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

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

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

**DEFENDANTS' NOTICE OF
 MOTION AND 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);
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

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

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 16, 2015, at 9:30 a.m., or as
3 soon thereafter as counsel may be heard before the Honorable George H. King,
4 Chief Judge, in Courtroom 650 of the Edward R. Roybal Federal Building, located
5 at 255 E. Temple Street, Los Angeles, California 90012, Defendants
6 Warner/Chappell Music, Inc. and Summy-Birchard, Inc. (collectively,
7 “Warner/Chappell”) will and hereby do move the Court, pursuant to Rules 59(e) of
8 the Federal Rules of Civil Procedure and Civil Local Rule 7-18, for reconsideration
9 of the Court’s September 22, 2015 Memorandum and Order Re Cross-Motions for
10 Summary Judgment (Dkt. No. 244) (the “Order”), or, alternatively, to certify the
11 Order for interlocutory appeal under 28 U.S.C. § 1292(b).

12 This Motion is made on the grounds that:

13 1. The Order clearly erred in refusing to extend any prima facie
14 presumption of validity to copyright registration E51990;

15 2. The Order failed to consider the complete language of the October 16,
16 1944 Hill-Summy agreements, which transferred to Clayton F. Summy Co.
17 (“Summy”) all of the interest of Patty and Jessica Hill in the *Happy Birthday* works
18 published by Summy, including “‘Happy Birthday to You’, Piano Solo with
19 Words,” and including any of Patty and Jessica’s common law copyrights in such
20 works (which, if the Court adheres to its conclusion that federal copyright
21 registration E51990 did not include the *Happy Birthday* lyrics, would include Patty
22 and Jessica’s retained common law copyright in the lyrics); and

23 3. The Order satisfies the standards for certification in 28 U.S.C.
24 § 1292(b).

25 This Motion is made following the conference of counsel pursuant to Civil
26 L.R. 7-3 that took place on October 8, 2015. This Motion is based upon this Notice
27 of Motion and Motion, the accompanying Memorandum of Points and Authorities,
28 all the pleadings and documents on file herein, such other oral and documentary

1 evidence as may be presented at or before the time of the hearing on this Motion,
2 and all facts of which the Court may take judicial notice.

3 DATED: October 15, 2015 MUNGER, TOLLES & OLSON LLP

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By: /s/ Kelly M. Klaus
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Attorneys for Defendants Warner/Chappell
Music, Inc. and Summy-Birchard, Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction and Summary of Argument**

3 Warner/Chappell respectfully requests that the Court either reconsider the
4 September 22, 2015 Memorandum and Order Re Cross-Motions for Summary
5 Judgment (Dkt. No. 244) (the “Order”) or certify the Order for interlocutory appeal.
6 Warner/Chappell makes this Motion with due recognition and appreciation for the
7 substantial time and effort the Court invested in resolving the summary judgment
8 motions. Warner/Chappell nevertheless believes that the Order satisfies the
9 standards for reconsideration or certification.

10 There are two grounds for reconsideration:

11 **1. The Order clearly erred in refusing to extend any prima facie**
12 **presumption of validity to the E51990 registration.** Courts uniformly apply the
13 presumption of validity where errors in registration are non-fraudulent and
14 immaterial. That rule applies where the registration omits or misstates an author,
15 because that is an immaterial error. *See Torres-Negron v. J & N Records, LLC*, 504
16 F.3d 151, 158 (1st Cir. 2007) (“Mistakes such as ... failure to list all co-authors
17 easily qualify as immaterial because the Copyright Office’s decision to issue a
18 certificate would not be affected by them”); *In re Napster, Inc. Copyright Litig.*, 191
19 F. Supp. 2d 1087, 1100 (N.D. Cal. 2002); *Nat’l Broad. Co. v. Sonneborn*, 630 F.
20 Supp. 524, 531 (D. Conn. 1985). That rule applies here. Registration E51990
21 identified as author Preston Ware Orem (author of the arrangement) but omitted the
22 name of Patty Hill, who (the fact-finder could conclude, Order at 18-19) authored
23 the “text” that the application claimed and that (the fact-finder could conclude, as
24 shown) constituted the “familiar” lyrics of *Happy Birthday*. The registration claims
25 copyright over *both* the “arrangement” and the “text,” (J.A. 48). Hence, the most
26 that can be said is that the registration omits the name of all co-authors.

27 The Order effectively creates a rule that the omission of the name of
28 additional co-authors deprived registration E51990 of any prima facie evidentiary

1 presumption that Summy was authorized to publish and register the *Happy Birthday*
 2 lyrics. That was clear error under the applicable authorities. The omission of
 3 Patty’s name was immaterial: there is no basis in law, logic or evidence to believe
 4 the Copyright Office would have done anything different with the registration had
 5 her name been included. There is no evidence or even any contention by Plaintiffs
 6 that the omission was an attempt to defraud the Copyright Office. Even if Plaintiffs
 7 presented evidence that Summy was not authorized to publish and register the lyrics,
 8 the evidentiary effect of the prima facie showing would not disappear. The dispute,
 9 at most, would create a triable issue of fact.

10 **2. The Order “fail[ed] to consider” the complete language of the**
 11 **October 16, 1944 Hill-Summy agreements, which transferred to Summy Patty**
 12 **and Jessica Hill’s common law copyrights in addition to their rights to**
 13 **federally registered copyrights.** Civ. L.R. 7-18(c). Patty and Jessica Hill, the Hill
 14 Foundation and Summy settled *The Hill Foundation v. Summy* litigation by signing
 15 three agreements simultaneously on October 16, 1944.¹ The Court concluded that
 16 one of these agreements—which the Order called the “Third Agreement”—showed
 17 only Patty and Jessica’s intent to transfer their interest in eleven federally registered
 18 copyrights. Order at 36.

19 Warner/Chappell submits that language in the Third Agreement which the
 20 Order did not quote or discuss shows (or at a minimum creates a triable fact issue)
 21 that Patty and Jessica Hill did not simply intend to transfer to Summy all of their
 22 “right, title and interest ... in and to” whatever was included in Summy’s 1935
 23

24 ¹ All three of these agreements (collectively, the “1944 Assignment”) are in the
 25 summary judgment record. *See* J.A. 126 (Settlement Agreement among Patty and
 26 Jessica Hill, Hill Foundation, Inc. and Clayton F. Summy Co., Oct. 16, 1944)
 27 (“Third Agreement”); J.A. 113 (Patty and Jessica Hill Assignment to Hill
 28 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”).

1 *copyright registrations of Happy Birthday to You!* Rather, Patty and Jessica also
2 intended to—and by their language did—transfer all of their “right, title and interest
3 ... in and to” a list of specifically enumerated “books *and musical compositions*”
4 published by Summy, including “‘Happy Birthday to You’, Piano Solo with
5 Words.” The Hill Foundation’s Assignment to Summy underscores this fact. That
6 agreement explicitly stated that the Hill Foundation was transferring not only rights
7 to copyrights, but “all of its property, right, title and interest in and to said books,
8 *musical compositions* and arrangements”—including “‘Happy Birthday to You’,
9 Piano Solo with Words”—and “*including both the words and music thereof.*” J.A.
10 115 at 1665-66 (emphasis added). And the evidence shows—or at a minimum
11 creates a triable fact issue—that the “Words” in “‘Happy Birthday to You’, Piano
12 Solo with Words” were the “familiar” lyrics of *Happy Birthday*.²

13 If the Court does not reconsider the Order, Warner/Chappell respectfully
14 requests that the Court certify it for interlocutory appeal under 28 U.S.C. § 1292(b).
15 The Order involves disputed questions of law—including the effect of non-
16 fraudulent, non-prejudicial errors in copyright applications and third-party standing
17 to challenge copyright registrations—that are controlling; that present substantial
18 grounds for difference of opinion; and the resolution of which on appeal would
19 materially advance the ultimate termination of this litigation.

20 **II. The Court Should Reconsider The Order**

21 **A. Standard Of Review**

22 The Court has discretion to reconsider and vacate its summary judgment
23 ruling pursuant to its inherent authority and also under Federal Rule of Civil
24 Procedure 59(e). *See Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 887

25 _____
26 ² Warner/Chappell notes for the record that it disagrees with other parts of the Order
27 that are not discussed in this Motion. Warner/Chappell confines its reconsideration
28 request to the parts of the Order discussed in this Motion and reserves its other
arguments for appeal if necessary.

1 (9th Cir. 2001) (“[A] district court’s authority to rescind an interlocutory order over
2 which it has jurisdiction is an inherent power rooted firmly in the common law and
3 is not abridged by the Federal Rules of Civil Procedure.”). Central District Civil
4 Local Rule 7-18 states that the Court may reconsider its prior Orders on several
5 grounds, including where the moving party makes “a manifest showing of a failure
6 to consider material facts presented to the Court before such decision.” Civil L.R.
7 7-18(c). *See, e.g., Pegasus Satellite Television, Inc. v. DirecTV, Inc.*, 318 F. Supp.
8 2d 968, 978-79 (C.D. Cal. 2004) (granting motion for reconsideration based on
9 court’s failure to fully address material facts presented).

10 Although not expressly stated in Civil Local Rule 7-18, Ninth Circuit
11 precedent makes it clear that reconsideration also “is appropriate if the district court
12 ... committed clear error or the initial decision was manifestly unjust.” *Sch. Dist.*
13 *No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993);
14 *Thomas v. Hous. Auth. of Cnty. of Los Angeles*, No. CV 04-6970 MMM(RCX),
15 2005 WL 6136322, at *8 (C.D. Cal. Sept. 19, 2005) (same); *see also City of Colton*
16 *v. Am. Promotional Events, Inc.*, No. CV 09-6630-PSG (SSX), 2010 WL 4569038,
17 at *5 (C.D. Cal. Nov. 2, 2010) (“no party’s interests are served by a lengthy appeal
18 on a discrete issue, only to later be told what the Court already knows”).

19 **B. First Ground For Reconsideration: The Court Clearly Erred In**
20 **Failing To Hold That Registration E51990 Establishes Prima Facie**
21 **Evidence That Summy Was Authorized To Publish And Register**
22 **The *Happy Birthday* Lyrics**

23 The Order held that registration E51990 does not provide Warner/Chappell
24 with any evidentiary support for Summy’s authorization to publish and register the
25 *Happy Birthday* lyrics for copyright protection. In particular, the Order concluded
26 that “[b]ecause this registration does not list any Hill sister as the author or
27 otherwise make clear that the *Happy Birthday* lyrics were being registered, we
28 cannot presume this registration reflects the Copyright Office’s determination that
Summy Co. had the rights to the lyrics to copyright them.” Order at 15. The Order

1 thus gave no weight whatsoever to the registration as evidencing Summy’s authority
2 to publish and register the lyrics in 1935, and (for reasons set forth in the Court’s
3 analysis of the transfer issue) held there was no other evidence showing that Summy
4 had the right to do the same.

5 The Court clearly erred by giving registration E51990 no evidentiary weight
6 and failing to recognize that the registration explicitly claimed copyright in the
7 “text” deposited with the registration.

8 *First*, as to the issue of evidentiary weight, the ruling that the presumption of
9 validity does not apply where a registration lists some but not all of the authors is
10 contrary to precedent applying the presumption where omissions of authorship are
11 immaterial and non-fraudulent. Because the registration was entitled to at least
12 prima facie weight, the Court at a minimum should have denied Plaintiffs’ summary
13 judgment motion.

14 A copyright registration constitutes prima facie evidence that the copyright is
15 valid. This entails a presumption of originality, compliance with statutory
16 formalities, copyrightability, and of a valid chain of title from author to proprietor.
17 *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d
18 1446, 1451 (9th Cir. 1991). As long as a misstatement in registration is neither
19 fraudulent nor material, it will not displace the statutory presumption. *Eckes v. Card*
20 *Prices Update*, 736 F.2d 859, 861 (2d Cir. 1984) (applying presumption of validity
21 notwithstanding omissions in the copyright applications); *Dynamic Solutions, Inc. v.*
22 *Planning & Control, Inc.*, 646 F. Supp. 1329, 1341 (S.D.N.Y. 1986) (“Innocent
23 errors do not abrogate the presumption of validity afforded registered works by
24 section 410(c) of the Act.”).

25 An omission or misidentification as to authorship is a quintessential example
26 of an error that is immaterial and that will not jeopardize a registration’s validity.
27 “[A]n error is immaterial if its discovery is not likely to have led the Copyright
28 Office to refuse the application,” *Data Gen. Corp. v. Grumman Sys. Support Corp.*,

1 36 F.3d 1147, 1161 (1st Cir. 1994), and “neither the statute nor the rules of the
2 Copyright Office require that the author be named” in the first instance. *Baron v.*
3 *Leo Feist, Inc.*, 173 F.2d 288, 289-90 (2d Cir. 1949). Hence, the law is clear that
4 “[m]istakes such as ... *failure to list all co-authors* easily qualify as immaterial
5 because the Copyright Office’s decision to issue a certificate would not be affected
6 by them.” *Torres-Negron*, 504 F.3d at 158 (emphasis added).³

7 Because errors or omissions relating to authorship are not material, courts
8 routinely apply the statutory *presumption* of validity even where the copyright
9 application or registration omitted or misstated an author. In *In re Napster, Inc.*
10 *Copyright Litigation*, for example, the court emphasized that “[u]nless Napster can
11 show that plaintiffs defrauded the Copyright Office in a manner that prejudiced
12 Napster, the alleged inconsistencies in plaintiffs’ certificates”—there, incorrectly
13 identifying the record companies and not the artists as the authors of the works—
14 would not displace the presumption of ownership. 191 F. Supp. 2d at 1099-1100.
15 See also *Nat’l Broad. Co.*, 630 F. Supp. at 531-37 (applying presumption of validity
16 notwithstanding alleged errors in registration certificate, including claim that NBC
17 authored the entire work).

18 *Second*, Warner/Chappell submits that it was clear error for the Court to
19 conclude that, even if the *Happy Birthday* lyrics “were printed in the deposit copy
20 for E51990, it is unclear whether those lyrics were being registered, and unclear
21 whether the Copyright Office determined the validity of Summy Co.’s alleged
22 interest in the lyrics in 1935.” Order at 13-14 (footnote omitted). Registration
23 E51990 unambiguously claims protection in the lyrics that were deposited with the
24 registration. J.A. 48, 101 (deposit record). The registration states that copyright

25 ³ *Accord One Treasure Ltd., Inc. v. Richardson*, 202 F. App’x 658, 660 (5th Cir.
26 2006) (noting that “Courts have repeatedly excused a wide range of errors”
27 including “misstatement of work’s author”); *Testa v. Janssen*, 492 F. Supp. 198, 201
28 (W.D. Pa. 1980) (“[P]laintiffs’ misrepresentations here, with respect to authorship,
are immaterial inasmuch as no prejudice has accrued to defendants, and the
transgression in no way affects the validity of plaintiffs’ copyright.”).

1 was claimed in an arrangement “with text.” J.A. 48. Although the deposit copy for
2 E51990 is not available, the admissible evidence in the record proves—or at a
3 minimum creates a triable fact issue—that the only copyrightable lyrics deposited
4 with E51990 were the “familiar” lyrics of *Happy Birthday*.

5 Specifically: The Copyright Office’s deposit records state that on December
6 9, 1935, Summy deposited two copies of a musical composition entitled “*Happy*
7 *Birthday to You!*,” by Mildred J. Hill, that is described as a “Piano Solo with
8 words.” J.A. 101. On December 6, 1935, Summy deposited in the British Museum
9 a musical composition with the same exact title, author and description as a “Piano
10 Solo with words.” Defs.’ Mot. to Supplement the Record, Exs. A & B; Order at 7
11 (granting Warner/Chappell’s request to supplement the record with the British
12 Museum deposit copy and receipt). The only copyrightable “text” in the deposited
13 copy is the “familiar” lyrics of *Happy Birthday*. The only other “text” on that copy
14 is the title, the name “Mildred J. Hill,” the musical directions (“Vocal or
15 Instrumental” and “Brightly”) and the copyright notice—none of which the
16 Copyright Office will register. *See* 37 C.F.R. § 202.1(a) (“[w]ords and short phrases
17 such as names, titles, and slogans” “not subject to copyright and applications for
18 registration of such works cannot be entertained”). There is no evidence that
19 Summy deposited any other lyrics with the E51990 application—or, for that matter,
20 that it ever printed a composition entitled *Happy Birthday to You!* described as a
21 “Piano Solo with words” that contained different lyrics. At the very least, there is a
22 triable issue of fact as to what lyrics were claimed by registration E51990.

23 The fact that Preston Ware Orem is the only author listed on the registration
24 proves only that the registration listed some but not all authors. Orem authored the
25 arrangement, but he did not author the “text” over which the registration confers
26 copyright. As the authorities discussed above show, the omission of Patty Hill’s
27 name is immaterial and does not displace the prima facie presumption of validity
28 and authorization. The Copyright Office would not refuse to register the work

1 because the registration omitted Patty Hill’s name. Contrary to the Court’s
2 conclusion, the omission of her name would have no bearing on the Office’s
3 determination of “the validity of Summy Co.’s alleged interest in the lyrics in
4 1935.” Order at 13. Were the rule as the Court concluded, then in every case where
5 a registration omitted or incorrectly identified an author (or authors), the registration
6 would raise the questions the Court described. But the authority discussed above
7 shows that is not the rule.

8 For these reasons, the E51990 registration at a minimum should have
9 constituted prima facie evidence, *inter alia*, that Summy was authorized to copyright
10 the *Happy Birthday* lyrics. Plaintiffs’ other evidence at most would create a triable
11 issue of fact regarding whether Summy was authorized to publish and register the
12 lyrics. That evidence would not eliminate the presumption and entitle Plaintiffs to
13 summary judgment. The Court should reconsider the Order on this ground.

14 **C. Second Ground For Reconsideration: The Order Did Not**
15 **Consider Material Facts That Show (Or At A Minimum Create A**
16 **Triable Issue Of Fact) That Patty and Jessica Hill Transferred The**
17 ***Happy Birthday* Lyrics To Summy At Least As Of 1944 As Part Of**
18 **The 1944 Assignment**

19 For the reasons set forth above, Warner/Chappell submits that registration
20 E51990 at a minimum creates a triable issue of fact that Summy was authorized to
21 copyright the *Happy Birthday* lyrics in 1935. Even if the Court disagrees, however,
22 the Court should reconsider the Order in light of the complete language of the 1944
23 Assignment.

24 At pages 35 (line 23) to 37, the Order considered Warner/Chappell’s
25 argument that, even if the Patty and Jessica did not authorize Summy to publish and
26 register the *Happy Birthday* lyrics in 1935 (the “Second Agreement,” in the Court’s
27 words) and thus retained the common law copyright to the lyrics, Patty and Jessica
28 nevertheless transferred their retained common law interest as part of the 1944

1 Assignment arising from the settlement of *The Hill Foundation v. Summy*. The
2 Order analyzed some of the language in the Third Agreement (J.A. 126):

3 The Third Agreement was entered into in 1944 to resolve the Hill-
4 Summy lawsuit. (*See* J.A. 126 at ¶ g.) Under the agreement, the Hill
5 Foundation and the Hill sisters transferred all their “right, title and
6 interest ... in” *eleven different registered copyrighted works, including*
7 *all the copyrights* to the various published versions of *Song Stories* and
8 the copyrights to E51990 and four other piano-based versions of *Happy*
9 *Birthday* (presumably, the “various piano arrangements” of the Second
10 Agreement). (*Id.* at ¶¶ a, 2.) Nowhere in the agreement is there any
discussion of the *Happy Birthday* lyrics; nor is there any suggestion
that the Hill sisters transferred their common law rights in the *Happy*
Birthday lyrics to Summy Co.

11 Order at 36:2-10 (emphasis added).

12 Based on the conclusion that Patty and Jessica Hill transferred only their
13 rights in “eleven different registered copyrighted works,” the Order called
14 Warner/Chappell’s reliance on the Third Agreement “circular.” The Order said that
15 the Third Agreement could have transferred Patty and Jessica’s rights to the lyrics
16 “only if the lyrics were *within the scope of one of the eleven copyrighted works* that
17 were the subject of the agreement.” *Id.* at 36:14-16 (emphasis added). The Court
18 then said that the lyrics “could have been *within the scope of those registered*
19 *copyrights* only if, at some point in the past, the Hill sisters had given Summy Co.
20 authorization to publish and register the lyrics”—evidence of which the Court found
21 lacking. *Id.* at 36:16-19 (emphasis added). As these passages make clear, the Order
22 critically relied on the conclusion that Patty and Jessica Hill only intended to
23 transfer to Summy what was within the scope of the prior copyright registrations—
24 and no other rights related to the works that were the subject of the Third
25 Agreement. The Order thus held—as a matter of undisputed fact—that if (as the
26 Order elsewhere holds as an undisputed fact) Patty and Jessica did not authorize
27 Summy to publish and register the *Happy Birthday* lyrics in 1935, then the Third
28

1 Agreement excluded the transfer of any common law copyright Patty and Jessica
2 retained to those lyrics.⁴

3 Warner/Chappell respectfully submits that the Court failed to consider
4 materials facts presented to it regarding the 1944 Assignment. The facts not
5 considered show that the Court’s reading of the 1944 Assignment was incorrect. If
6 Patty and Jessica retained the common law copyright to the *Happy Birthday* lyrics
7 prior to October 16, 1944—and, based on other rulings in the Order, Patty and
8 Jessica’s retention of the common law copyright in the lyrics must be assumed at a
9 minimum as a triable issue of fact—the language of the agreements making up the
10 1944 Assignment nevertheless shows the parties’ unambiguous intent to transfer the
11 common law copyright as part of the settlement of *The Hill Foundation v. Summy*.
12 Under binding Ninth Circuit authority, the 1944 Assignment gave Summy (and its
13 successors in interest) a valid copyright to the lyrics.

14 **1. The Express Language Of The 1944 Assignment Shows An**
15 **Unambiguous Intent To Transfer The *Happy Birthday* Lyrics**
16 **From Patty and Jessica Hill To Summy**

17 The parties executed three agreements on October 16, 1944, referred to herein
18 as the 1944 Assignment, all of which were in the summary judgment record. *See*
19 n.1, *supra*. The Order focuses on the Third Agreement (J.A. 126), and we start
20 there. The Third Agreement begins with a series of recitals, the first of which is that
21 “Summy is the publisher of the following copyrighted books *and musical*
22 *compositions.*” (J.A. 126 at 1939 ¶ (a) (emphasis added).) The Third Agreement
23 then lists eleven different works, the tenth of which is:

24 (10) “Happy Birthday to You”, Piano Solo *with Words*,
25 (original United States copyright registration, December 6, 1935, entry
#51990)

26 ⁴ Warner/Chappell’s first ground for reconsideration (Section B, *supra*)
27 demonstrates that the Court clearly erred in holding that it was an undisputed fact
28 that Patty and Jessica did not authorize Summy to publish and register the lyrics.

1 (*Id.* at 1940 ¶ (a)(10) (emphasis added).)

2 The covenants in the Third Agreement start at page 1942 of J.A. 126. The
3 transfer provision is in covenant number two. Contrary to the Court’s description,
4 the agreement to transfer is not limited just to the copyright registrations. That
5 covenant states:

6 2. Hill will simultaneously with the execution of this
7 Agreement execute an instrument of assignment in the form annexed
8 hereto and marked “A,” assigning all its right, title and interest in and
9 to the aforementioned copyrights and renewals and extensions of them,
10 *and in and to the aforementioned books and musical compositions and*
11 *arrangements thereof ...*

12 (*Id.* at 1942-43 (emphasis added).)

13 The unambiguous language of covenant number two thus makes it clear that
14 Patty and Jessica intended to transfer to Summy more than just their right, title and
15 interest in and to the registered copyrights. If that is all they intended to transfer, the
16 covenant would end with “assigning all its right, title and interest in and to the
17 aforementioned copyrights and renewals and extensions of them.” But the covenant
18 does not end there. It goes on to state that the transfer includes “all right, title and
19 interest in and to ... *the aforementioned books and musical compositions,*” number
20 10 of which is “‘Happy Birthday to You’, Piano Solo with Words.” (*Id.* (emphasis
21 added).) Item number 10 does refer to the E51990 registration. As discussed
22 below, that reference is important for determining what “Words” were encompassed
23 within the specific musical work that item number 10 references. For purposes of
24 covenant number two, however, the critical point is that the transfer agreement
25 includes not only Patty and Jessica’s rights in the copyright registration, but any
26 rights they had in the specific underlying musical work—rights that would include a
27 common law copyright in the lyrics.

28 The Hill Foundation’s Assignment to Summy—referenced as annexed exhibit
“A” in covenant number two of the Third Agreement—follows through on the

1 commitment in covenant number two. In that document—executed by Patty Hill as
2 President of the Hill Foundation—the Hill Foundation transfers to Summy “[a]ll of
3 its property, right, title and interest in and to the present copyrights and present
4 renewals and extensions of copyrights” and, separately, “all of its property, right,
5 title and interest in and to said books, *musical compositions* and arrangements,
6 *including both the words and music thereof.*” (J.A. 115 at 1664-66 (emphasis
7 added).)

8 The last component of the 1944 Assignment is the Hills’ Assignment to Hill
9 Foundation. (J.A. 113.) That agreement states that Patty and Jessica Hill
10 transferred to the Hill Foundation “all our right, title and interest, joint and several,
11 in and to the following copyrights.” (*Id.* at 1652.) The agreement sets forth, in
12 seven numbered paragraphs, references to specific works, along with original
13 registration numbers in parentheses. (*Id.*) Item number 6 on this list is identical to
14 item number 10 in the Third Agreement at recital paragraph (a). Warner/Chappell
15 expects Plaintiffs to argue that this part of the Hills’ Assignment to Hill Foundation
16 shows that Patty and Jessica intended to transfer only their interest in federally
17 registered copyrights, and not any retained common law rights. That interpretation
18 is not tenable—and it cannot be taken to establish Plaintiffs’ reading as a matter of
19 undisputed fact.

20 Again, Warner/Chappell believes the evidence shows that both Patty and
21 Jessica Hill and Summy understood the 1935 registration to cover the *Happy*
22 *Birthday* lyrics, and that through the 1944 Assignment, Patty and Jessica transferred
23 to Summy any and all rights in and to those registrations. But, even if the facts were
24 as the court construed them—a construction with which Warner/Chappell
25 respectfully disagrees—the 1944 Assignment nonetheless demonstrates that Patty
26 and Jessica were transferring anything that they retained. It is clear from the
27 language and structure of the Third Agreement that the parties thereto—Patty and
28 Jessica Hill, the Hill Foundation, and Summy—intended to transfer to Summy “all

1 of the right, title and interest” that Patty and Jessica had in specific musical works.
2 Patty and Jessica covenanted in the Third Agreement that they had “assigned to [the
3 Hill Foundation] all of the right, title and interest of the Misses Hill *in and to the*
4 *said copyrighted books and musical compositions*, and any and all assignments and
5 agreements with respect thereto.” (J.A. 126 at 1942 ¶ 1 (emphasis added).) And, as
6 described above, the second covenant in the Third Agreement provided that the Hill
7 Foundation would assign to Summy all of its rights “*in and to the aforementioned*
8 *books and musical compositions and arrangements thereof.*” (*Id.* ¶ 2 (emphasis
9 added).)

10 Given this background, it would be error to read the Hills’ Assignment to the
11 Hill Foundation (signed by Patty Hill) to place the Hill Foundation in breach of its
12 covenant to Summy by promising (in the two other agreements simultaneously
13 executed by Patty Hill) to convey rights that the Hill Foundation was not capable of
14 conveying. The reading that Plaintiffs favor—that Patty and Jessica’s assignment to
15 Summy ultimately was limited to rights in registered copyrights—would render
16 illusory the language from both the Third Agreement and the Hill Foundation’s
17 Assignment to Summy that goes well beyond registered copyrights. As noted, those
18 other two agreements—executed the same day as part of the 1944 Assignment—
19 assign to Summy not only rights in copyrights and renewals, but rights in actual
20 published “books, *musical compositions* and arrangements, *including both the words*
21 *and music thereof.*” (J.A. 115 at 1665-66 (emphasis added).)

22 For all the foregoing reasons, Patty and Jessica Hill and the Hill Foundation
23 plainly intended for the 1944 Assignment to transfer to Summy all of their
24 interest—including a retained common law copyright interest—in the musical work
25 identified as “‘Happy Birthday to You’, Piano Solo with Words.” J.A. 126 at 1940
26 ¶ (a)(10). That raises the question: what were those “Words”? The Court found it
27 unnecessary to resolve what lyrics were deposited with E51990. Order at 13 & n.5.
28 For the reasons shown in Section B above, Warner/Chappell respectfully submits

1 those words can only be the *Happy Birthday* lyrics. J.A. 101, 106; Defs.’ Mot. to
2 Supplement the Record, Exs. A & B. At a minimum, the evidence would create a
3 triable issue of fact about whether those lyrics are the “Words” the parties referred
4 to in the 1944 Assignment.

5 Finally, because the evidence shows that Patty and Jessica transferred to
6 Summy their rights to the lyrics at least as of 1944, the Court also should reconsider
7 its ruling that Plaintiffs have standing to challenge the 1944 Assignment. *See* Order
8 at 38-41. In particular, the Court declined to apply the rule of *Eden Toys, Inc. v.*
9 *Florelee Undergarment Co., Inc.*, 697 F.2d 27 (2d Cir. 1982), and *Magnuson v.*
10 *Video Yesteryear*, 85 F.3d 1424 (9th Cir. 1996)—that third-party strangers to a
11 copyright transfer agreement may not challenge the transfer absent a dispute
12 between the actual parties—on the ground that “Defendants have no evidence that a
13 transfer occurred.” Order at 40:24-25. As shown above, Warner/Chappell does
14 have evidence of a transfer. Hence, the *Magnuson-Eden Toys* principle should
15 apply to bar Plaintiffs’ challenges to the transfer.

16 **2. If The 1944 Assignment Transferred The *Happy Birthday***
17 **Lyrics To Summy, Then It Is Immaterial Whether Patty and**
18 **Jessica Hill Authorized Summy To Register And Publish The**
19 **Lyrics In 1935**

20 The Order did not address the implications of a finding that Patty and Jessica
21 transferred their common law copyright in the *Happy Birthday* lyrics to Summy
22 through the 1944 Assignment. Under controlling Ninth Circuit precedent, such a
23 finding would mean that registration E51990 protects the *Happy Birthday* lyrics
24 even if Summy did not have authorization from Patty and Jessica to publish and
25 register those lyrics in 1935.

26 In *Harris v. Emus Records Corp.*, 734 F.2d 1329 (1984), Hannah Brown
27 Music (Emmylou Harris’s “dba” for her music business) registered a copyright for
28 the song “Gliding Bird” in its name in 1969. *Id.* at 1331. The certificate of
registration listed Emmylou Harris as the author. *Id.* at 1335. That was a mistake.

1 Harris did not author the song. The actual author was Tommy Slocum, and as of the
2 date of the registration, he had not assigned his rights to Hannah Brown Music. *Id.*
3 at 1331, 1335. Later in 1969, Hannah Brown Music assigned its registered
4 copyright for Gliding Bird to Nanshel Music; at the same time, Slocum assigned his
5 rights in Gliding Bird to Nanshel Music. *Id.* at 1331-32. Several years later,
6 Nanshel assigned the copyright to Gliding Bird to Hannah Brown Music. *Id.*
7 Hannah Brown Music then sued Emus Records and others for infringing Gliding
8 Bird.

9 The defendants argued that Gliding Bird “ha[d] entered the public domain
10 because of inaccuracies in the copyright registration.” *Id.* at 1335. The Ninth
11 Circuit rejected this argument. It explained that “[w]hile the 1909 Copyright Act
12 makes no provision for correcting mistakes in copyright registrations, plaintiffs did
13 in fact effectuate the necessary correction through transfers of interest.
14 Furthermore, defendants have made no showing that they have been prejudiced in
15 any way by the incorrect original registration.” *Id.* Importantly, the Ninth Circuit
16 did not question the validity of the Gliding Bird registration even though the author
17 of the song did not authorize its publication or registration until after the fact. *See*
18 *id.* at 1331-32 (quoting letter from Slocum to Nanshel Music regarding the post-hoc
19 transfer of rights).

20 Here, as in *Harris*, even if the 1935 registration of E51990 was technically
21 inaccurate—and even if Summy did not yet have authority to publish (and register
22 in its own name) the *Happy Birthday* lyrics—the 1944 Assignment transferred to
23 Summy the common law copyright that (under the Order) Patty and Jessica retained
24 in and to the work covered by registration E51990. As in *Harris*, Plaintiffs cannot
25 and so do not allege (much less attempt to prove) that Summy tried to defraud the
26 Copyright Office or that Plaintiffs “have been prejudiced in any way by the
27 incorrect original registration.” *Id.* at 1335.

28

1 In an analogous context, courts have held “that where an unauthorized person
2 takes out a copyright and claims to be the owner thereof that he acts as trustee for
3 the true owner, and any copyright that he obtains is considered in equity as being
4 held in trust by him for the owner.” *Machaty v. Astra Pictures, Inc.*, No. CIV. 48-
5 394, 1951 WL 4631, at *1 (S.D.N.Y. May 2, 1951) *aff’d on other grounds*, 197 F.2d
6 138 (2d Cir. 1952). Similarly, courts have held that where a party registers a
7 derivative work without authorization from the owner of the underlying work, the
8 requisite authorization can be obtained retroactively—and also can entitle the owner
9 of the derivative work “to protection beyond its own original contribution.” *JBJ*
10 *Fabrics, Inc. v. Brylane*, 714 F. Supp. 107, 110 (S.D.N.Y.1989); *see also Eden Toys*,
11 697 F.2d 27, at 34 n. 6; *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 21 &
12 n.5 (2d Cir. 1976). These cases further show that, in light of the 1944 Assignment,
13 registration E51990 protects the *Happy Birthday* lyrics regardless of whether Patty
14 and Jessica Hill authorized Summy to publish and copyright the lyrics in 1935.

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

17 If the Court does not reconsider the Order, then the Court should certify it (or
18 any amended Order) for interlocutory appeal under 28 U.S.C. § 1292(b). Under that
19 section, certification of an order is warranted where (1) the decision involves a
20 controlling question of law, (2) on which there is substantial ground for a difference
21 of opinion and (3) immediate appeal from the order may materially advance the
22 ultimate termination of the litigation. The Order satisfies each of these three
23 requirements.

24 The Order presents at least the following controlling questions of law, as to
25 which there is substantial ground for difference of opinion:

- 26 (1) Whether registration E51990 constitutes prima facie evidence that
27 Summy was authorized to copyright the *Happy Birthday* lyrics even though the
28 registration omitted the name of the author of the lyrics.

1 (2) Whether Plaintiffs have standing to challenge Patty and Jessica’s
2 transfer of the *Happy Birthday* lyrics to Summy even though there is no evidence of
3 a dispute between them (or any of their successors) and Summy (or any of its
4 successors) regarding the transfer of those lyrics.

5 *First*, because each of these questions could “materially affect the outcome of
6 litigation in the district court,” they are “controlling” under § 1292(b). *In re Cement*
7 *Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). The Ninth Circuit has made
8 clear that the term “controlling question of law,” as used in Section 1292(b), should
9 not be construed “so narrowly as to require that reversal of the district court’s order
10 terminate the litigation.” *Id.* Here, there can be no dispute that reversal as to either
11 of the issues above would “materially affect the outcome of the litigation.” Reversal
12 would enable the parties to proceed to trial on the scope and validity of
13 Warner/Chappell’s copyright, which, in turn, might obviate the need for litigation on
14 class certification issues and the merits of Plaintiffs’ state law claims.

15 *Second*, even if the Court does not agree with Warner/Chappell’s arguments
16 on these legal questions, the cases that support those arguments show that the
17 questions are ones ““over which reasonable judges might differ””—and that satisfies
18 § 1292(b)’s requirement for “substantial ground for difference of opinion.” *Reese v.*
19 *BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). The questions
20 clearly are ones as to which “fair-minded jurists might reach contradictory
21 conclusions.” *Id.*

22 *Third*, certification of an appeal will “materially advance the ultimate
23 termination of the litigation.” 28 U.S.C. § 1292(b). In evaluating this factor, courts
24 consider the “substantiality of the burdens imposed on the parties by a wrong
25 ruling.” 16 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*,
26 § 3930, at 415-16 (2d ed. 2009); *see also United States Rubber Co. v. Wright*, 359
27 F.2d 784, 785 (9th Cir.1966) (interlocutory appeal appropriate where it “might avoid
28 protracted and expensive litigation”). Here, the expense and burden of litigating and

1 resolving the class certification issues, the merits of Plaintiffs’ state law claims, and
2 proceedings relating to remedies will be substantial. The Court should seek
3 guidance from the Ninth Circuit now so as to avoid a potentially “needless
4 expenditure of judicial resources.” *Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081,
5 1099 (C.D. Cal. 2005).

6 **IV. Conclusion**

7 Warner/Chappell respectfully requests that the Court reconsider the Order.
8 Alternatively, the Court should certify the Order for interlocutory appeal.

9 DATED: October 15, 2015 MUNGER, TOLLES & OLSON LLP

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