOULD ARISE FROM THE COPYRIGHT ACT; AND  
20 THEREFORE, AS A MATTER OF FIRST INSTANCE, WE DON'T NEED TO  
21 BORROW ANYTHING FROM THE STATE COURT.

22 WE HAVE A THREE-YEAR STATUTE OF LIMITATIONS  
23 UNDER THE COPYRIGHT ACT; AND THEREFORE, WE DON'T EVEN TAKE  
24 THAT FIRST STEP PERHAPS SUGGESTED BY NORTH STAR STEEL,  
25 WHERE THERE TRULY IS NO STATUTE OF LIMITATIONS FOR ANY OF



1 THE SUBSTANTIVE CLAIMS THERE.

2 THAT APPEARS TO BE WHAT THE STATUS OF THE LAW IS  
3 WITH RESPECT TO, LET'S SAY, A VERY RELATED ISSUE OF  
4 DISPUTES OVER CO-OWNERSHIP OF A COPYRIGHT.

5 THERE'S SEVERAL OF THOSE CASES -- ONE FROM THE  
6 NINTH CIRCUIT, ONE FROM THE SECOND CIRCUIT, ONE FROM THE  
7 FIRST CIRCUIT -- FOLLOWING THAT ANALYSIS AND APPLYING THE  
8 THREE-YEAR STATUTE OF LIMITATIONS OF THE COPYRIGHT ACT.

9 SO HAVING SAID THAT, MY QUESTION TO YOU IS WHY  
10 SHOULDN'T I FOLLOW THOSE CASES AND APPLY THAT REASONING  
11 AND CONCLUDE THAT YOUR DECLARATORY RELIEF IS GOVERNED BY  
12 THE THREE-YEAR COPYRIGHT STATUTE OF LIMITATIONS?

13 **MR. RIFKIN:** YOUR HONOR, I THINK THE IMPORTANT  
14 CONCEPT TO UNDERSTAND IN ANALYZING THAT QUESTION IS THE  
15 DISTINCTION BETWEEN JURISDICTION, FEDERAL JURISDICTION,  
16 FOR A CLAIM THAT -- AND I'LL PUT THIS IN QUOTES -- "ARISES  
17 UNDER THE COPYRIGHT ACT VERSUS A CLAIM THAT IS BROUGHT  
18 UNDER THE COPYRIGHT ACT."

19 AND IN A NUMBER OF THE CASES THAT THE DEFENDANTS  
20 HAVE CITED, BOTH IN THE STATUTE OF LIMITATIONS CONTEXT AND  
21 ALSO IN THE PREEMPTION CONTEXT, ARE CASES THAT ADDRESS  
22 JURISDICTION RATHER THAN THE APPLICATION OF THE LAW.

23 AND THE COURTS INTERPRET THAT PHRASE "ARISES  
24 UNDER" FAR MORE BROADLY FOR DETERMINING JURISDICTION THAN  
25 THEY DO FOR DETERMINING WHETHER A CLAIM IS PREEMPTED OR

1 WHETHER A PARTICULAR STATUTE OF LIMITATIONS SHOULD APPLY.

2 SO GIVEN WHAT WE SAY AND GIVEN WHAT I THINK THE  
3 COURT RECOGNIZES IS THE STATE OF THE LAW, WHICH IS THAT  
4 OUR TWO FEDERAL CLAIMS UNDER THE DECLARATORY JUDGMENT ACT  
5 HAVE NO STATUTE OF LIMITATIONS UNDER THEM, THE QUESTION  
6 THAT WE THINK IS RELEVANT TO THE STATUTE OF LIMITATIONS  
7 INQUIRY IS, IN THE FIRST INSTANCE, WOULD APPLYING A STATE  
8 LAW STATUTE OF LIMITATIONS BE REPUGNANT TO ANY PURPOSE  
9 SERVED, EITHER BY THE DECLARATORY JUDGMENT ACT OR EVEN,  
10 ARGUABLY, BY THE COPYRIGHT ACT?

11 AND ON THAT, THE DEFENDANTS HAVE OFFERED NO  
12 ARGUMENT.

13 **THE COURT:** I DON'T WANT TO GET TO THAT POINT  
14 YET BECAUSE WE DON'T GET THERE UNLESS THERE IS NO  
15 APPLICABLE STATUTE OF LIMITATIONS.

16 THE MERE FACT THAT THE DECLARATORY RELIEF ACT OR  
17 JUDGMENT ACT DOES NOT ITSELF CONTAIN A STATUTE OF  
18 LIMITATIONS, IN MY JUDGMENT, DOES NOT END THE INQUIRY AND  
19 CAUSE US TO JUMP TO BORROWING.

20 I WANT TO KNOW FIRST WHETHER OR NOT MY  
21 ASSERTIONS -- YOU AGREE WITH IT; IF YOU DON'T AGREE WITH  
22 IT, WHY YOU THINK THAT THAT IS NOT CORRECT OTHER THAN WHAT  
23 YOU SAY.

24 I AGREE WITH YOU THAT THERE IS A DISTINCTION  
25 BETWEEN JURISDICTION AND LATER ON, IF WE GET TO IT,

1     PREEMPTION.  BUT IN THIS CASE, THE CASES, LIKE THE  
2     MERCHANT VERSUS LEVY CASE FROM THE SECOND CIRCUIT AND  
3     PERHAPS ONE OF THE OTHERS, DIDN'T LOOK TO WHETHER OR NOT  
4     IT WAS JUST ARISING UNDER FOR JURISDICTION PURPOSES, BUT  
5     ALSO LOOKED AT WHETHER OR NOT, IN EFFECT, THE DECLARATORY  
6     RELIEF CALLS FOR AN INTERPRETATION OR APPLICATION OF  
7     COPYRIGHT LAW OR NOT.

8             BECAUSE IF, LET'S SAY, IN THOSE CASES OF  
9     CO-OWNERSHIP, IT ONLY DEPENDED ON A PIECE OF PAPER, IT WAS  
10    JUST A CONTRACT, THAT'S ALL.  NO REFERENCE TO COPYRIGHT  
11    ACT AS TO OWNERSHIP OTHER THAN WHAT'S IN THIS CONTRACT.

12            THE COURT SAID, WELL, MAYBE THAT'S NOT A CASE  
13    WHERE WE WOULD APPLY THE THREE-YEAR STATUTE OF  
14    LIMITATIONS, BUT WE WOULD LOOK TO STATE CONTRACT LAW.

15            SO I'M SAYING THE SAME THING HERE.

16            **MR. RIFKIN:**  AND I'M SORRY.  THE ANSWER -- I  
17    THINK THE ANSWER IS SUGGESTED BY THE NINTH CIRCUIT'S  
18    DECISION IN LEVALD VERSUS PALM DESERT WHERE THE COURT  
19    APPLIED A TWO-YEAR CALIFORNIA STATUTE OF LIMITATIONS FOR  
20    PERSONAL INJURY CLAIMS THAT WERE BROUGHT UNDER SECTION  
21    1983 UNDER THE FEDERAL STATUTE.

22            AND WHAT THE COURT THERE SAID IS IF A CLAIM FOR  
23    DECLARATORY RELIEF THAT WAS A DECLARATORY JUDGMENT ACTION,  
24    JUST LIKE OUR ACTION IS A DECLARATORY JUDGMENT ACTION, IF  
25    A CLAIM FOR DECLARATORY RELIEF COULD HAVE BEEN RESOLVED

1 THROUGH ANOTHER FORM OF ACTION -- IN OTHER WORDS, LOOK TO  
2 THE SUBSTANCE OF THE CLAIM.

3 IF THE CLAIM COULD HAVE BEEN RESOLVED THROUGH  
4 ANOTHER FORM OF ACTION WHICH HAS A SPECIFIC LIMITATIONS  
5 PERIOD, THEN THAT SPECIFIC LIMITATIONS PERIOD WILL GOVERN.

6 AND IN THAT CASE, THE COURT APPLIED A TWO-YEAR  
7 STATUTE OF LIMITATIONS UNDER CALIFORNIA LAW FOR PERSONAL  
8 INJURY CLAIMS.

9 **THE COURT:** THAT'S TOTALLY DIFFERENT.

10 **MR. RIFKIN:** WELL, I DON'T THINK SO, YOUR HONOR,  
11 FOR ONE REASON.

12 **THE COURT:** I THINK SO, BECAUSE 1983 DOES NOT,  
13 ITSELF, HAVE A STATUTE OF LIMITATIONS, AND HENCE THE  
14 SUPREME COURT SAID WE LOOK TO THE GENERAL RESIDUAL STATE  
15 LAW STATUTE OF LIMITATIONS.

16 THE OTHER PART THAT YOU SAID, I THINK, IS REALLY  
17 AN ARGUMENT AGAINST WHAT YOU HAVE TO SAY, YOUR POSITION,  
18 BECAUSE WHEN -- YOU QUOTED THE CIRCUIT AS SAYING YOU LOOK  
19 TO WHAT IS REALLY NECESSARY TO RESOLVE THAT ISSUE.

20 SO IN THIS CASE, HAD YOU NOT BROUGHT DECLARATORY  
21 RELIEF AND YOU JUST DIDN'T PAY, YOU SAY I THINK THIS IS  
22 WORTHLESS; SO WE'RE GOING TO USE IT IN OUR FILM, BUT WE'RE  
23 NOT PAYING YOU A DIME. THAT'S EFFECTIVELY HOW ELSE IT  
24 WOULD BE RESOLVED. THEY WOULD SUE YOU FOR INFRINGEMENT.

25 **MR. RIFKIN:** RIGHT.

1           **THE COURT:** YOU SAY NO INFRINGEMENT. YOU DON'T  
2 EVEN HAVE A VALID COPYRIGHT.

3           SO THAT'S HOW IT'S GOING TO BE RESOLVED THERE.  
4 THAT WOULD CLEARLY BE A THREE-YEAR STATUTE.

5           **MR. RIFKIN:** WELL, YOUR HONOR, LET ME TRY TO  
6 ANSWER THAT DIRECTLY BECAUSE I THINK THAT'S EXACTLY THE  
7 ISSUE.

8           IF THOSE HAD BEEN THE FACTS, IF THE PLAINTIFFS  
9 HERE SAID WE'RE NOT GOING TO SIGN YOUR LICENSE, WE'RE JUST  
10 GOING TO GO AHEAD AND USE THE SONG; AND WARNER THEN  
11 BROUGHT A COPYRIGHT INFRINGEMENT ACTION, THERE IS NO  
12 QUESTION THAT THAT COPYRIGHT INFRINGEMENT ACTION WOULD BE  
13 SUBJECT TO THE STATUTE OF LIMITATIONS SPECIFIED BY THE  
14 COPYRIGHT ACT, THE THREE-YEAR STATUTE OF LIMITATIONS.

15           THE DEFENSE TO THAT CLAIM MIGHT WELL BE  
16 INVALIDITY OF THE COPYRIGHT, YOU DON'T HAVE A COPYRIGHT --  
17 WHATEVER THE DEFENSE MAY BE. WE WOULD, IN THAT CASE, SAY  
18 YOU DON'T OWN THE COPYRIGHT TO THE SONG; SO YOUR CLAIM HAS  
19 NO MERIT.

20           BUT IN THE FIRST INSTANCE, THE QUESTION IS  
21 WHETHER THE CLAIM FOR INFRINGEMENT WOULD HAVE BEEN TIMELY,  
22 NOT WHETHER THE DEFENSE WOULD HAVE BEEN UNTIMELY. IN  
23 OTHER WORDS, WHAT'S UNUSUAL ABOUT THIS CASE IS IT'S  
24 UPSIDE-DOWN FROM THE TYPICAL CASE. IT'S UPSIDE-DOWN FROM  
25 THE MERCHANT CASE, FOR EXAMPLE.

1           **THE COURT:** I UNDERSTAND THAT. BUT -- NO, IN  
2 TERMS OF THE MERCHANT CASE, IT WAS ALSO DECLARATORY  
3 RELIEF.

4           **MR. RIFKIN:** YES, BUT THERE, TWO PARTIES CLAIMED  
5 OWNERSHIP IN THE SAME COPYRIGHT.

6           **THE COURT:** CORRECT.

7           **MR. RIFKIN:** AND WE DON'T HAVE THAT SITUATION  
8 HERE.

9           YOUR HONOR, I THINK THE MORE CLOSE ANALOGY IS A  
10 DIFFERENT ONE. LET ME SUGGEST --

11           **THE COURT:** BEFORE YOU DO THAT, GO BACK AND READ  
12 TO ME AGAIN EXACTLY WHAT YOU READ TO ME FROM THE NINTH  
13 CIRCUIT, AND I'LL TELL YOU IF THAT'S THE PART THAT I WANT  
14 TO QUESTION YOU ON.

15           **MR. RIFKIN:** I WILL.

16           IN LEVALD, WHAT THE COURT SAID WAS THAT IF A  
17 CLAIM FOR DECLARATORY RELIEF COULD HAVE BEEN RESOLVED  
18 THROUGH ANOTHER FORM OF ACTION WHICH HAS A SPECIFIC  
19 LIMITATIONS PERIOD --

20           **THE COURT:** OKAY. STOP RIGHT THERE.

21           **MR. RIFKIN:** YES.

22           **THE COURT:** STOP RIGHT THERE. ISN'T THAT WHAT I  
23 JUST SAID?

24           **MR. RIFKIN:** NO.

25           **THE COURT:** THIS DECLARATORY RELIEF -- WAIT.

1           FIRST OF ALL, COUNSEL, I'M GOING TO GIVE YOU THE  
2 COURTESY OF NOT INTERRUPTING YOU UNLESS I NEED TO QUESTION  
3 YOU. AND I WANT YOU TO UNDERSTAND THAT WHEN I'M TALKING,  
4 YOU DO NOT INTERRUPT ME BY SAYING "YES" OR "NO." YOU WILL  
5 HAVE THAT OPPORTUNITY TO DO SO.

6           I DON'T KNOW BEFORE WHICH JUDGES YOU HAVE  
7 APPEARED, BUT IF YOU'RE GOING TO APPEAR BEFORE ME, YOU  
8 BETTER UNDERSTAND THE GROUND RULES OF THIS COURTROOM.

9           DO YOU UNDERSTAND ME?

10          **MR. RIFKIN:** YES, I DO, YOUR HONOR. AND I  
11 APOLOGIZE. I THOUGHT YOU WERE FINISHED WITH THE QUESTION.

12          **THE COURT:** YOU DON'T THINK. LISTEN.

13          **MR. RIFKIN:** YES, YOUR HONOR.

14          **THE COURT:** ALL RIGHT. SO WHAT I SAID TO YOU  
15 WAS IF YOU TAKE A LOOK AT THAT QUOTE, IF THE DECLARATORY  
16 RELIEF ACTION COULD HAVE BEEN RESOLVED BY ANOTHER WAY  
17 WHERE THERE IS A STATUTE OF LIMITATIONS, WE APPLY THAT.

18                 HERE, IN A DECLARATORY RELIEF ACTION, WE  
19 TYPICALLY LOOK TO WHAT THE UNDERLYING COERCIVE CLAIM COULD  
20 HAVE BEEN; IN OTHER WORDS, THAT EXACT UPSIDE-DOWNNESS THAT  
21 YOU WERE TALKING ABOUT, WHICH IS AN INFRINGEMENT ACTION BY  
22 THEM, AND YOU ASSERTING NO, NO INFRINGEMENT. YOU SAY THAT  
23 CASE IS CLEARLY A THREE-YEAR STATUTE OF LIMITATIONS.

24                 MY QUESTION IS WHY DOESN'T THAT SUPPORT THE  
25 THREE-YEAR STATUTE?

1           **MR. RIFKIN:** AND, YOUR HONOR, BECAUSE THE  
2           COPYRIGHT ACT DOES NOT PROVIDE A MECHANISM THROUGH WHICH  
3           SOMEONE WHO DISPUTES THE EXISTENCE OF A COPYRIGHT CAN  
4           AFFIRMATIVELY BRING THAT CLAIM, THERE IS NO RIGHT UNDER  
5           THE COPYRIGHT ACT THAT SOMEONE IN THE PLAINTIFF'S POSITION  
6           CAN ENFORCE TO DETERMINE WHETHER A CLAIMANT, IN FACT, OWNS  
7           A COPYRIGHT, OTHER THAN TO DO WHAT WE DID, WHICH IS TO  
8           BRING A DECLARATORY JUDGMENT ACTION OR TO PROCEED AND WAIT  
9           TO BE SUED FOR INFRINGEMENT.

10                    A PLAINTIFF DOES NOT HAVE THE RIGHT TO BRING A  
11           CLAIM UNDER THE COPYRIGHT ACT TO DETERMINE THE SCOPE OF  
12           SOMEONE ELSE'S COPYRIGHT. THAT RIGHT DOES NOT EXIST UNDER  
13           THE COPYRIGHT ACT.

14                    **THE COURT:** IS THERE A RIGHT THAT COULD HAVE  
15           BEEN ASSERTED OTHER THAN AS A DECLARATORY RELIEF ACTION IN  
16           MERCHANT?

17                    **MR. RIFKIN:** IN MERCHANT, AS I UNDERSTAND IT,  
18           THE CLAIM HAD TO DO WITH DISPUTED OWNERSHIP TO THE SONG  
19           "WHY DO FOOLS FALL IN LOVE?" AND IT'S MY UNDERSTANDING  
20           THAT THE SCOPE OF THE COPYRIGHT WAS NOT AN ISSUE. IT WAS  
21           A QUESTION OF CO-AUTHORSHIP OF THE COPYRIGHT.

22                    AS I UNDERSTAND IT, THERE IS NO OTHER SOURCE OF  
23           LAW UNDER WHICH SUCH A CLAIM COULD HAVE BEEN BROUGHT  
24           EXCEPT BY THE DECLARATORY JUDGMENT. I DO NOT BELIEVE A  
25           COPYRIGHT ACT ALLOWS A CLAIM FOR DISPUTED AUTHORSHIP TO BE



1 RESOLVED UNDER, FOR EXAMPLE, SECTION 106 OF THE COPYRIGHT  
2 ACT.

3 SO I DON'T THINK THAT SUCH A CLAIM COULD HAVE  
4 BEEN BROUGHT DIRECTLY EXCEPT BY DECLARATORY JUDGMENT OR  
5 PERHAPS UNDER SOME SOURCE OF STATE LAW WHERE THE PLAINTIFF  
6 HAS A CLAIM, FOR EXAMPLE, BREACH OF CONTRACT, JUST LIKE WE  
7 THINK WE HAVE CLAIMS UNDER CALIFORNIA STATE LAW FOR THE  
8 DEFENDANTS' ALLEGED MISUSE OR MISASSERTION, I SHOULD SAY,  
9 MISASSERTION OF COPYRIGHT.

10 BUT WE COULD NOT HAVE BROUGHT COUNT 1 UNDER  
11 SECTION WHATEVER, WHETHER IT HAD BEEN 501 OR ANY OTHER  
12 SECTION OF THE COPYRIGHT ACT. WE COULD NOT HAVE BROUGHT  
13 AN ACTION UNDER THE COPYRIGHT ACT, WHICH IS WHY I THINK  
14 THE LEVALD CASE IS INSTRUCTIVE.

15 OUR ONLY EXISTING REMEDY AS AN AFFIRMATIVE  
16 CLAIM, IF NOT A DECLARATORY JUDGMENT, WOULD HAVE BEEN THE  
17 CLAIMS WE ASSERTED UNDER STATE LAW, WHICH IS WHY I THINK  
18 THE STATE LAW IS THE APPROPRIATE ANALOGY.

19 **THE COURT:** SO YOU DISAGREE WITH THE SECOND  
20 CIRCUIT IN MERCHANT.

21 **MR. RIFKIN:** NO. I THINK THE SECOND CIRCUIT IN  
22 MERCHANT HAD A TOTALLY DIFFERENT CASE IN FRONT OF IT.

23 **THE COURT:** HOW DIFFERENT? YOU SAID THE SAME  
24 THING.

25 YOU SAID, IN THAT CASE, THEY ALSO COULD NOT HAVE

1 BROUGHT ANYTHING UNDER THE COPYRIGHT ACT AS A DISPUTE  
2 BETWEEN CO-OWNERS. YOU CERTAINLY CAN'T HAVE AN  
3 INFRINGEMENT ACTION BECAUSE CO-OWNERS CANNOT POSSIBLY BE  
4 SAID TO INFRINGE EACH OTHER.

5 SO THERE THEY RELIED ON DECLARATORY RELIEF.  
6 THERE THE COURT APPLIED THE ANALYSIS THAT I'M ASSERTING  
7 HERE, TO SAY THAT THE THREE-YEAR STATUTE OF LIMITATIONS  
8 APPLIED.

9 SO EITHER YOU DISAGREE WITH MERCHANT OR, IF  
10 MERCHANT IS CORRECT, THEN YOUR DECLARATORY RELIEF CLAIMS  
11 MUST BE THREE YEARS.

12 **MR. RIFKIN:** NO. I THINK THE REASON THAT  
13 MERCHANT IS DIFFERENT FROM OUR CASE IS BECAUSE THE  
14 COPYRIGHT ACT ADDRESSES THIS VERY QUESTION. IN OTHER  
15 WORDS, THERE IS A PROVISION OF THE COPYRIGHT ACT TO  
16 RESOLVE CLAIMS OF OWNERSHIP.

17 THERE IS NOT A REMEDY PROVIDED FOR THAT. THERE  
18 IS NOT A MECHANISM UNDER WHICH THE ANSWER IS DETERMINED,  
19 BUT THERE'S NOT EVEN A PARALLEL SECTION IN THE COPYRIGHT  
20 ACT.

21 THERE'S NO RIGHT -- FOR EXAMPLE, THERE'S NO  
22 RIGHT UNDER SECTION 106 TO BE FREE FROM THE WRONGFUL CLAIM  
23 OF COPYRIGHT.

24 NO ONE HAS ANY RIGHTS UNDER THE COPYRIGHT ACT NO  
25 MATTER HOW THEY CAN BE ENFORCED. NO ONE HAS ANY RIGHTS

1 UNDER THE COPYRIGHT ACT TO BE FREE FROM THE UNLAWFUL  
2 ASSERTION OF A COPYRIGHT, BUT THE COPYRIGHT ACT DOES  
3 PROVIDE RIGHTS TO CO-AUTHORS.

4 AND SO NO MATTER WHAT FORM THE ACTION TAKES, I  
5 THINK THE DIFFERENCE IS THERE IS NO LAW, THERE IS NO  
6 REMEDY, THERE IS NO RIGHT THAT THE COPYRIGHT ACT PROVIDES  
7 THAT ALLOWS THE COURT TO RESOLVE THE ANSWER.

8 AND I THINK IT MAKES SENSE, THEN, TO LOOK AT THE  
9 COPYRIGHT ACT IN THE MERCHANT CASE. I THINK IT MAKES  
10 SENSE FOR THE COURT TO SAY WELL, IF THE QUESTION IS THE  
11 RIGHT OF CO-OWNERSHIP UNDER THE COPYRIGHT ACT, WE  
12 UNDERSTAND THAT.

13 BUT HERE, THERE IS NO PARALLEL RIGHT. SO THAT'S  
14 WHY I SUGGESTED A MORE APPROPRIATE ANALOGY AND A BETTER  
15 WAY TO THINK OF THIS IS TO ASK THE FOLLOWING QUESTION.

16 IF WARNER HAD DECIDED TO SUE BIRCH TREE  
17 LIMITED -- THAT'S THE COMPANY THAT THEY BOUGHT TO ACQUIRE  
18 THE RIGHTS TO THE SONG.

19 IF SOMETIME AFTER THAT TRANSACTION, WARNER HAD  
20 DECIDED THAT THEY DID NOT ACQUIRE THE COPYRIGHTS TO "HAPPY  
21 BIRTHDAY" WHEN THEY BOUGHT BIRCH TREE, LIMITED, IF THEY  
22 HAD BROUGHT AN ACTION -- IF WARNER HAD THEN BROUGHT AN  
23 ACTION AGAINST BIRCH TREE, EITHER FOR BREACH OF CONTRACT  
24 BECAUSE THE SALE DID NOT DELIVER THE RIGHTS TO THE SONG  
25 THAT HAD BEEN PROMISED OR FOR MISREPRESENTATION BECAUSE

1 THERE WAS A REPRESENTATION OR A WARRANTY, AN AGREEMENT OF  
2 SALE THAT BIRCH TREE OWNED THE RIGHT TO THE SONG, OR  
3 WHATEVER THE CASE MAY BE, IF WE TRY TO TAKE OUT THE FACT  
4 THAT THIS IS A LICENSEE WHO IS SUING A LICENSOR SO THAT WE  
5 CAN SEE THE ISSUE CLEARLY, I DON'T THINK ANYONE WOULD  
6 SUGGEST THAT WARNER'S CLAIM AGAINST BIRCH TREE WOULD BE  
7 SUBJECT TO THE THREE-YEAR LIMITATIONS PERIOD FOR COPYRIGHT  
8 INFRINGEMENT BECAUSE, CLEARLY, THAT CLAIM IS NOT A CLAIM  
9 FOR COPYRIGHT INFRINGEMENT.

10 AND, RESPECTFULLY, I THINK THAT'S A CLOSER  
11 ANALOGY TO WHAT THIS CLAIM IS IN THE ONLY WAY THAT THESE  
12 PLAINTIFFS CAN AFFIRMATIVELY ASSERT IT.

13 THE ONLY WAY THEY CAN ASSERT A CLAIM TO BE FREE  
14 FROM THE MISUSE OF A COPYRIGHT IS TO BRING EITHER A  
15 DECLARATORY JUDGMENT ACTION TO DETERMINE THE SCOPE OF THAT  
16 DISPUTED RIGHT OR TO BRING STATE LAW CLAIMS, WHICH THEY'VE  
17 DONE.

18 SO THERE'S NO REMEDY PROVIDED FOR, THERE'S NO  
19 RIGHT PROVIDED FOR IN THE COPYRIGHT ACT, AND THERE'S NO  
20 CAUSE OF ACTION PROVIDED FOR IN THE COPYRIGHT ACT, WHICH  
21 IS WHY WE THINK, ANALYTICALLY, THIS CASE IS DIFFERENT THAN  
22 THE MERCHANT CASE, WHERE THE COPYRIGHT ACT DOES ADDRESS  
23 QUESTIONS OF CO-AUTHORSHIP.

24 AND WE THINK THAT MAKES ALL THE DIFFERENCE IN  
25 THE WORLD.

1           **THE COURT:** WELL, I THINK THAT IS A FALSE  
2 DIFFERENTIATION BECAUSE, WHILE IT IS TRUE THE COPYRIGHT  
3 ACT MAY ADDRESS CO-OWNERSHIP, THE COPYRIGHT ACT ADDRESSES  
4 VALIDITY AS TO WHAT IS COPYRIGHTABLE. IS IT IN THE PUBLIC  
5 DOMAIN? IS IT SOMETHING THAT IS SUFFICIENTLY ORIGINAL FOR  
6 IT TO GET COPYRIGHT PROTECTION? THESE ARE ALSO ADDRESSED.

7           I SEE NO DIFFERENCE IN THAT PARALLEL. IF YOU  
8 ARE TELLING ME THESE ARE NOT THE SAME FACTS, I HAVE TO  
9 AGREE WITH YOU, THEY ARE NOT THE SAME FACTS. BUT  
10 CONCEPTUALLY, I DON'T SEE A DIFFERENCE, AND YOU HAVE NOT  
11 CONVINCED ME OTHERWISE.

12           IF YOU HAVE ANYTHING ELSE YOU WANT TO ADD, GO  
13 AHEAD. I'M GOING TO HEAR FROM THE OTHER SIDE, AND THEN  
14 WE'LL MOVE ON.

15           **MR. RIFKIN:** ON THIS QUESTION, YOUR HONOR, THE  
16 ONLY OTHER THING THAT I WOULD SAY, OF COURSE, IS WE HAVE  
17 RAISED THE ISSUE OF THE DISCOVERY RULE. WE'VE BRIEFED  
18 IT.

19           AND WE THINK HERE, EVEN IF THE COURT WERE GOING  
20 TO APPLY A THREE-YEAR STATUTE OF LIMITATIONS TO ANY OF  
21 THESE CLAIMS, IT'S NOT SO SIMPLE AS SAYING THE THREE YEARS  
22 BEGIN TO RUN FROM WHEN THE PLAINTIFF SIGNED THEIR CONTRACT  
23 BECAUSE IN FAIRNESS TO THE PLAINTIFFS THE COURTS THAT HAVE  
24 APPLIED THE THREE-YEAR STATUTE OF LIMITATIONS RECOGNIZE  
25 THAT THERE IS A LEGITIMATE QUESTION ABOUT WHEN THE

1 AGGRIEVED PARTY CAN DETERMINE, CAN DECIDE WHETHER THERE'S  
2 BEEN A REPUDIATION OF RIGHTS.

3 SO, FOR EXAMPLE, WE CITE THE WELLES CASE. THIS  
4 IS ORSON WELLES' DAUGHTER, WHO SUED TURNER ENTERTAINMENT  
5 OVER RIGHTS TO AN ORSON WELLES MOVIE; AND THE COURT THERE  
6 SAYS THAT, UNDER THE DISCOVERY RULE, THE PERIOD DOES NOT  
7 BEGIN TO RUN UNTIL THE DEFENDANTS NOTIFIED HER THAT THEY  
8 REPUDIATED HER COPYRIGHT OWNERSHIP CLAIM.

9 AND WE ALSO CITE THE SMUCKER CASE --

10 **THE COURT:** COUNSEL, WE DON'T NEED TO GET INTO  
11 THAT.

12 I WILL TAKE WHAT YOU ARE SAYING AS THAT EVEN IF  
13 I WERE TO RULE AGAINST YOU, I SHOULD GRANT LEAVE TO AMEND.

14 **MR. RIFKIN:** WE BELIEVE WE SHOULD BE PERMITTED  
15 TO AMEND ON THE QUESTION OF THE DISCOVERY RULE.

16 **THE COURT:** ALL RIGHT. I'LL TAKE IT AS THAT  
17 ARGUMENT.

18 WHICH ONE OF YOU WILL BE ADDRESSING THIS ISSUE?  
19 MR. KLAUS?

20 ALL RIGHT. THANK YOU, MR. RIFKIN.

21 **MR. RIFKIN:** THANK YOU, YOUR HONOR.

22 **THE COURT:** MR. KLAUS.

23 **MR. KLAUS:** YES. GOOD MORNING, YOUR HONOR.

24 I HAVE VERY LITTLE TO ADD ON THE QUESTION OF THE  
25 THREE-YEAR STATUTE OF LIMITATIONS. I THINK THAT IT IS

1 CLEAR THAT WHAT WE HAVE HERE IS SIMPLY A REVERSE CASE OF  
2 WHAT WE OTHERWISE WOULD HAVE IN AN INFRINGEMENT ACTION.

3 I THINK THAT --

4 **THE COURT:** WHY DON'T YOU GO AHEAD AND ADDRESS  
5 WHAT MR. RIFKIN SAID IS, IN HIS MIND, THE DIFFERENCE  
6 BETWEEN THE MERCHANT SITUATION AND OUR SITUATION, NUMBER  
7 ONE, AND ADDRESS WHAT MR. RIFKIN BELIEVES THAT NINTH  
8 CIRCUIT LAW RELATING TO THE 1983 ACTION MIGHT SUGGEST, IN  
9 HIS MIND AT LEAST, PURSUANT TO HIS ARGUMENT THAT WE SHOULD  
10 HAVE A DIFFERENT RESULT HERE.

11 WHY DON'T YOU GO AHEAD AND SEE IF YOU CAN  
12 ADDRESS THOSE TWO, PLEASE.

13 **MR. KLAUS:** ON THE TWO POINTS WITH RESPECT TO  
14 MERCHANT AND CO-OWNERSHIP AND WITH RESPECT TO WHAT IS  
15 BEING ALLEGED HERE BY THE PLAINTIFFS, I DON'T THINK THERE  
16 IS A MATERIAL DIFFERENCE. I DON'T THINK THE COPYRIGHT ACT  
17 CREATES A CAUSE OF ACTION FOR SOMEONE TO SAY I'M AN OWNER  
18 OR NOT AN OWNER OR A CO-OWNER.

19 IT ESTABLISHES THE PARAMETERS OF WHAT  
20 CO-OWNERSHIP ARE AND WHAT FOLLOWS FROM CO-OWNERSHIP IN THE  
21 SAME WAY THAT THE COPYRIGHT ACT SAYS WHAT FOLLOWS FROM  
22 WHETHER OR NOT SOMETHING IS AN ORIGINAL WORK OF EXPRESSION  
23 UNDER SECTION 102. AND IF SOMETHING IS OR IS NOT AN  
24 ORIGINAL EXPRESSION, IT IS OR IS NOT ELIGIBLE FOR  
25 COPYRIGHT PROTECTION.

1 THE OTHER ELEMENTS OF THE CLAIMS THAT ARE BEING  
2 ALLEGED HERE HAVE TO DO WITH COMPLIANCE WITH FORMALITIES  
3 IN THE ORIGINAL REGISTRATION OF THE COPYRIGHT, IN THE  
4 RENEWAL REGISTRATIONS.

5 AGAIN, THOSE DON'T CREATE CAUSES OF ACTION  
6 THEMSELVES, BUT THEY ALLOCATE AND THEY SPECIFY HOW IT IS  
7 THAT THE COPYRIGHT SYSTEM IS TO APPLY IN A VERY SIMILAR  
8 WAY AS OWNERSHIP.

9 AND THE PROVISION OF THE COPYRIGHT ACT SETTING  
10 FORTH LIMITATION, NOTABLY -- THIS IS SECTION 507(B) --  
11 SECTION 507(B) DOES NOT SAY IN ANY ACTION FOR AN  
12 INFRINGEMENT OF COPYRIGHT THAT THE STATUTE OF LIMITATIONS  
13 WILL BE THREE YEARS.

14 IT IS ANY ACTION THAT IS MAINTAINED UNDER THE  
15 PROVISIONS OF THIS TITLE, TITLE 17, WHICH INCLUDE THE  
16 ORIGINALITY, THE REGISTRATION, THE RENEWAL ISSUES THAT THE  
17 PLAINTIFFS ARE TALKING ABOUT.

18 WITH RESPECT TO THE SECTION 1983 CAUSE OF  
19 ACTION, YOUR HONOR, AS YOU HAVE STATED, SECTION 1983 DOES  
20 NOT HAVE ITS OWN CAUSE OF ACTION -- OR STATUTE OF  
21 LIMITATIONS IN THE WAY THAT THE COPYRIGHT ACT DOES.

22 AND I THINK THAT THE PROBLEM WITH RESPECT TO THE  
23 ENTIRE ARGUMENT FOR BORROWING STATE LAW STATUTES OF  
24 LIMITATIONS IS THAT, AS THE SUPREME COURT, AS THE NINTH  
25 CIRCUIT HAVE MADE CLEAR, YOU LOOK TO ANALOGOUS STATE LAW



1 CAUSES OF ACTIONS ONLY WHEN YOU DETERMINE THAT FEDERAL LAW  
2 DOESN'T APPLY ITS OWN STATUTE OF LIMITATIONS, WHICH HERE  
3 IT CLEARLY DOES UNDER 507(B).

4 I WOULD BE HAPPY TO ADDRESS THE EQUITABLE  
5 TOLLING ARGUMENT IF YOU WOULD LIKE, YOUR HONOR.

6 **THE COURT:** I DON'T THINK THAT'S NECESSARY AT  
7 THIS TIME. THANK YOU.

8 ALL RIGHT. LET'S MOVE ON, THEN, TO THE NEXT  
9 ISSUE.

10 MR. RIFKIN, ARE YOU GOING TO BE ADDRESSING THAT  
11 AS WELL, ALL THE REST OF IT?

12 **MR. RIFKIN:** I AM, YOUR HONOR.

13 **THE COURT:** OKAY. WHY DON'T YOU GO TO THE  
14 LECTERN, AND NORMALLY WHAT I WOULD DO IS ESSENTIALLY SAY,  
15 OKAY, LET'S TALK ABOUT THE NEXT ISSUE, WHICH IS THE  
16 PREEMPTION OF ALL OF YOUR STATE LAW CLAIMS THAT THEY CLAIM  
17 EXIST.

18 AND FRANKLY, WHEN I WAS WORKING THIS UP, THAT'S  
19 EXACTLY WHAT I DID. BUT AFTER I WORKED THIS ALL UP AND  
20 STARTED THINKING ABOUT THE BIGGER PICTURE OF HOW WE'RE  
21 GOING TO PROCEED WITH THIS CASE, NOW I'M QUESTIONING  
22 WHETHER, FROM AN EFFICIENCY STANDPOINT, IT IS SOMETHING  
23 THAT WE SHOULD BE PROCEEDING WITH NOW OR, IF NECESSARY,  
24 ONLY AT A SUBSEQUENT TIME.

25 SO LET ME TELL YOU WHAT I MEAN BY ALL OF THIS.

1           FIRST LET ME ASK YOU -- I'M NOT CLEAR ON WHAT IT  
2 IS THAT YOU THINK YOU CAN GET FOR YOUR CLIENTS OR THE  
3 CLASS, IF THERE IS A CLASS UNDER THE FIVE STATE LAW CLAIMS  
4 THAT YOU HAVE THAT, IN REALITY, IN ANY MATERIAL MEASURE,  
5 YOU CANNOT GET ON YOUR DECLARATORY RELIEF ACTIONS OR, YOU  
6 KNOW, CAUSES OF ACTION.

7           **MR. RIFKIN:** YOU ARE ASKING NOW STRICTLY BY WAY  
8 OF REMEDY?

9           **THE COURT:** YES.

10          **MR. RIFKIN:** I THINK THAT THE CALIFORNIA LAW  
11 PERMITS, NUMBER ONE, THE ATTORNEYS' FEES, RECOVERY OF  
12 ATTORNEYS' FEES, WHERE THE COPYRIGHT ACT, I DON'T BELIEVE,  
13 WOULD HERE, BECAUSE WE DON'T THINK WE HAVE A CLAIM UNDER  
14 THE COPYRIGHT ACT.

15          **THE COURT:** WELL, IF YOU --

16          **MR. RIFKIN:** WE HAD A CLAIM --

17          **THE COURT:** LET ME FINISH.

18                 IF YOUR DECLARATORY RELIEF ACTION IS BASED UPON  
19 THE PROVISIONS OF THE COPYRIGHT ACT, IT SEEMS TO ME THAT  
20 THE COPYRIGHT ACT'S ATTORNEYS' FEES PROVISION WOULD APPLY.

21                 AND I JUST DID SOME QUICK RESEARCH BECAUSE THIS  
22 IS MORE -- I GUESS WE'RE TALKING MORE IN TERMS OF CASE  
23 MANAGEMENT THAN ULTIMATE SUBSTANTIVE ISSUES, BUT I THINK  
24 THAT'S IMPORTANT BECAUSE I DON'T WANT TO PUT A CART BEFORE  
25 THE HORSE.

1           IT APPEARS THAT THERE ARE AT LEAST A COUPLE OF  
2 SECOND CIRCUIT CASES WHICH HAVE GRANTED ATTORNEYS' FEES  
3 UNDER THE COPYRIGHT ACT FOR DECLARATORY RELIEF ACTIONS  
4 THEREUNDER. THAT'S FROM MY PRELIMINARY RESEARCH.

5           SO LET'S JUST, FOR THE SAKE OF ARGUMENT, ASSUME  
6 THAT THAT'S CORRECT. WE CAN CERTAINLY CHECK IT.

7           BUT IF THAT IS CORRECT, WHAT OTHER REMEDIES THAT  
8 YOU WOULD GET FROM THESE FOUR -- I'M SORRY -- FIVE CLAIMS  
9 UNDER STATE LAW THAT YOU COULD NOT OTHERWISE GET FROM YOUR  
10 DECLARATORY RELIEF?

11           **MR. RIFKIN:** WELL, YOUR HONOR, WE ADDRESSED ONE,  
12 WHICH, OF COURSE, IS THE QUESTION OF HOW FAR BACK IN TIME  
13 WE ARE PERMITTED TO GO.

14           THE DEFENDANTS' MOTION EFFECTIVELY, WITH RESPECT  
15 TO THE THREE-YEAR STATUTE OF LIMITATIONS, CUTS OFF THE  
16 CLAIMS OF TWO OF THE PLAINTIFFS AND SHORTENS THE CLASS  
17 PERIOD.

18           SO I THINK IT SIGNIFICANTLY WOULD EXPAND THE  
19 SCOPE OF THE CASE BY THAT ADDITIONAL YEAR. IF THE COURT  
20 DECIDES TO APPLY THE THREE-YEAR STATUTE OF LIMITATIONS ON  
21 THE DECLARATORY JUDGMENT ACT CLAIM, I DON'T BELIEVE THE  
22 COURT WOULD APPLY THE THREE-YEAR STATUTE OF LIMITATIONS TO  
23 THE -- FOR EXAMPLE, THE U.C.L. CLAIM.

24           **THE COURT:** WELL, LET'S PUT THAT ASIDE. LET'S  
25 COUNT THEM UP SO THAT I KNOW WHAT THE DIFFERENCES ARE.

1           ONE IS POTENTIALLY ATTORNEYS' FEES. ONE IS  
2 POTENTIALLY STATUTE OF LIMITATIONS.

3           ANYTHING ELSE?

4           **MR. RIFKIN:** OTHER THAN ANY OTHER STATUTORY  
5 DAMAGES THAT I'M NOT AWARE OF, TO ANSWER THE QUESTION, I  
6 DON'T BELIEVE THERE ARE ANY OTHER REMEDIES BESIDES THE  
7 ATTORNEYS' FEES QUESTIONS AND THE QUESTION ON THE STATUTE  
8 OF LIMITATIONS.

9           AND, AGAIN, YOU KNOW, THIS WAS CONSISTENT WITH  
10 OUR VIEW THAT WE DO NOT HAVE EITHER A RIGHT UNDER THE  
11 COPYRIGHT ACT TO BE FREE FROM THIS WRONGDOING OR A REMEDY  
12 UNDER THE COPYRIGHT ACT.

13           IF THE COURT'S GOING TO DISAGREE WITH THAT,  
14 WE'LL OBVIOUSLY BE GUIDED BY THE COURT'S RULINGS, AND THAT  
15 MAY CHANGE MY POINT OF VIEW.

16           BUT WE CERTAINLY BELIEVE THAT THE STATUTE -- THE  
17 AVAILABILITY OF ATTORNEYS' FEES AND THE EXTRA YEAR ON THE  
18 STATUTE OF LIMITATIONS ARE IMPORTANT CONSIDERATIONS.

19           **THE COURT:** SO AGAIN, MAYBE IT'S NOT SOMETHING  
20 THAT WE NEED TO DECIDE STRICTLY TODAY, BUT LET'S PUT ASIDE  
21 THE ATTORNEYS' FEES BECAUSE I THINK WE CAN FIGURE THAT OUT  
22 RELATIVELY SIMPLY.

23           SO LET'S TALK ABOUT THE STATUTE OF LIMITATIONS.

24           THERE ARE TWO OF THE PLAINTIFFS -- I DON'T  
25 REMEMBER WHICH TWO. I THINK MR. SIEGEL IS ONE, AND --

1           **MR. RIFKIN:** CORRECT.

2           **THE COURT:** WHO IS THE OTHER ONE?

3           **MR. RIFKIN:** MAJAR PRODUCTIONS IS THE OTHER  
4 ONE.

5           **THE COURT:** OKAY. MAJAR PRODUCTIONS.

6           LET'S JUST SAY, FOR THE SAKE OF ARGUMENT ONLY,  
7 BECAUSE I CERTAINLY HAVEN'T EVEN REACHED THE QUESTION OF  
8 GIVING YOU LEAVE TO AMEND, MUCH LESS KNOW WHAT YOU ARE  
9 GOING TO SAY, WHICH MAY CHANGE EVERYTHING. LET'S PUT THAT  
10 ASIDE.

11           ASSUME FOR THE SAKE OF ARGUMENT THAT, AT THE END  
12 OF THE DAY, AFTER WHATEVER AMENDMENTS I GIVE YOU AN  
13 OPPORTUNITY TO MAKE, I STILL DECIDE IT'S A THREE-YEAR  
14 STATUTE AND THAT MR. SIEGEL AND THE OTHER PLAINTIFF ARE  
15 OUTSIDE OF IT.

16           LET'S JUST ASSUME THAT.

17           **MR. RIFKIN:** CORRECT.

18           **THE COURT:** WHICH MEANS THAT I WOULD DISMISS THE  
19 DECLARATORY RELIEF ACTIONS AS TO THOSE DEFENDANTS AS TIME  
20 BARRED -- THOSE TWO PLAINTIFFS AS TIME BARRED, MUCH LIKE  
21 WHAT THEY DID IN MERCHANT.

22           THEY DISMISSED IT AND SAID NO RELIEF. THE  
23 MAGISTRATE JUDGE THERE HAD SOMEHOW SAID WELL, YOUR RELIEF  
24 IS LIMITED TO THREE YEARS, BUT THE SECOND CIRCUIT  
25 DISAGREED WITH THAT AND SAID THEY'RE GONE.

1 ALL RIGHT. IF THAT IS ALSO THE CASE WITH  
2 RESPECT TO MR. SIEGEL AND THE OTHER PLAINTIFF -- AND WE  
3 POSIT THAT FOR ARGUMENT'S SAKE -- THEN COULD THEY STILL  
4 HAVE A FOUR-YEAR STATUTE OF LIMITATIONS WITH RESPECT TO  
5 THE STATE LAW CLAIMS?

6 NOT THAT THE STATE LAW CLAIMS ALL OF A SUDDEN  
7 CHANGE A STATUTE OF LIMITATIONS. BUT EFFECTIVELY, CAN  
8 THEY EVEN HAVE A CLAIM EVEN THOUGH THE STATUTE OF  
9 LIMITATIONS IS FOUR YEARS BECAUSE ONE OF THE ELEMENTS UPON  
10 WHICH IT IS DEPENDENT -- THAT IS, VALIDITY OR INVALIDITY  
11 AS TO THEM -- HAS BEEN DECIDED AGAINST THEM.

12 AND SO AS AN ELEMENT, THEY CAN'T EVEN PREVAIL ON  
13 THAT ELEMENT.

14 SO ALL THE REST OF IT IS IRRELEVANT BECAUSE ALL  
15 OF YOUR STATE LAW CLAIMS -- I THINK YOU WOULD AGREE ON  
16 THAT. IF I'M WRONG AND YOU DISAGREE, PLEASE LET ME KNOW.

17 BUT I THINK YOU WOULD AGREE THAT ALL OF YOUR  
18 STATE LAW CLAIMS ARE DEPENDENT UPON THE DETERMINATION THAT  
19 THEIR COPYRIGHT CLAIM IS INVALID. RIGHT?

20 **MR. RIFKIN:** THE FACTUAL DETERMINATION THAT  
21 THEIR COPYRIGHT DOES NOT EXTEND TO THE SONG, CORRECT.

22 **THE COURT:** RIGHT.

23 **MR. RIFKIN:** INVALID OR VALID, IT'S A  
24 DIFFERENCE. THEY CLAIM RIGHTS UNDER TWO COPYRIGHTS, WHICH  
25 WE SAY DO NOT PROTECT THE SONG. IT'S NOT THAT THOSE

1     COPYRIGHTS ARE INVALID, IT'S THAT THEY DON'T PROTECT THE  
2     SONG.

3             BUT THAT'S CORRECT, YOUR HONOR. WE WOULD HAVE  
4     TO PROVE, EVEN UNDER THE STATE LAW CLAIMS --

5             **THE COURT:** RIGHT. YOU HAVE TO DO THAT.

6             **MR. RIFKIN:** WE WOULD HAVE TO PROVE THAT THEY DO  
7     NOT OWN THE RIGHTS THEY CLAIM TO OWN.

8             **THE COURT:** LET'S PUT IT SIMPLY. IF YOU LOSE  
9     THE DECLARATORY RELIEF CLAIMS THAT YOU HAVE, YOU CAN'T GO  
10    FORWARD WITH YOUR STATE LAW CLAIM, CAN YOU?

11            **MR. RIFKIN:** I DISAGREE WITH THAT.

12            **THE COURT:** HOW IS THAT?

13            **MR. RIFKIN:** BECAUSE IT IS NOT NECESSARY, FOR  
14    EXAMPLE, UNDER THE FALSE ADVERTISING LAW.

15            IT IS NOT NECESSARY FOR THE PLAINTIFF TO PLEAD  
16    OR PROVE THAT THE DEFENDANTS' CONDUCT IS VIOLATIVE OF ANY  
17    STATUTORY RIGHT THAT THE PLAINTIFF HAS OR DOESN'T HAVE.  
18    IT SIMPLY HAS TO BE MISLEADING.

19            AND IF THE CLAIM IS FALSE OR MISLEADING, THE  
20    FACT THAT THE PLAINTIFF IS PRECLUDED BY AN APPLICABLE  
21    STATUTE OF LIMITATIONS -- AND I'M GOING TO ASSUME FOR A  
22    MOMENT THAT --

23            **THE COURT:** NO, NO. DON'T GO TO THE STATUTE OF  
24    LIMITATIONS YET.

25            FINISH THEIR THOUGHT ON WHY, UNDER ANY

1 CIRCUMSTANCES, YOU WOULD STILL HAVE A FALSE ADVERTISING  
2 CLAIM EVEN IF YOU WERE TO LOSE ON YOUR TWO DECLARATORY  
3 RELIEFS.

4 **MR. RIFKIN:** OH, I'M SORRY, I MISUNDERSTOOD. I  
5 THOUGHT YOU WERE ASKING, IF THE COURT DETERMINES THE  
6 STATUTE OF LIMITATIONS --

7 **THE COURT:** NO, NO. I'M SORRY. I WASN'T CLEAR.  
8 MY FAULT. OKAY. LET ME REPHRASE.

9 LET'S SAY WE GO AHEAD WITH THE DECLARATORY  
10 RELIEF ACTIONS. WHETHER IT'S THREE YEARS OR OTHERWISE,  
11 LET'S PUT THAT ASIDE. WE'RE NOT TALKING STATUTE OF  
12 LIMITATIONS ANYMORE; WE'RE TALKING SUBSTANCE.

13 WE HAVE A TRIAL, AND THE TRIAL COMES OUT YOU  
14 LOSE, THEY WIN.

15 **MR. RIFKIN:** ON THE DECLARATORY JUDGMENT?

16 **THE COURT:** ON EVERYTHING THAT YOU RAISE IN YOUR  
17 DECLARATORY JUDGMENT CAUSES OF ACTIONS.

18 CAN YOU STILL GO AHEAD WITH YOUR STATE LAW  
19 CLAIMS?

20 **MR. RIFKIN:** I SUPPOSE THE ONLY ISSUE THAT I'M  
21 HESITANT ON -- SUBSTANTIVELY, I THINK THE FACT WOULD BE IN  
22 THAT CASE THAT THE JURY FOUND THAT WE HAD NOT PROVEN THAT  
23 THE COPYRIGHT DID NOT COVER THE RIGHT TO THE SONG.

24 **THE COURT:** OR THAT IT WAS INVALID BECAUSE I  
25 THINK YOU WERE ALSO TALKING ABOUT VALIDITY.



1           **MR. RIFKIN:** WELL, WE TALKED ABOUT VALIDITY ONLY  
2 TO THE EXTENT THAT THE CLAIM IS INVALID.

3           IF THE COURT UNDERSTOOD US BE ASKING TO  
4 INVALIDATE ANY EXISTING COPYRIGHTS, I DON'T THINK THAT'S  
5 NECESSARY, GIVEN WHAT WE NOW UNDERSTAND THE DEFENDANTS'  
6 DEFENSE TO BE.

7           **THE COURT:** OKAY. I WASN'T CLEAR ON THAT. I'M  
8 GLAD YOU CLARIFIED THAT.

9           **MR. RIFKIN:** AND IT'S ONLY NOW THAT WE'VE SEEN A  
10 HINT OF THE DEFENDANTS' DEFENSE THAT WE KNOW THAT THEY'RE  
11 CLAIMING, AT LEAST WHAT WE UNDERSTAND, IS THAT THEY'RE  
12 CLAIMING RIGHTS UNDER TWO 1935 COPYRIGHTS WHICH WE DON'T  
13 BELIEVE COVER THE SUBJECT MATTER OF THE SONG.

14           IT'S NOT A QUESTION OF THEIR VALIDITY OR  
15 INVALIDITY, IT'S JUST THE SCOPE OF THEM.

16           **THE COURT:** THAT'S NOW AT THE HEART OF YOUR  
17 DECLARATORY RELIEF.

18           **MR. RIFKIN:** AS WE UNDERSTAND THE WAY THE  
19 DEFENDANTS HAVE SAID THEY INTEND TO DEFEND THIS CASE IN  
20 SUMMARY JUDGMENT AND, THEN, IF THEY LOSE SUMMARY JUDGMENT,  
21 AT TRIAL, THEY, AS WE UNDERSTAND IT, THEY SAY THAT TWO  
22 COPYRIGHTS IN 1935 GIVE THEM THE RIGHTS TO THE SONG.

23           WE DISPUTE THAT THOSE TWO COPYRIGHTS GIVE THEM  
24 THE RIGHTS TO THE SONG.

25           NOW, I WILL PARENTHETICALLY SAY THAT ONE OF

1 THOSE COPYRIGHTS -- THERE MAY BE A QUESTION ABOUT THE  
2 ENFORCEABILITY OF THAT COPYRIGHT, BUT IT'S A TECHNICAL  
3 QUESTION THAT I DON'T THINK NEEDS TO BE RESOLVED TO ANSWER  
4 THE COURT'S QUESTIONS.

5 **THE COURT:** OKAY.

6 **MR. RIFKIN:** I THINK THAT UNLESS THERE IS A  
7 DIFFERENT BURDEN OF PROOF, WE WOULD NEED TO PROVE THE SAME  
8 FACTS FOR THE STATE LAW CLAIMS AS FOR THE DECLARATORY  
9 JUDGMENT.

10 **THE COURT:** WHICH MEANS THAT YOU AGREE WITH ME  
11 THAT IF YOU, SUBSTANTIVELY, ON THE MERITS LOSE ON YOUR  
12 CLAIMS FOR DECLARATIVE RELIEF, YOU WOULD NOT HAVE ANY  
13 STATE LAW CLAIMS LEFT. RIGHT?

14 **MR. RIFKIN:** CORRECT.

15 **THE COURT:** OKAY. WITH THAT UNDERSTANDING, MY  
16 QUESTION TO YOU IS THIS, AND THEN I'LL ADDRESS MR. KLAUS  
17 ON THIS AS WELL.

18 SO YOU MIGHT BE THINKING ABOUT IT AS WE'RE  
19 TALKING, MR. KLAUS.

20 WHY ARE WE SPENDING TIME, NOT ONLY IN TERMS OF  
21 LITIGATING PREEMPTION, LITIGATING WHAT YOUR STATUTES ARE,  
22 WHETHER THOSE THREE-YEAR STATUTES -- I THINK THAT'S THE  
23 F.A.L. AND THE MONEY-HAD-AND-RECEIVED COUNTS -- WHETHER WE  
24 SHOULD ALLOW YOU TO AMEND TO ASSERT SOME SORT OF  
25 DISCOVERY, TOLLING, WHATEVER YOUR THEORIES ARE; AND WHY

1 ARE WE LITIGATING THE SUFFICIENCY OF YOUR ALLEGATIONS  
2 WHETHER THEY ARE CONTROLLED BY RULE 9(B)?

3 AND EVEN IF THEY ARE NOT CONTROLLED BY RULE  
4 9(B), SUFFICIENTLY PLAUSIBLE OF THE TWOMBLY AND IQBAL  
5 UNDER RULE 8, DO WE NEED TO LITIGATE ANY OF THOSE NOW?  
6 NOW?

7 OR DO WE, FROM A CASE MANAGEMENT STANDPOINT, SAY  
8 WE BIFURCATE THIS ACTION, WE GO AHEAD AND PROCEED ON THE  
9 DECLARATORY RELIEF ONLY, AND WE HAVE A TRIAL ON THAT, IF  
10 NECESSARY; OR IF IT'S RESOLVED IN SUMMARY JUDGMENT, FINE.  
11 IF IT'S NOT RESOLVED IN SUMMARY JUDGMENT, WE HAVE A TRIAL  
12 ON IT.

13 ONCE WE HAVE THAT TRIAL, IF YOU LOSE AND THEY  
14 WIN, CASE OVER. IF YOU WIN, THEY LOSE, THEN THE INTERIM  
15 QUESTION IS IS THERE REALLY ANY DIFFERENCE IN TERMS OF  
16 REMEDIES THAT ARE AVAILABLE?

17 AND THAT MAY BE THE TIME THAT WE CAN, IN  
18 EARNEST, LITIGATE THE ISSUE OF THE AVAILABILITY OF  
19 ATTORNEYS' FEES AND ANY CONSTRICTION IN THE STATUTE OF  
20 LIMITATIONS FOR THE STATE LAW CLAIMS.

21 IF THERE IS NO DIFFERENCE, THEN AGAIN, WHY DO WE  
22 NEED TO WORRY ABOUT THOSE? IF THERE IS A DIFFERENCE, THEN  
23 AND ONLY THEN, IT SEEMS TO ME, THEN WE CAN SAY, WELL, ARE  
24 THESE CLAIMS ALL PREEMPTED ANYWAY?

25 IF THE ANSWER IS YES, END OF STORY. IF THE

1 ANSWER IS NO, THEN WE CAN TALK ABOUT THE SUFFICIENCY OF  
2 THE CLAIMS AS A SUBSTANTIVE MATTER.

3 THAT'S SORT OF MY THOUGHT PROCESS, AND I WANTED  
4 YOU TO HAVE A SHOT AT IT, AND I WANT MR. KLAUS TO HAVE A  
5 SHOT AT IT.

6 **MR. RIFKIN:** YOUR HONOR, I APPRECIATE VERY MUCH  
7 YOUR THOUGHTS ON THAT; AND THE THOUGHT OCCURRED TO US  
8 THAT, REALLY, ALL THE EFFECT OF THIS MOTION IS IS TO  
9 DECIDE WHETHER THIS IS A THREE-YEAR CLASS OR A FOUR-YEAR  
10 CLASS.

11 AND I THINK THAT, AS LONG AS THE COURT  
12 UNDERSTANDS THAT, IN OUR VIEW -- AND I DON'T KNOW THAT THE  
13 DEFENDANTS REALLY WOULD GENUINELY DISPUTE THIS.

14 IF WE WERE SUCCESSFUL IN OUR DECLARATORY  
15 JUDGMENT CLAIM AND THE COURT WERE TO ENTER JUDGMENT ON  
16 THOSE CLAIMS, IT WOULD NOT -- AND AGAIN, LET'S LEAVE ASIDE  
17 THE QUESTION OF ATTORNEYS' FEES FOR A MOMENT -- IT WOULD  
18 NOT GIVE US THE RIGHT TO THEN MOVE IMMEDIATELY FOR  
19 JUDGMENT ON ALL THE STATE LAW CLAIMS BECAUSE I THINK SOME  
20 OF THE STATE LAW CLAIMS HAVE ADDITIONAL ELEMENTS TO THEM.

21 BUT AS LONG AS THE COURT UNDERSTANDS THAT THERE  
22 MAY BE SOME ISSUES LEFT TO TRY AFTER THE DECLARATORY  
23 JUDGMENT, IF THE DECLARATORY JUDGMENT WAS RESOLVED  
24 SUCCESSFULLY IN FAVOR OF THE PLAINTIFFS, THEN I THINK YOUR  
25 HONOR'S SUGGESTION MAKES SENSE. AND MAYBE THE THING TO DO

1 IS TO HAVE THE DEFENDANTS WITHDRAW THE MOTION TO DISMISS,  
2 WHICH REALLY DOESN'T MOVE TO DISMISS THE CASE SO MUCH AS  
3 JUST LIMIT THE CLAIMS.

4 BUT I JUST WANT TO MAKE SURE WE ARE AWARE THAT  
5 IT ONLY ENDS THE CASE IN THE EVENT OF AN ADVERSE  
6 DETERMINATION AGAINST THE PLAINTIFF ON THE DECLARATORY  
7 JUDGMENT SIDE OF THE CASE ON THE MERITS, AS OPPOSED TO FOR  
8 SOME TECHNICAL DEFICIENCY OR SOMETHING LIKE THAT.

9 BUT IF THE COURT OR A JURY DECIDES THAT THE  
10 PLAINTIFF CANNOT PROVE THE MERITS OF THE CASE ON THE  
11 DECLARATORY JUDGMENT, THEN I WOULD AGREE THE PLAINTIFF  
12 CAN'T PROVE THE MERITS OF ANY OF THE STATE LAW CLAIMS.

13 WITH THOSE CLARIFICATIONS IN MIND, I THINK THE  
14 COURT'S SUGGESTION IS SENSIBLE.

15 **THE COURT:** I THINK WE'RE REALLY ON THE SAME  
16 PAGE. AND BECAUSE, AS YOU SEE, THE WAY THAT I SET FORTH  
17 THE DIFFERENT LEVELS OF WHAT WE HAVE TO DO, DEPENDING ON  
18 WHAT HAPPENS WITH THE DECLARATORY RELIEF ACTION, CLEARLY  
19 DOES NOT SUGGEST AT ALL THAT I THINK, NECESSARILY, THAT IF  
20 YOU WERE TO WIN THE DECLARATORY RELIEF, THE CASE ENDS --  
21 I'M NOT SUGGESTING THAT AT ALL. THE CASE MAY VERY WELL  
22 NOT END BECAUSE WE HAVE TO CONSIDER ALL OF THESE OTHER  
23 ISSUES.

24 NOW, AS A PRACTICAL MATTER, MIGHT IT END? WHO  
25 KNOWS.

1           **MR. RIFKIN:** OF COURSE.

2           AND THERE IS ONE OTHER THING WHICH I THINK WE  
3 PROBABLY OUGHT TO PUT OUT ON THE TABLE JUST BECAUSE I SEE  
4 IT AS A POTENTIAL ISSUE, AND FRANKLY, I HAVEN'T THOUGHT  
5 ENOUGH ABOUT IT YET TO HAVE A DEFINITIVE ANSWER.

6           BUT THERE IS A QUESTION ABOUT A RIGHT TO A JURY.  
7 AND I AM NOT SURE, AND I COULD NOT DEFINITELY ANSWER YOU  
8 BECAUSE THE ISSUE HASN'T ARISEN YET.

9           BUT IF ALL WE HAD BROUGHT WERE TWO DECLARATORY  
10 JUDGMENT ACTIONS, I'M NOT SURE WHETHER THE PLAINTIFFS HAVE  
11 OR DO NOT HAVE A RIGHT TO A TRIAL BY JURY.

12           ON THE OTHER HAND, I KNOW WITH CERTAINTY THAT  
13 THE PLAINTIFFS HAVE A RIGHT TO A TRIAL BY JURY ON THE  
14 STATE LAW CLAIMS.

15           AND I WANT TO BE CAUTIOUS OF PROTECTING THEIR  
16 RIGHTS TO A TRIAL BY JURY. AND BEFORE WE COULD SAY YES,  
17 LET'S BIFURCATE, I THINK WE MIGHT NEED TO GIVE A LITTLE  
18 BIT OF THOUGHT TO THAT AND THEN THE COURT NEEDS TO  
19 CONSIDER WHETHER, IF ONE CAUSE OF ACTION ALONE COULD BE  
20 TRIED BY A JURY BUT ANOTHER CAUSE OF ACTION ALONE COULD  
21 NOT BE, WHAT THAT MEANS FOR BIFURCATING THE CASE THE WAY  
22 YOUR HONOR HAS SUGGESTED.

23           AND IN FAIRNESS TO YOU AND IN FAIRNESS TO THE  
24 DEFENDANTS, I'M NOT PREPARED TO ANSWER THAT QUESTION  
25 DEFINITELY.

1           **THE COURT:** I UNDERSTAND.

2           **MR. RIFKIN:** BUT I AM AWARE OF THE ISSUE, AND I  
3 WANT TO MAKE SURE THAT WE GIVE IT SOME THOUGHT.

4           **THE COURT:** I APPRECIATE THAT. THANK YOU VERY  
5 MUCH.

6           **MR. RIFKIN:** YOU ARE WELCOME, YOUR HONOR.

7           **THE COURT:** MR. KLAUS.

8           **MR. KLAUS:** THANK YOU, YOUR HONOR.

9           I THINK THAT, FIRST OF ALL, THE QUESTION OF  
10 BIFURCATION, I THINK THE ISSUE THAT MR. RIFKIN RAISED NEAR  
11 THE END OF HIS ARGUMENT POSES A REAL QUESTION.

12           ON THE DECLARATORY JUDGMENT CLAIMS, THE  
13 DECLARATORY JUDGMENT CLAIMS, IN AND OF THEMSELVES, ARE  
14 TRIED TO THE COURT. THERE IS NOT A JURY TRIAL RIGHT ON  
15 THE DECLARATORY JUDGMENT CLAIMS.

16           AND I BELIEVE THAT WHAT MR. RIFKIN WAS SAYING  
17 WAS THAT HE WOULD BE HESITANT TO AGREE TO BIFURCATION IF  
18 HE THOUGHT THAT HE HAD A SEVENTH AMENDMENT JURY TRIAL  
19 RIGHT TO ONE OF THE ADDITIONAL STATE LAW CAUSES OF ACTION.

20           AND FRANKLY, THAT IS ONE OF THE -- THAT'S ONE OF  
21 THE DIFFERENCES BETWEEN PROCEEDING IN JUST A BIFURCATED  
22 WAY AND THEN RESOLVING THE ISSUES WITH THESE POINTS NOW.

23           WE WOULD THINK THAT IF THE PLAINTIFFS WERE  
24 AGREEABLE TO A DECLARATORY JUDGMENT, TO HAVING DISCOVERY  
25 LIMITED TO THE DECLARATORY JUDGMENT CLAIM AND HAVING A

1 BENCH TRIAL LIMITED TO THE DECLARATORY JUDGMENT CLAIM,  
2 THAT WOULD BE FAR AND AWAY THE MOST EFFICIENT WAY TO  
3 MANAGE THIS CASE.

4 JUST BY WAY OF BACKGROUND, FOR ALL THE  
5 PARAGRAPHS, FOR ALL THE CONTENTIONS THAT ARE IN THE  
6 COMPLAINT ABOUT PEOPLE IN A SUNDAY SCHOOL, HAVING SUNG THE  
7 LYRICS TO "HAPPY BIRTHDAY TO YOU" PRIOR TO THE 1935  
8 REGISTRATION, WE THINK THIS CASE WILL, IN FACT, END VERY  
9 QUICKLY ON THE MERITS WHEN WE PUT INTO EVIDENCE THE  
10 REGISTRATION, THE CERTIFICATES OF REGISTRATION THAT WERE  
11 ISSUED IN 1935 THAT DO TALK ABOUT TEXT, NOT SIMPLY PIANO  
12 ARRANGEMENTS -- TEXT, WHICH MEANS LYRICS, AND WHICH DO  
13 TALK ABOUT THE AUTHORSHIP BEING ORIGINAL TO MILDRED HILL.

14 THOSE REGISTRATION CERTIFICATES, UNDER OPERATION  
15 OF THE COPYRIGHT ACT, ARE PRIMA FACIE PROOF THAT THE  
16 COPYRIGHTS ARE VALID --

17 **THE COURT:** I DON'T WANT TO --

18 **MR. KLAUS:** -- THAT THEY WERE NOT COPIED.

19 BUT MY POINT BEING, YOUR HONOR, THAT IT WOULD BE  
20 A VERY STREAMLINED. WE THINK IT WOULD BE A VERY  
21 STREAMLINED PROCEDURE TO PROCEED WITH A JUDGMENT AS TO  
22 WHAT REALLY IS THE ONLY ALLEGATION WE THINK THAT'S FAIRLY  
23 IN THE CASE, WHICH IS AN ALLEGATION THAT YOU,  
24 WARNER/CHAPPELL, HAVE A COPYRIGHT THAT WE CONTEND IS  
25 INVALID. YOU HAVE LICENSED THAT COPYRIGHT THAT WE CONTEND



1 IS INVALID, AND WE THINK THAT THAT --

2 **THE COURT:** BUT MR. RIFKIN HAS SORT OF WALKED  
3 BACK FROM THAT CONTENTION TODAY. YOU HEARD HIM SAY THAT.

4 HE SAID HE'S NOT NECESSARILY SO MUCH CONTENDING  
5 THAT YOUR COPYRIGHTS ARE INVALID AS THAT YOUR COPYRIGHTS  
6 DON'T COVER WHAT IT IS THAT HE SAYS THAT HIS CLIENTS WOULD  
7 LIKE TO DO.

8 **MR. KLAUS:** I HEARD WHAT HE SAID, AND I READ THE  
9 ALLEGATIONS OF THE COMPLAINT IN PARAGRAPH 93 AND 98 WHERE  
10 THE PLAINTIFFS SPECIFICALLY ALLEGE THAT THE WORK THAT WAS  
11 ALLEGED INCLUDED THE LYRICS.

12 SO IF THEY WANT TO -- IF THEY ARE GOING TO AMEND  
13 THE COMPLAINT AND THEY ARE GOING TO DO SO CONSISTENT WITH  
14 THEIR OBLIGATIONS TO INVESTIGATE THE COMPLAINT AND FILE  
15 IT, I DON'T THINK THEY'RE ULTIMATELY EVER GOING TO BE ABLE  
16 TO HAVE AN ALLEGATION THAT BACKS AWAY FROM THE CLAIM THAT  
17 YOU, WARNER/CHAPPELL, HAVE COPYRIGHT REGISTRATIONS THAT  
18 COVER THE LYRICS TO "HAPPY BIRTHDAY TO YOU."

19 AND IT'S THE PLAINTIFFS' CONTENTION THAT YOU  
20 COULD NOT VALIDLY HAVE OBTAINED THOSE REGISTRATIONS  
21 BECAUSE THAT WORK WAS NOT ORIGINAL TO THE COPYRIGHT  
22 AUTHOR.

23 THAT'S THE ESSENCE OF THE CLAIM THAT'S IN THE  
24 CASE.

25 **THE COURT:** WELL, IT IS WHAT IT IS; AND IF THEY

1 HAVE A DIFFERENT THEORY, THEN IT'S UP TO THEM TO ASK TO  
2 AMEND TO SET FORTH THAT THEORY THAT DOESN'T EXIST OR IS  
3 NOT APPARENT, PERHAPS, IN THE PLEADING SO FAR.

4 LET'S GO BACK TO MY ISSUE. AND THAT IS I GUESS  
5 THE POINT THAT MR. RIFKIN IDENTIFIED IS THAT, TO THE  
6 EXTENT THAT HE HAS A RIGHT, CLEARLY, TO JURY TRIAL ON HIS  
7 STATE CLAIMS, IF THEY SURVIVE, ONE OF THE ELEMENTS OF  
8 WHICH IS -- LET'S JUST GO BY WHAT HAS BEEN ALLEGED TODAY  
9 AS OPPOSED TO -- AS OF TODAY, AS OPPOSED TO WHAT MAY BE  
10 DIFFERENT, BUT THAT IF IT IS INVALID, THAT WOULD ALSO BE  
11 AN ELEMENT OF THE STATE LAW CLAIMS THAT THEY HAVE TO PROVE  
12 UP AS PART OF THEIR ELEMENTS, I THINK.

13 AND IF THEY HAVE TO DO THAT, THE JURY WOULD HAVE  
14 TO MAKE A DECISION. BUT IF THAT DECISION HAS ALREADY BEEN  
15 MADE BY ME IN A DECLARATORY RELIEF CONTEXT, THE QUESTION  
16 THEN IS WHETHER OR NOT I HAVE, IN ESSENCE, SUPERSEDED THAT  
17 JURY DETERMINATION TO WHICH THEY WOULD OTHERWISE HAVE A  
18 RIGHT TO UNDER STATE LAW, AND THE QUESTION IS WHETHER  
19 THOSE OLD, YOU KNOW, BEACON THEATER, THE DAIRY QUEEN  
20 CASES, WOULD COME INTO EFFECT OR NOT.

21 FRANKLY, I HAVEN'T TAKEN A CLOSE READ OF THOSE  
22 CASES IN SOME TIME. AND I DON'T KNOW AT THIS POINT  
23 WHETHER, GIVEN THE FACT THAT THIS DETERMINATION UNDER THE  
24 COPYRIGHT ACT, WOULD THAT MAKE A DIFFERENCE AS TO WHETHER  
25 OR NOT I WOULD GET TO DO IT REGARDLESS OF IT, WHETHER

1 THOSE CASES WOULD NOT APPLY TO THIS CASE. I CAN'T SAY AT  
2 THIS POINT.

3 BUT YOU AGREE THAT THERE IS THAT ISSUE WHICH  
4 MIGHT CAUSE A PROBLEM IN TERMS OF THE BIFURCATION.

5 **MR. KLAUS:** I AGREE THAT IT'S AN ISSUE, AND LIKE  
6 YOUR HONOR, I HAVEN'T LOOKED AT THE BEACON THEATER OR THE  
7 DAIRY QUEEN CASES IN SOME TIME TO DETERMINE WHETHER --

8 THE INTERESTING QUESTION BEING WHETHER, IF AN  
9 ELEMENT OF YOUR STATE LAW CLAIM, WHICH IS HERE, THE STATE  
10 LAW CLAIMS, AT LEAST AS PLEADED TO DATE, ARE ALL.

11 -- YOU HAVE AN INVALID COPYRIGHT THAT YOU  
12 LICENSED; ERGO, YOU BREACHED THE CONTRACT.  
13 MONEY-HAD-AND-RECEIVED, RESCISSION, FALSE ADVERTISING --  
14 ALL THAT.

15 **THE COURT:** RIGHT.

16 **MR. KLAUS:** I DON'T KNOW WHETHER THEY ACTUALLY  
17 HAVE A SEVENTH AMENDMENT JURY TRIAL RIGHT TO THE  
18 UNDERLYING QUESTION, WHICH IS PURELY ONE OF FEDERAL LAW  
19 AND A LEGAL QUESTION AS TO WHETHER OR NOT THE COPYRIGHT IS  
20 VALID OR NOT.

21 I DON'T KNOW THE ANSWER TO THAT QUESTION, BUT IT  
22 IS AN ISSUE.

23 **THE COURT:** OKAY. SO BECAUSE THAT IS AN ISSUE,  
24 DOES THAT NECESSARILY MEAN THAT BIFURCATION WOULD BE  
25 INADVISABLE; IN OTHER WORDS, WE DON'T HAVE TO SAY THAT

1 BIFURCATION OF THE DECLARATORY RELIEF WOULD NECESSARILY GO  
2 ALL THE WAY THROUGH TRIAL.

3 WE COULD SAY THAT FOR PURPOSES OF DISCOVERY AND  
4 PURPOSE OF SUMMARY JUDGMENT, WE'RE GOING TO LIMIT  
5 EVERYTHING RATHER THAN EVERYBODY SPENDING TIME, MONEY, AND  
6 EXPENSES ON BOTH SIDES ON ALL OF THE REST OF IT -- RATHER  
7 THAN HAVING TO SEE WHETHER OR NOT THEY HAVE TO AMEND TO  
8 STATE, IF THEY CAN, A PROPER CLAIM FOR THE U.C.L. AND  
9 F.A.L.; WHETHER 9(B) APPLIES, SO FORTH AND SO ON --  
10 WHETHER UNDER THE THREE-YEAR STATUTE OF LIMITATIONS THE  
11 F.A.L. AND MONEY-HAD-RECEIVED THEY WOULD HAVE TO AMEND TO  
12 ALLEGE SOME WAY OF GETTING AROUND THE STATUTE OF  
13 LIMITATIONS.

14 THOSE ISSUES WE DON'T HAVE TO DECIDE AT THIS  
15 POINT, NECESSARILY. WE CAN STILL GO AHEAD AND HAVE IT.

16 IF THE CASE IS DECIDED ON SUMMARY JUDGMENT IN  
17 YOUR FAVOR, WELL, WE DON'T HAVE TO DO ANYTHING ELSE. IF  
18 THE CASE IS NOT DECIDED IN YOUR FAVOR IN SUMMARY JUDGMENT,  
19 WE NEED TO HAVE A TRIAL.

20 PERHAPS AT THAT TIME WE CAN DECIDE WHETHER OR  
21 NOT THOSE ISSUES REALLY MATTER TO THEM OR WHETHER, FROM  
22 THE STANDPOINT OF RELIEF, THEY CAN GET EVERYTHING THEY CAN  
23 GET IF THEY WERE TO WIN ON THE DECLARATORY RELIEF.

24 ALL OF THESE THINGS HAVE NOT BEEN DECIDED BY  
25 PLAINTIFFS' COUNSEL, NOR CAN I EXPECT THEM TO SINCE I HAVE

1 LARGELY RAISED THEM JUST TODAY, BUT THAT'S WHAT I -- SO  
2 WHY DON'T YOU WEIGH IN ON THAT ONE, MR. KLAUS.

3 **MR. KLAUS:** WELL, LIKE PLAINTIFFS' COUNSEL, I  
4 WOULD NEED TO, SINCE THESE ISSUES HAVE COME UP AT THE  
5 HEARING TODAY, IT'S TYPICALLY THE SORT OF THING THAT I  
6 WOULD LIKE TO CONSULT WITH MY CLIENT ON TO MAKE SURE THAT  
7 THEY WERE ON BOARD WITH IT.

8 I WILL TELL YOU, YOUR HONOR, THAT MY REACTION IS  
9 THAT IF DISCOVERY AND AN EARLY SUMMARY JUDGMENT PERIOD  
10 WERE LIMITED TO THE CLAIM OF COPYRIGHT VALIDITY OR  
11 INVALIDITY, THAT THAT'S SOMETHING THAT I THINK MAKES A  
12 TREMENDOUS AMOUNT OF PRACTICAL SENSE AND WOULD BE -- IT  
13 WOULD BE SOMETHING THAT I WOULD THINK WOULD FURTHER CASE  
14 MANAGEMENT, AND AT LEAST MY FIRST REACTION IS AGREEABLE TO  
15 IT.

16 THAT WOULD, I THINK, SAVE A LOT OF TIME AND A  
17 LOT OF MONEY FOR THE PARTIES AND FOCUS THEM, REALLY, IN ON  
18 WHAT IS THE CORE ISSUE IN THE CASE.

19 **THE COURT:** OKAY. MR. RIFKIN SEEMS TO BE  
20 DISAGREEING. SO WHY DON'T WE HEAR FROM HIM.

21 **MR. RIFKIN:** YOUR HONOR, AS YOU WERE ASKING  
22 MR. KLAUS THE QUESTIONS, IT OCCURRED TO ME THAT THE  
23 PERFECT SOLUTION TO THIS IS THAT THE COURT SHOULD HEAR THE  
24 TWO DECLARATORY JUDGMENT CLAIMS, AT LEAST THROUGH SUMMARY  
25 JUDGMENT, BECAUSE THE QUESTION THAT I RAISED ABOUT JURY OR

1 NO JURY CERTAINLY DOESN'T IMPLICATE ANYTHING UP TO THAT  
2 POINT.

3 **THE COURT:** CORRECT.

4 **MR. RIFKIN:** AND SO I WOULD HAVE NO RESERVATION  
5 IN SAYING THAT UP TO THE SUMMARY JUDGMENT DECISION, THEN,  
6 YES, IT IS A MORE EFFICIENT WAY TO PROCEED BECAUSE IT  
7 POTENTIALLY COULD RESOLVE THE CLAIM EITHER AS A MATTER OF  
8 LAW OR, AS YOUR HONOR SUGGESTED, AS A PRACTICAL MATTER.

9 THE ONLY THING I DISAGREED WITH WAS MR. KLAUS'  
10 LAST COMMENT, WHICH I WANT TO CAUTION THE COURT ABOUT.

11 HE SAID HE WAS COMFORTABLE RECOMMENDING TO THE  
12 CLIENT, I THINK, THAT THE CASE BE BIFURCATED ON THE ISSUE  
13 OF THE VALIDITY OR INVALIDITY OF THE COPYRIGHTS.

14 I WANT TO BE CLEAR THAT WHAT WE ARE AGREEING TO  
15 IS THE COURT'S INQUIRY ABOUT BIFURCATING THE CASE TO  
16 DECIDE THE TWO DECLARATORY JUDGMENT ACT CLAIMS, COUNT 1  
17 AND COUNT 2, FIRST.

18 THEY ARE NOT LIMITED TO THE VALIDITY OR  
19 INVALIDITY OF THE COPYRIGHTS BECAUSE, AS I SAID, WHAT WE  
20 REALLY COMPLAIN ABOUT IS THE SCOPE OF THOSE COPYRIGHTS,  
21 VALID, INVALID, OR OTHERWISE.

22 WE SAY THOSE COPYRIGHTS DO NOT PROTECT THE  
23 RIGHTS THEY CLAIM TO OWN IN THE SONG. IT IS NOT DEPENDENT  
24 ON THEIR VALIDITY OR INVALIDITY, BUT EQUALLY DEPENDENT ON  
25 THE SCOPE OF THE COPYRIGHT ITSELF. AND WE DISPUTE THE

1 DEFENDANTS' CHARACTERIZATION OF IT, BUT THAT'S A QUESTION  
2 FOR ANOTHER DAY.

3 **THE COURT:** DO YOU ASSERT THAT IN YOUR  
4 DECLARATORY RELIEF ACTIONS, THE TWO CLAIMS AS THEY ARE  
5 PRESENTLY CONSTITUTED, THAT THAT'S THE THEORY THAT'S BEEN  
6 FAIRLY RAISED?

7 **MR. RIFKIN:** WHICH?

8 **THE COURT:** THE LATTER ONE.

9 **MR. RIFKIN:** YES.

10 **THE COURT:** OKAY. POINT TO ME. TELL ME THE  
11 PARAGRAPHS THAT SAY THAT.

12 **MR. RIFKIN:** WELL, FOR EXAMPLE, PARAGRAPH 93  
13 THAT MR. KLAUS POINTED TO FIRST. WE SAY IN THE COMPLAINT,  
14 "FOR THE FIRST TIME THE LYRICS TO 'HAPPY BIRTHDAY TO YOU'  
15 INCLUDED A SECOND VERSE AS THE REVISED TEXT, WERE INCLUDED  
16 ON THE WORK REGISTERED WITH THE COPYRIGHT OFFICE AS  
17 E51988."

18 THAT SECOND VERSE IS THE LIMITATION. THAT'S THE  
19 REVISED TEXT, IS THE SECOND VERSE THAT WAS ADDED BY R.R.  
20 FORMAN, MRS. FORMAN, IN 1935.

21 WE HAVE REVIEWED NOT JUST THE COPYRIGHT  
22 APPLICATION, BUT ALSO THE COPYRIGHT RECORD AND WHAT'S  
23 CALLED THE "DEPOSIT COPY" FOR THAT COPYRIGHT. AND THERE  
24 IS A SECOND VERSE THAT HAS WORDS THAT YOUR HONOR HAS  
25 PROBABLY NEVER HEARD.

1 I'VE NEVER HEARD "MAY YOUR DAY BE BRIGHT, FILLED  
2 WITH SUNSHINE AND THE LIGHT," OR SOMETHING LIKE THAT. NO  
3 ONE SINGS, NO ONE WANTS TO PUBLICLY PERFORM. IT HAS NO  
4 COMMERCIAL VALUE. THAT IS THE LIMITATION TO THE CLAIM OF  
5 THE NEW MATTER IN 51988.

6 THE OTHER COPYRIGHT THEY CLAIM TO HAVE OWNERSHIP  
7 RIGHTS IN IS 51990. AND YOU WILL FIND OUT SOON ENOUGH  
8 THAT WHAT 51990 SAYS IS A MYSTERY TO THE ENTIRE WORLD.

9 NO ONE -- NO ONE KNOWS, BECAUSE NO ONE HAS A  
10 DEPOSIT COPY FOR THAT COPYRIGHT -- NOT THE COPYRIGHT  
11 OFFICE, AND WE BELIEVE NOT THE DEFENDANTS.

12 SO WE DON'T BELIEVE THAT THE DEFENDANTS WILL  
13 EVER BE ABLE TO PROVE THE SCOPE OF 51990. IT'S CLEAR TO  
14 US THAT THE SCOPE OF 51988 IS THE PIANO ARRANGEMENT AND  
15 THE NEW TEXT.

16 IT IS NOT CLEAR TO US AT ALL WHAT THE SCOPE IS  
17 FOR 51990 BECAUSE NO ONE KNOWS WHAT IT IS. THE WHOLE  
18 WORLD IS WAITING FOR THE DEPOSIT COPY FOR THIS COPYRIGHT.

19 **THE COURT:** SO AS TO THE ONE WHERE THERE IS A  
20 DEPOSIT COPY, YOU ARE SAYING THAT THE ONLY LYRICS ARE  
21 THOSE -- ONLY LYRICS, NOT THE ADDITIONAL LYRICS, BUT THE  
22 ONLY LYRICS IN THE DEPOSIT COPY ARE THOSE THAT YOU SAY  
23 HAVE NO COMMERCIAL VALUE, AND YOU ARE NOT INTERESTED IN  
24 THAT ANYWAY.

25 **MR. RIFKIN:** NO. THE ONLY CLAIM OF COPYRIGHT



1 WAS TO THE NEW TEXT. THE DEPOSIT COPY INCLUDES THE WORDS,  
2 BUT WHEN A WORK IS SORT OF A DERIVATIVE WORK, THE CLAIMANT  
3 HAS TO IDENTIFY THE SCOPE OF THE NEW CLAIM. AND THAT'S  
4 WHEN THEY SAID PIANO ARRANGEMENT AND REVISED TEXT. AND  
5 THE ONLY REVISED TEXT --

6 **THE COURT:** IT WAS CLAIMED AS A DERIVATIVE WORK?

7 **MR. RIFKIN:** IT WAS CLAIMED AS A DERIVATIVE  
8 WORK, YES.

9 **THE COURT:** OKAY. SO WHAT YOU ARE SAYING IS YOU  
10 ARE NOT REALLY SAYING THAT THE COPYRIGHTS ARE INVALID. SO  
11 TO THE EXTENT THAT SOMEBODY WANTS TO PERFORM THOSE LYRICS  
12 THAT YOU CHARACTERIZE AS COMMERCIALY WORTHLESS, OR WORDS  
13 TO THAT EFFECT, THAT'S FINE. THEY CAN MAKE THEM PAY TO  
14 SING THOSE WORDS THAT NOBODY CARES ABOUT IS WHAT YOU ARE  
15 SAYING?

16 **MR. RIFKIN:** WHAT I'M SAYING IS THOSE WORDS HAVE  
17 NOTHING TO DO WITH THIS CASE, THAT'S CORRECT.

18 **THE COURT:** AND YOU ARE NOT CHALLENGING THE  
19 COPYRIGHT TO THE EXTENT THAT IT, IN YOUR VIEW, COVERS  
20 THOSE WORDS.

21 **MR. RIFKIN:** OR THE PIANO ARRANGEMENT, FOR THAT  
22 MATTER.

23 **THE COURT:** OKAY. BUT IF THE DEFENDANTS DISPUTE  
24 THAT AND SAY NO, THAT THIS COPYRIGHT PROPERLY CONSTRUED  
25 INCLUDES NOT JUST THOSE WORDS OR THAT PIANO COMPOSITION,

1 BUT TO ALL OF THE OTHER, SHALL WE SAY, MORE VALUABLE AND  
2 POPULAR ASPECTS OF IT, IS THAT IN THE NATURE -- WHAT WOULD  
3 YOUR ARGUMENT BE THAT THEY DON'T HAVE THAT COPYRIGHT?

4 THAT COPYRIGHT, TO THAT EXTENT OF ASSERTION, IS  
5 BEYOND THE SCOPE OF THE COPYRIGHT THAT WAS OBTAINED; AND  
6 THEREFORE, IT IS NOT COPYRIGHTED.

7 **MR. RIFKIN:** WE WOULD HAVE TWO ARGUMENTS THERE.

8 FIRST, WE WOULD DISPUTE THAT THAT IS THE SCOPE  
9 OF THE COPYRIGHT. BUT ON THE ASSUMPTION THAT YOUR HONOR  
10 OR SOME FINDER OF FACT WERE TO CONCLUDE THAT THAT IS THE  
11 SCOPE OF THE COPYRIGHT, THAT THE COPYRIGHT 51988 INCLUDES  
12 NOT JUST THE ARRANGEMENT AND THE NEW TEXT -- WHICH IS THE  
13 CLAIM -- BUT ALSO THE PREEXISTING WORK, WHICH IT SAYS IT  
14 DOESN'T --

15 BUT NONETHELESS, THEN OUR VIEW WOULD BE, NUMBER  
16 ONE, YOU DO NOT HAVE THAT, THAT THAT WORK DOES NOT FALL  
17 WITHIN THE SCOPE OF 102 OR 103 BECAUSE IT IS NOT ORIGINAL  
18 WORK. IT WAS ALREADY IN EXISTENCE, NUMBER ONE; AND NUMBER  
19 TWO, IT WAS, IN FACT, ALREADY COPYRIGHTED.

20 **THE COURT:** ALL RIGHT. I'M SORT OF NOW TRYING  
21 TO UNDERSTAND, AND MAYBE I DO HAVE A BETTER UNDERSTANDING  
22 OF WHAT YOU ARE SAYING.

23 YOU ARE SAYING TO START OFF WITH THAT THE  
24 COPYRIGHT THAT THEY HAVE, IN YOUR VIEW, IS MORE LIMITED IN  
25 SCOPE AND DOES NOT -- CRITICALLY, DOES NOT COVER WHATEVER

1 IT IS THAT YOU WANT TO DO.

2 **MR. RIFKIN:** RIGHT.

3 **THE COURT:** BUT TO THE EXTENT THAT IT IS BROADER  
4 IN SCOPE THAN YOU ASSERT, THEN THAT BROADER SCOPE IS  
5 ITSELF INVALID.

6 **MR. RIFKIN:** CORRECT.

7 **THE COURT:** IS THAT A REASONABLE SUMMARY OF WHAT  
8 YOU ARE SAYING?

9 **MR. RIFKIN:** THAT IS CORRECT, YOUR HONOR.

10 **THE COURT:** ALL RIGHT. SO YOU ARE SAYING, TO  
11 THE EXTENT THAT EITHER IT'S CLEAR NOW OR COULD BE MADE  
12 CLEAR ON AMENDMENT, IF THAT IS YOUR ASSERTION AS TO YOUR  
13 DECLARATORY RELIEF CLAIMS, YOU ARE AGREEABLE TO PUTTING  
14 THAT UP TO AND INCLUDING BIFURCATION FOR PURPOSES OF  
15 SUMMARY JUDGMENT; AND THEN THEREAFTER, WE'LL SEE, IN TERMS  
16 OF WHETHER WE CAN THEN, AT THAT POINT, PERHAPS MAKE THE  
17 HARD DECISIONS OF WHETHER WE HAVE TO HAVE YOUR LEGAL  
18 CLAIMS TRIED FIRST AS OPPOSED TO THE EQUITABLE ONE, AND SO  
19 FORTH AND SO ON, ALONG WITH ALL THE OTHER ISSUES THAT I  
20 HAVE IDENTIFIED, INCLUDING WHETHER IT'S EVEN THAT  
21 IMPORTANT TO YOU TO HAVE THOSE OTHER CLAIMS.

22 **MR. RIFKIN:** CORRECT, YOUR HONOR.

23 AND DEPENDING UPON THE COURT'S RULING ON, FOR  
24 EXAMPLE, THE QUESTION OF ATTORNEYS' FEES, AND ALSO PERHAPS  
25 EVEN THE QUESTION OF THE STATUTE OF LIMITATIONS, IT MIGHT

1 OR MIGHT NOT MATTER TO US. IT MAY, BUT --

2 **THE COURT:** I UNDERSTAND.

3 **MR. RIFKIN:** -- IT MAY NOT.

4 AND AGAIN, I WOULD CAUTION YOU THAT WE DO HAVE  
5 THAT JURY TRIAL ISSUE.

6 BUT I JUST WANTED TO BE CLEAR THAT WHAT WE  
7 UNDERSTOOD AND WHAT WE BELIEVE IS THE RIGHT WAY TO PROCEED  
8 IS, IF THE COURT IS INCLINED TO BIFURCATE FOR  
9 EFFICIENCY -- AND THAT MAKES SOME SENSE -- THEN IT SHOULD  
10 BE COUNTS 1 AND 2, NOT JUST A DETERMINATION OF VALIDITY OR  
11 INVALIDITY OF TWO COPYRIGHTS.

12 **THE COURT:** MR. KLAUS, NOW THAT THERE IS, AT  
13 LEAST IN MY MIND, A CLEARER UNDERSTANDING OF THE THEORY OF  
14 THE PLAINTIFF IN TERMS OF THE REQUEST FOR DECLARATORY  
15 RELIEF, WHAT IS YOUR VIEW TO HAVING THOSE TWO CLAIMS,  
16 CAUSES OF ACTION CLAIM 1 AND 2, BIFURCATED, AT LEAST UNTIL  
17 AND THROUGH SUMMARY JUDGMENT?

18 **MR. KLAUS:** THANK YOU, YOUR HONOR.

19 SO THE FIRST THING IS, I WOULD SAY, IT'S REALLY  
20 COUNT 1 THAT --

21 **THE COURT:** THAT'S TRUE. COUNT 2 IS REMEDIES.

22 **MR. KLAUS:** COUNT 2 IS REMEDIES.

23 **THE COURT:** RIGHT.

24 **MR. KLAUS:** SO I THINK IT SHOULD BE LIMITED TO  
25 COUNT 1.

1 THE SECOND THING I WOULD SAY, YOUR HONOR -- AND  
2 THIS IS THE PROBLEM WITH HAVING THE COMPLAINT, IN EFFECT,  
3 AMENDED ON THE FLY AT THE HEARING, IS I'M LOOKING AT  
4 PARAGRAPH 97 OF THE COMPLAINT. MR. RIFKIN SAID THERE'S NO  
5 DEPOSIT COPY ANYWHERE IN THE COPYRIGHT OFFICE ON 51990.

6 PARAGRAPH 97 OF THE COMPLAINT, THEIR COMPLAINT,  
7 THEIR WELL RESEARCHED COMPLAINT, SAYS THAT THERE WAS A  
8 1935 APPLICATION.

9 SUMMY CLAIMED TO BE THE PROPRIETOR OF THE  
10 COPYRIGHT AS A WORK FOR HIRE BY OREM, AND CLAIMED THE  
11 COPYRIGHTED NEW MATTER AS ARRANGEMENT AS EASY PIANO SOLO,  
12 PIANO ARRANGEMENT, WITH TEXT.

13 THE SHEET MUSIC DEPOSITED WITH THE APPLICATION  
14 CREDITED OREM ONLY FOR THE ARRANGEMENT, NOT FOR ANY  
15 LYRICS, AND DID NOT CREDIT THE HILL SISTERS WITH WRITING  
16 THE LYRICS.

17 THE VERY NEXT SENTENCE IN THE COMPLAINT, FIRST  
18 SENTENCE TO PARAGRAPH 98, "THE LYRICS TO 'HAPPY BIRTHDAY  
19 TO YOU' WERE INCLUDED ON THE WORK REGISTERED WITH THE  
20 COPYRIGHT OFFICE AS REGISTRATION NUMBER E51990."

21 NOW, I SUPPOSE, TO ANSWER YOUR QUESTION  
22 DIRECTLY, YOUR HONOR, ABOUT WHETHER -- HOW WE FEEL ABOUT  
23 THE SCOPE, AS MR. RIFKIN HAS DEFINED IT, OR NOT, I SUPPOSE  
24 THAT'S FINE.

25 I WOULD LIKE TO KNOW HERE AND NOW IF MR. RIFKIN

1 IS WALKING AWAY FROM THE ALLEGATION IN THE COMPLAINT THAT  
2 THE HILL SISTERS -- THAT THE WORK WAS NOT ORIGINAL TO  
3 THEM, WHICH IS A CORE SECTION OF 102, COPYRIGHT ISSUE, AND  
4 WHICH REALLY GOES TO THE QUESTION OF THE VALIDITY OF THE  
5 COPYRIGHT, OR IF WHAT HE IS SAYING IS WE'RE NOT GOING TO  
6 ALLEGE THAT THE LYRICS "HAPPY BIRTHDAY TO YOU," WHICH NOW,  
7 YEARS LATER, HAVE BECOME QUITE POPULAR, WERE NOT  
8 SUFFICIENTLY ORIGINAL UNDER THE TEST THAT THE SUPREME  
9 COURT HAS LAID OUT IN FEIST TO QUALIFY AS ORIGINAL  
10 COPYRIGHT MATTER.

11 IF HE'S GOING TO SAY THAT'S NO LONGER PART OF  
12 OUR CASE AND WE'RE LIMITED TO THE SCOPE, IT WOULD BE  
13 HELPFUL TO KNOW THAT NOW BEFORE --

14 **THE COURT:** I DON'T THINK THAT HE'S SAYING THAT.  
15 WHAT HE'S SAYING IS HE'S SAYING IT IS NOT LIMITED -- IT IS  
16 BEYOND THE SCOPE. HE'S VIEWING YOUR COPYRIGHTS AS A MORE  
17 LIMITED SCOPE, ONLY COVERING THE NEW MATERIAL, NOT  
18 SOMETHING HE CARES ABOUT.

19 IF HE LOSES ON THAT, THEN HE WILL -- SO THAT, IF  
20 SOMEHOW, THERE'S A DETERMINATION, THEN NO, NO. THESE  
21 COPYRIGHTS DON'T JUST COVER THE NEW MATERIAL, IT COVERS  
22 EVERYTHING.

23 THEN HE'S GOING TO SAY THAT THOSE COPYRIGHTS ARE  
24 INVALID FOR THE REASONS THAT HE SET FORTH.

25 THAT'S THAT HE'S SAYING. I MEAN -- I DON'T

1 THINK I AGREE. WHEN I READ IT, IT WASN'T CLEAR TO ME THAT  
2 THAT'S THAT TWO-STEP PROCESS, AND MAYBE IT'S JUST A MATTER  
3 OF MAKING IT CLEAR ON AMENDMENT, BUT AT LEAST IT'S CLEAR  
4 IN MY HEAD NOW THAT THAT'S WHAT HE'S SAYING.

5 AM I CORRECT IN THAT, MR. RIFKIN?

6 **MR. RIFKIN:** YOU ARE CORRECT IN YOUR  
7 UNDERSTANDING OF OUR ALLEGATIONS. I ONLY DISAGREE IN THAT  
8 I THINK THE COMPLAINT SETS BOTH OUT.

9 **THE COURT:** OKAY.

10 **MR. RIFKIN:** I DON'T THINK AMENDMENT IS  
11 NECESSARY, BUT YOU CERTAINLY UNDERSTAND THE CLAIM.

12 **THE COURT:** ALL RIGHT. SO WITH THAT  
13 UNDERSTANDING, TELL ME WHAT YOUR POINT IS.

14 **MR. KLAUS:** IF IT'S THAT TWO-PART TEST, I DON'T  
15 DISAGREE THAT, IF IT'S THE SCOPE AS ARTICULATED AND  
16 VALIDITY OR NOT WITH RESPECT TO ORIGINALITY AND  
17 INFRINGEMENT, THAT HAVING DISCOVERY LIMITED AND SUMMARY  
18 JUDGMENT LIMITED TO THAT IN COUNT 1 OF THE COMPLAINT MAKES  
19 A TREMENDOUS AMOUNT OF PRACTICAL SENSE.

20 **THE COURT:** LIMITED TO (A) THE SCOPE, AND (B) IF  
21 NOT THE SCOPE, THEN THE VALIDITY.

22 **MR. KLAUS:** YES. CORRECT, YOUR HONOR.

23 **THE COURT:** ALL RIGHT. WHAT IS YOUR VIEW AS TO  
24 WHETHER IT IS SUFFICIENTLY CLEAR TO YOU THAT IT IS THIS  
25 TWO-STEP THEORY FROM THE COMPLAINT AS CURRENTLY PLED?

1           **MR. KLAUS:** THAT THE TWO-STEP THEORY WAS NOT  
2 CLEAR TO ME FROM THE COMPLAINT, YOUR HONOR. AND IT'S NOT  
3 CLEAR FROM THE PARAGRAPHS THAT I JUST READ, WHICH SAY THAT  
4 THERE IS A DEPOSIT COPY, WHICH SAY THAT THE LYRICS TO  
5 "HAPPY BIRTHDAY TO YOU" WERE INCLUDED ON THAT WORK THAT  
6 WAS REGISTERED WITH THE COPYRIGHT OFFICE.

7           **THE COURT:** THAT'S TWO DIFFERENT ISSUES.  
8 ONE IS ARE YOU CHALLENGING THEIR ASSERTION THAT,  
9 AS TO ONE COPYRIGHT, THERE IS NO DEPOSIT COPY?

10          **MR. KLAUS:** I FRANKLY DON'T -- I DON'T KNOW THE  
11 ANSWER TO THE QUESTION AS TO IS WHETHER OR NOT, WITH  
12 RESPECT TO 5 -- IT'S THE FIRST I'VE HEARD OF THE CLAIM  
13 THAT THERE IS NO DEPOSIT COPY FOR 51990.

14          **THE COURT:** HAVE YOU LOOKED INTO THIS, WHETHER  
15 OR NOT THERE IS A DEPOSIT COPY FOR THAT?

16          **MR. KLAUS:** YOUR HONOR, I HAVE NOT GONE TO THE  
17 COPYRIGHT OFFICE TO LOOK TO SEE WHETHER THERE IS.

18                 I HAVE LOOKED FOR THE REGISTRATION CERTIFICATES  
19 WHICH WE HAVE, BUT ON THE QUESTION OF THE DEPOSIT COPY, I  
20 JUST DON'T KNOW THE ANSWER TO THAT, YOUR HONOR.

21          **THE COURT:** WHICH IS A SEPARATE QUESTION, I  
22 THINK, FROM THIS TWO-STEP THEORY.

23                 BECAUSE EVEN WITH RESPECT TO THE ONE WHERE THERE  
24 IS INDISPUTABLY A DEPOSIT COPY, THAT IS STILL, MR. RIFKIN,  
25 YOUR TWO-STEP THEORY, ISN'T IT?



1           **MR. RIFKIN:** CORRECT.

2           **THE COURT:** OKAY. ALL RIGHT. SO I SEE A LITTLE  
3 BIT OF DIFFERENCE.

4           I MEAN, ONE IS JUST THE FACT THAT EITHER THE  
5 COPYRIGHT OFFICE HAS THE DEPOSIT COPY OR NOT. EITHER  
6 SOMEBODY, YOU KNOW -- AND WHAT THE CONSEQUENCES OF THAT,  
7 AS TO THAT COPYRIGHT, I GUESS WE'LL HAVE TO LET THAT PLAY  
8 OUT. BUT WE UNDERSTAND NOW THAT THAT'S WHAT THEIR THEORY  
9 IS AND --

10           I'LL TELL YOU THIS, NOW, THAT I CLEARLY HAVE IN  
11 MY MIND WHAT YOUR THEORY IS, MR. RIFKIN, I WILL REREAD  
12 YOUR COMPLAINT TO SEE, IN MY MIND, IF THAT IS CLEAR.

13           IF IT IS NOT CLEAR, I AM GOING TO REQUIRE YOU TO  
14 AMEND IT TO ABSOLUTELY SET IT FORTH CLEARLY THAT THAT IS  
15 WHAT THAT IS.

16           AND THEN I BELIEVE WHAT WE CAN DO, AT THE  
17 SCHEDULING CONFERENCE, IS TO HAVE A BIFURCATION OF ALL THE  
18 STATE LAW CLAIMS TO ONE SIDE, THE DECLARATORY RELIEF --  
19 ACTUALLY YOU ARE RIGHT.

20           CLAIM 1, BECAUSE THAT GOES TO THE HEART OF THIS.  
21 IT'S NOT SO MUCH AS TO THE REMEDIES.

22           DO ALL THE DISCOVERY ON THAT. IF THERE IS A  
23 SUMMARY JUDGMENT MOTION, FILE IT, AND WE'LL DECIDE IT.  
24 AND THEN, DEPENDING UPON WHAT HAPPENS THERE, WE'LL SEE  
25 WHAT HAPPENS.

1           WITH THE REST OF IT, YOU CAN COME IN, WE'LL CHAT  
2 MORE ABOUT IT.  MAYBE AT THAT TIME YOU'LL SAY OKAY, THE  
3 CASE IS NOT GOING AWAY; SO LET'S TEE-UP CERTAIN THINGS  
4 THAT WE WOULD HAVE TO TEE-UP, LIKE DO WE HAVE TO HAVE A  
5 JURY TRIAL IN ADVANCE OF THE DISPOSITION OF THIS?  IS  
6 THERE SOME NON-APPLICABILITY OF THOSE OLD CASES TO OUR  
7 SITUATION?

8           THAT MAY BE ONE.  WE MAY HAVE TO TEE-UP SOME  
9 OTHER THINGS, LIKE IS THERE GOING TO BE ATTORNEYS' FEES  
10 THAT'S APPLICABLE.

11           ANOTHER ONE MAY BE IF IT WERE DECIDED AGAINST  
12 THE PLAINTIFF ON THE DECLARATORY RELIEF, DOES THAT PREVENT  
13 THE PLAINTIFFS WHO ARE BARRED FROM THE DECLARATORY RELIEF  
14 ACTION FROM RESURRECTING IT UNDER A FOUR-YEAR STATE  
15 STATUTE OF LIMITATIONS, A NECESSARY ELEMENT OF WHICH IS  
16 THE ISSUE JUST DECIDED IN THE DECLARATORY RELIEF, AND THEN  
17 WE CAN GO FORWARD AND SEE WHETHER THERE'S ANY NECESSITY TO  
18 HAVE STATE LAW CLAIMS?

19           IF SO, THEN AT THAT TIME WE CAN REACH THE ISSUES  
20 OF PREEMPTION, SUFFICIENCY OF PLEADING, WHATEVER.

21           I'M HOPING THAT -- UNFORTUNATELY, I DIDN'T THINK  
22 OF ALL OF THIS BEFORE I WORKED UP THE PREEMPTION.  I  
23 REALLY WOULD RATHER, IN SOME WAYS, GET THIS DONE, BUT I  
24 DON'T THINK IT MAKES A WHOLE LOT OF SENSE FOR US TO DO  
25 THAT AT THIS POINT.

1 SO ANYTHING FURTHER AS FAR AS YOU ARE  
2 CONCERNED?

3 **MR. KLAUS:** NO, NO. THANK YOU, YOUR HONOR.

4 **THE COURT:** OKAY. ANYTHING FURTHER, MR. RIFKIN?

5 **MR. RIFKIN:** YOUR HONOR, JUST A COUPLE OF  
6 PROCEDURAL QUESTIONS.

7 WE'RE OBVIOUSLY -- IF THE COURT WANTS US TO  
8 CLARIFY ANYTHING IN THE COMPLAINT, WE'RE PREPARED TO DO  
9 THAT.

10 WE REALLY THINK IT'S SPELLED OUT HERE, BUT IF  
11 THE COURT THINKS IT WOULD BE HELPFUL TO HAVE THIS SPELLED  
12 OUT MORE CLEARLY, WE'RE HAPPY TO DO THAT.

13 JUST TWO PROCEDURAL ISSUES. NUMBER ONE, WE  
14 HAVE --

15 **THE COURT:** YOU KNOW WHAT, BEFORE YOU DO THAT,  
16 WHY DON'T YOU TELL ME NOW PRECISELY WHAT PARAGRAPHS I  
17 SHOULD CONCENTRATE ON RATHER THAN REREADING THE WHOLE  
18 THING LOOKING FOR IT.

19 WHY DON'T YOU TELL ME WHERE I REALLY OUGHT TO  
20 CONCENTRATE ON, WHAT PARAGRAPH TO WHAT PARAGRAPH THAT YOU  
21 BELIEVE FAIRLY SETS FORTH THIS SO-CALLED TWO-STEP THEORY.

22 AND THEN I'LL REREAD IT AGAIN AND SAY OKAY, NOW  
23 IN LIGHT OF HE TOLD ME, OKAY, I THINK THAT'S CLEAR HERE OR  
24 SUFFICIENTLY CLEAR. THEN WE'LL JUST MOVE AHEAD.

25 IF IT IS NOT, THEN I'LL SAY OKAY, YOU'RE GOING

1 TO HAVE TO AMEND THIS TO TELL IT TO ME IN SO MANY WORDS,  
2 AND THEN WE'LL MOVE AHEAD.

3 **MR. RIFKIN:** RIGHT. WELL, YOUR HONOR, I ALREADY  
4 DIRECTED THE COURT TO PARAGRAPH 93, WHICH WE THINK MAKES  
5 THAT PRETTY CLEAR.

6 MR. KLAUS DIRECTED THE COURT'S ATTENTION TO  
7 PARAGRAPH 97, WHICH I ALSO THINK EXPLAINS THAT THERE WAS A  
8 LIMITATION ON THE CLAIM OF THE COPYRIGHT.

9 PARAGRAPH 98 SAYS THE SAME THING. IT SAYS THE  
10 LYRICS TO "HAPPY BIRTHDAY TO YOU" --

11 **THE COURT:** DON'T READ IT TO ME.

12 JUST TELL ME THE NUMBERS, AND THEN I'M GOING TO  
13 READ IT TO MYSELF IN THE QUIET OF MY CHAMBERS.

14 **MR. RIFKIN:** I THINK THE EASIEST THING TO DO IS  
15 TO DIRECT YOUR HONOR TO THE SECTION THAT BEGINS ON  
16 PAGE 13, PARAGRAPH 75, UNDER THE HEADING "APPLICATIONS FOR  
17 COPYRIGHT FOR NEW MUSICAL ARRANGEMENT."

18 **THE COURT:** OKAY, 75 THROUGH --

19 **MR. RIFKIN:** AND THAT SECTION GOES THROUGH  
20 PARAGRAPH 110 ON PAGE 18. AND THAT TRACES THE HISTORY OF  
21 THOSE COPYRIGHT APPLICATIONS IN 1935. AND I THINK --

22 **THE COURT:** WELL, THAT TRACES IT, BUT WHERE WILL  
23 I FIND YOUR ASSERTIONS AS TO HOW IT IS THAT WILL ANIMATE  
24 YOUR DECLARATORY RELIEF?

25 **MR. RIFKIN:** WELL YOUR HONOR, IT'S THROUGHOUT.

1           FOR EXAMPLE, PARAGRAPH 7 OF THE COMPLAINT SAYS,  
2 "IRREFUTABLE DOCUMENTARY EVIDENCE, SOME DATING BACK TO  
3 1893, SHOW THAT THE COPYRIGHT TO 'HAPPY BIRTHDAY TO YOU,'  
4 IF THERE EVER WAS A VALID COPYRIGHT TO ANY PART OF THAT  
5 SONG" --

6           **THE COURT:** LET ME DO THIS.

7           RATHER THAN HAVE YOU DO IT ON THE FLY, IN TWO  
8 DAYS SEND A SUBMISSION TO ME.

9           FILE IT, BASICALLY SAY AS A FOLLOW-UP, WE  
10 SUGGEST THAT THE COURT PARTICULARLY REVIEW THESE  
11 PARAGRAPHS IN WHICH WE BELIEVE, WHEN READ IN CONTEXT,  
12 SUFFICIENTLY SETS FORTH THE GIST OF OUR TWO-STEP THEORY.

13           AND THEN I WILL LOOK AT THAT. I WILL LOOK AT  
14 IT. AND THEN I'LL SAY, IF I'M NOT CLEAR ON IT, I'LL START  
15 LOOKING AT OTHER PLACES TO -- FOR CONTEXT. WHO KNOWS. I  
16 MAY END UP REREADING THE WHOLE THING ANYWAY. BUT AT LEAST  
17 IT WILL GIVE ME A GOOD START. OKAY.

18           **MR. RIFKIN:** OF COURSE.

19           AND THEN, YOUR HONOR, JUST TO MAKE SURE THAT WE  
20 ALL KNOW, THERE ARE A COUPLE OF PROCEDURAL ISSUES.  
21 NUMBER ONE, WE NEED TO HAVE A PRETRIAL CONFERENCE IF WE'RE  
22 GOING TO PROCEED WITH DISCOVERY.

23           **THE COURT:** I UNDERSTAND THAT.

24           **MR. RIFKIN:** AND THEN NUMBER TWO, WE ARE  
25 PRESENTLY RELIEVED FROM THE OBLIGATION OF FILING THE CLASS

1 CERTIFICATION MOTION. I PRESUME THAT --

2 **THE COURT:** WE WILL DISCUSS IT AT THE TIME OF  
3 THE SCHEDULING CONFERENCE, BUT WE'RE NOT GOING TO HAVE A  
4 SCHEDULING CONFERENCE UNTIL I DETERMINE WHETHER OR NOT YOU  
5 NEED TO FILE A AMENDMENT.

6 IF YOU DETERMINE YOU DON'T NEED TO FILE AN  
7 AMENDMENT, THEN I WILL ISSUE AN ORDER BIFURCATING THAT  
8 CLAIM, CLAIM 1, AND DIRECTING COUNSEL TO ANSWER IT. AND  
9 THEN WE'LL HAVE A SCHEDULING CONFERENCE.

10 **MR. RIFKIN:** VERY WELL, YOUR HONOR.

11 **THE COURT:** WE'LL DO ALL THE REST OF IT. OKAY.

12 **MR. RIFKIN:** THANK YOU.

13 **THE COURT:** ALL RIGHT. MR. KLAUS, ANYTHING  
14 FURTHER?

15 **MR. KLAUS:** I THINK THAT WAS JUST ANSWERED IN  
16 THE EXCHANGE WITH MR. RIFKIN THAT, IF WE ARE PROCEEDING IN  
17 THE BIFURCATED WAY, THEN WE WOULD MAKE ARRANGEMENTS FOR  
18 CLASS CERTIFICATION DISCOVERY AND PROCEDURES TO BE A PART  
19 OF A LATER PROCEEDING, BECAUSE THIS IS A PURPORTED  
20 CLASS-ACTION COMPLAINT.

21 **THE COURT:** WELL, THERE'S NO REASON WHY WE CAN'T  
22 HAVE A CLASS CERTIFICATION AT THIS POINT LIMITED TO THE  
23 CLAIM 1.

24 **MR. KLAUS:** WHICH THAT WOULD -- THE CLAIM 1  
25 WOULD BE THERE, BUT I'M TALKING ABOUT THE ISSUES OF CLASS

1 CERTIFICATION THAT --

2           **THE COURT:** OH, IF WE NEED TO GO TO ALL OF THOSE  
3 OTHER CLAIMS, IF WE GO TO THOSE OTHER CLAIMS, WE CLEARLY  
4 WILL REVISIT WHETHER OR NOT THE CLASS WOULD BE CERTIFIABLE  
5 AND/OR WHAT THE PARAMETERS WOULD BE FOR THAT. WE DON'T  
6 NEED TO GET TO THAT YET.

7           I THINK WE ARE JUST TALKING ABOUT, CLEARLY,  
8 CLAIM 1.

9           **MR. KLAUS:** WOULD WE ALSO, AT THE SCHEDULING  
10 CASE, THE CASE MANAGEMENT CONFERENCE THAT YOUR HONOR HAS  
11 DESCRIBED, WE WOULD BE DISCUSSING THE PARAMETERS OF WHAT  
12 CLASS CERTIFICATION IS TO NUMBER AS TO THE FIRST CLAIM  
13 WOULD BE?

14           **THE COURT:** YES. YES. OKAY.

15           **MR. KLAUS:** YES.

16           **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH,  
17 COUNSEL.

18           **MR. RIFKIN:** THANK YOU, YOUR HONOR.

19           **THE CLERK:** THIS COURT NOW STANDS IN RECESS.

20                           *(RECESS AT 10:51 A.M.)*

21   --000--

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## CERTIFICATE

I HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 11TH DAY OF OCTOBER, 2013.

/S/ MARY RIORDAN RICKEY  
MARY RIORDAN RICKEY  
OFFICIAL COURT REPORTER