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10 INTERNATIONAL AND THE HILL FOUNDATION, INC.

11  
12 **UNITED STATES DISTRICT COURT**  
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
14

15 RUPA MARYA, et al.,  
16 Plaintiffs,

17 v.

18 WARNER / CHAPPELL MUSIC,  
INC., et al.,  
19 Defendants.  
20

Case No. 13-CV-04460 GHK (MRWx)  
Assigned to Hon. George H. King

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
UNOPPOSED MOTION TO  
INTERVENE**

**Date: December 7, 2015**  
**Time: 9:30 a.m.**  
**Courtroom: 650**

**[Fed. R. Civ. P. 24]**

**[Filed concurrently with Applicants'  
Notice of Unopposed Motion and  
Motion; [Proposed] Order; Notice of  
Interested Parties]**

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1 **MEMORANDUM AND POINTS OF AUTHORITY**

2 **I. INTRODUCTION AND BACKGROUND**

3 An alleged class of plaintiffs sued Warner/Chappell Music, Inc. and Summy-  
4 Birchard, Inc. (collectively “Defendants”) to declare invalid Defendants’ purported  
5 copyrights in the lyrics to the well-known song “Happy Birthday to You” (the  
6 “Song”). Dkt. 95. Plaintiffs assert that the Song is part of the public domain and  
7 seek the return of millions of dollars in alleged unlawful licensing fees pursuant to  
8 the Defendants’ wrongful assertion of copyright ownership in the Song. *Id.*

9 On September 22, 2015, this Court issued an Order finding Defendants, as  
10 successors in interest to the Clayton F. Summy Company (“Summy Co.”), do not  
11 own any valid copyrights to the Song as the Summy Co. never acquired any such  
12 rights. Dkt. 244. Until this ruling, The Hill Foundation, Inc. (“Hill Foundation”) and  
13 the Association for Childhood Education International (“ACEI”) (collectively  
14 “Applicants”) believed the rights to the Song had been properly assigned to Summy  
15 Co. by the Song’s original author, Patty Hill, and her sister, Jessica Hill. Indeed, the  
16 Applicants have been accepting royalties from the Defendants for over twenty (20)  
17 years as the beneficiaries of Patty and Jessica Hill’s estates pursuant to what they  
18 believed was a valid assignment from the Hill Sisters to the Summy Co. As a result  
19 of the Court’s ruling, it is now likely that Applicants are the valid owners of the  
20 copyrights to the Song, and none of the current parties are able to adequately  
21 represent Applicants’ interests. For these reasons, Applicants respectfully request  
22 that this Motion to Intervene be granted, allowing them to protect their interests in  
23 the copyrights to the “Happy Birthday to You” lyrics.

24 **A. THE ASSOCIATION FOR CHILDHOOD EDUCATION**  
25 **INTERNATIONAL.**

26 The Association for Childhood Education International, founded in 1892, in  
27 which Patty Hill was both a founding member and an active participant throughout  
28

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1 her life, is a Section 501(c)(3) charitable organization dedicated to promoting  
2 childhood education and development throughout the world. ACEI's tagline is  
3 "bright futures for every child, every nation," which highlights ACEI's commitment  
4 to support and advocate for access to education, equity in education settings, and  
5 quality educational content. As ACEI's mission to promote child well-being  
6 continues to strengthen and evolve with the changing environment, the organization  
7 commits to bridging the gap between global initiatives and local needs. Over the  
8 years, ACEI members have acted as social change agents, involving themselves in  
9 various critical societal issues to ensure that children around the world are protected,  
10 supported and educated in ways that allow them to reach their full potential.

11       Among the ways that ACEI supports its mission is through its Country  
12 Liaison Program which is a network of volunteer liaisons from various nations, the  
13 purpose of which is to gather information about childhood education practices and  
14 policies throughout the world, share this information with members, provide  
15 information to support the development of association programs, and promote  
16 international and intercultural understanding. ACEI also puts on a number of  
17 programs and events to further its missions, including its annual Global Summit on  
18 Childhood which provides a platform for interdisciplinary dialogue among the  
19 global education community. ACEI further provides students and members with  
20 grants and awards, including the Patty Smith Hill award, which awards extensive  
21 professional achievement in the field of education and for demonstrated exceptional  
22 leadership.

23       ACEI holds Consultative Status at the United Nations and membership in the  
24 NGO Committee on UNICEF. ACEI UN representatives attend annual UN  
25 Department of Public Information (DPI) conferences, participate in Working Groups  
26 affiliated with the NGO Committed on UNICEF, and attend annual conferences  
27 sponsored by the Committed on Teach About the United Nations (CTAUN). ACEI  
28 representatives attend events, briefings and the meetings of councils and special

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1 committees at the United Nations in New York and Geneva.

2 **B. THE HILL FOUNDATION, INC.**

3 The Hill Foundation was founded by Jessica and Patty Hill in 1942, with each  
4 holding fifty percent of the shares. The Foundation was created for the sole purpose  
5 of receiving royalties from Summy Co. under a certain agreement executed in 1944.  
6 Under that agreement, Summy Co. was to pay to the Hill Foundation one-third of all  
7 income derived from the Song in return for what the Applicants believed was an  
8 assignment of the copyrights to a number of different works, including the Song.  
9 From the date of its inception, the Hill Foundation has been the recipient of the  
10 royalty stream from “Happy Birthday to You.” By virtue of Jessica Hill’s will,  
11 ACEI is now the sole shareholder of the Hill Foundation.

12 **C. THE ESTATE OF JESSICA HILL IS BEQUEATHED TO ACEI.**

13 Upon information and belief, Patty Hill wrote the lyrics to “Happy Birthday  
14 to You” in 1893. When she died in 1946 she bequeathed her entire estate to her  
15 sister, Jessica Hill. In this regard, Patty’s Will states:

16 I give, devise and bequeath all the rest, residue and remainder of my  
17 estate, whether real, personal or mixed and wheresoever the same may  
18 be situate, to my sister, JESSICA MATEER HILL, if she shall survive  
me, to be her sole property absolutely and forever.

19 Ex. 1 at ¶ 3.

20 When Jessica died in 1951, her Will directed income from certain assets,  
21 which included the royalty stream paid by third parties for public performance use  
22 of the Song, be paid to her nephew, Archibald Hill, during his lifetime. The terms of  
23 Jessica Hill’s Will further make clear that upon Archibald Hill’s death, the residue  
24 of the estate would go to Archibald Hill’s children, biological or adopted. In the  
25 event that Archibald Hill did not have any children, the estate would be distributed  
26 to ACEI.

27 I give, devise and bequeath all the rest, residue and remainder of my  
28 estate of whatsoever kind and nature and wheresoever the same may be  
situate and over which I at the time of my death may have any power of

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1 disposition, to...PROFESSOR ARCHIBALD ANDERSON HILL, of  
2 Charlottesville, Virginia, during his life in semi-annual instalments or  
3 oftener...and upon the death of my said nephew...the corpus or fund  
4 remaining on hand together with any accrued income shall be paid over  
5 to the children of my nephew him surviving, in equal parts, share and  
6 share alike; and in default of such children him surviving, the corpus or  
7 fund remaining on hand together with any accrued income shall be paid  
8 over to the ASSOCIATION FOR CHILDHOOD EDUCATION, a  
9 corporation organized and existing under the laws of the District of  
10 Columbia, to be used by said corporation for its lawful and corporate  
11 purposes and to be designated as the “PATTY SMITH HILL FUND.”  
12 The term “children of my nephew” shall be construed to refer to an  
13 include any legally adopted child or children.

14 Ex. 2 at ¶ 14 (Emphasis added). Archibald Hill died in 1992 with no children.

15 Since Archibald Hill’s death, ACEI has been receiving one-third of the  
16 royalties from Defendants for “Happy Birthday to You” through the Hill  
17 Foundation. These royalty payments represent a substantial portion of the  
18 Organization’s yearly budget.

19 **D. ACEI AND THE HILL FOUNDATION ARE THE OWNERS OF**  
20 **THE COPYRIGHTS TO THE HAPPY BIRTHDAY LYRICS.**

21 ACEI is the beneficiary of Jessica Hill’s estate. On September 22, 2015, this  
22 Court issued an Order finding that Defendants, as successors in interest to the  
23 Summy Co., do not own any valid copyrights to the Song as Summy Co. was never  
24 assigned such rights. Dkt. 244. In particular, the Court found that certain agreements  
25 between the Hill sisters and the Summy Co. in 1934, 1935 and 1944 failed to  
26 transfer the lyrical rights to “Happy Birthday to You.” Id. Additionally, the Court  
27 found no evidence to suggest that the Hill sisters had ever transferred their common  
28 law rights in the Song to Summy Co. Id.

As a result, as the author of the lyrics in the Song, it is very likely that Patty Hill still possessed all copyrights in those lyrics at the time of her death. Patty Hill bequeathed her entire estate to Jessica Hill, which would include those copyrights, as well as her fifty percent interest in the Hill Foundation. When Jessica Hill died, her entire estate ultimately went to ACEI, which included ownership in the Hill



1 Foundation, as well as those same copyrights. As the beneficiaries of Jessica Hill's  
2 estate, both ACEI and the Hill Foundation have a very real and present interest in  
3 this litigation.

4 **II. ARGUMENT**

5 **A. THE APPLICANTS MAY INTERVENE AS A MATTER OF**  
6 **RIGHT UNDER RULE 24(a).**

7 Rule 24 governs a non-party's ability to intervene in a pending action. Rule  
8 24(a) regulates intervention by right while Rule 24(b) sets forth the requirements for  
9 permissive intervention. Applicants seek to intervene as a matter of right under Rule  
10 24(a), or, in the alternative, under Rule 24(b).

11 Rule 24(a) provides, in pertinent part:

12 On timely motion, the court must permit anyone to intervene who...(2)  
13 claims an interest relating to the property or transaction that is in the  
14 subject of the action, and is so situated that disposing of the action may  
as a practical matter impair or impede the movant's ability to protect its  
interest, unless existing parties adequately represent that interest.

15 Rule 24(a) is to be construed liberally in favor of intervention. *Southwest*  
16 *Center for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (reversing  
17 denial of motion to intervene). On a motion to intervene by right, the Ninth Circuit  
18 requires the applicant to establish the following:

- 19
- 20 1. it has a significant protectable interest relating to the property or  
transaction that is the subject of the action;
  - 21 2. the disposition of the action may, as a practical matter, impair or impede  
the applicant's ability to protect its interest;
  - 22 3. the application is timely; and
  - 23 4. the existing parties may not adequately represent the applicant's interest.

24 *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)  
25 (reversing denial of applicant's motion to intervene). Here, there can be no doubt  
26 that ACEI and the Hill Foundation have a significant interest in the pending  
27 litigation which can no longer be adequately represented by any of the Parties.  
28 Accordingly, as Applicants' Motion is timely and the existing Parties to the case do

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1 not object, this Motion to Intervene should be granted.

2 **1. Applicants Have a Significant, Non-Speculative Protectable**  
3 **Interest in the Litigation.**

4 “Whether an applicant for intervention demonstrates sufficient interest in an  
5 action is a practical, threshold inquiry[.]” *Southwest Center*, 268 F.3d at 818. The  
6 Ninth Circuit’s standard for determining an intervener’s interest is whether such  
7 interest is protected under law and whether there is a relationship between the  
8 intervener’s legally protected interest and the claims at issue in the litigation in  
9 which intervention is sought. *Id.* “[T]he ‘interest’ test is primarily a practical guide  
10 to disposing of lawsuits by involving as many apparently concerned persons as is  
11 compatible with efficient and due process.” *County of Fresno v. Andrus*, 622 F.2d  
12 436, 438 (9th Cir. 1980).

13 The Applicants here have a distinct, protectable interest in this action in that  
14 the validity and enforceability of the Song’s copyrights, which they very likely own,  
15 are directly at issue. Thus, Applicants should be entitled to set forth their arguments  
16 and be heard by this Court as to the validity and enforceability of these rights. If  
17 Applicants are not permitted to intervene, additional litigation is likely. For these  
18 reasons, Applicants have a significant non speculative interest in the litigation, one  
19 that deserves protection.

20 **2. Absent Intervention, the Applicants’ Ability to Protect Its’**  
21 **Interests Would Be Substantially Impaired.**

22 In determining whether an interest would be impaired or impeded by  
23 disposition of an action, the Ninth Circuit has relied on the Advisory Committee  
24 notes to Rule 24, which states that “[i]f an absentee would be substantially affected  
25 in a practical sense by the determination made in an action, [it] should, as a general  
26 rule, be entitled to intervene.” *Southwest Center for Biological Diversity*, 268 F.3d  
27 at 822 (citing Fed. R. Civ. P. 24 Advisory Committee notes); *Cunningham v. David*  
28 *Special Commitment Ctr.*, 158 F.3d 1035, 1038 (9th Cir. 1998) (setting the standard

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1 for this determination as whether a potentially adverse impact on an intervener’s  
2 interest would result from the decision or whether the decision may as a “practical  
3 matter” impede the applicant’s ability to protect its interest).

4 Applicants’ ability to protect their interests in the Happy Birthday lyric  
5 copyrights would be substantially impaired if they are not permitted to intervene. On  
6 one hand, one of Plaintiffs’ primary contentions in this litigation is that the Song’s  
7 lyrics have ascended to the public domain or that the Hill sisters otherwise  
8 abandoned their rights to those lyrics. Such a result, if so adjudicated, would  
9 terminate Applicants’ rights. On the other hand, Defendants’ contentions that they  
10 own the copyrights fundamentally impacts the Applicants’ contention that they in  
11 fact own those same rights. While, until recently, the Applicants believed there was  
12 a valid assignment between Summy Co. and the Hill sisters, the Court’s summary  
13 judgment order raised the very real likelihood that the Applicants are, in fact, the  
14 owners of the copyrights. As a result, the only way the Applicants can thoroughly  
15 protect their interests is to participate in this action.

16 **3. The Applicants’ Motion to Intervene is Timely.**

17 Courts weigh three factors in determining whether a motion to intervene is  
18 timely: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2)  
19 the prejudice to other parties; and (3) the reason for and length of the delay.” See  
20 *Peruta v. County of San Diego*, 771 F.3d 570, 572 (9th Cir. 2014); *United States v.*  
21 *Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (stating that courts are to be lenient when  
22 determining whether a motion to intervene as a matter of right is timely). The  
23 timeliness of intervention is measured from the point at which the applicant knew or  
24 should have known that his interests may be adversely affected by the outcome of  
25 the litigation. *Id.*

26 The Applicants’ motion to intervene here is timely. *First*, this case has not  
27 gone to trial. See *Hartley Pen Co. v. Lindy Pen Co., Inc.*, 16 F.R.D. 141 (C.D. Ca.  
28 1954) (motion to intervene filed before trial was timely). Second, the existing parties

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1 will not be prejudiced by the Applicants intervention because ACEI and the Hill  
2 Foundation do not seek to extend discovery or prolong the trial. *See Schaulis v.*  
3 *CTB/McGraw-Hill, Inc.*, 496 F. Supp. 666 (N.D. Ca. 1980) (motion to intervene  
4 untimely where Court would have to reopen discovery and trial would be delayed).  
5 As a result of a subpoena issues much earlier in these proceedings to ACEI, the  
6 parties have had an opportunity to review all of the Applicants' documents related to  
7 the litigation. If the intervention is granted, there would be no surprise as to the  
8 documents relied on at trial by ACEI and the Hill Foundation. Thus, the parties will  
9 not be prejudiced by the intervention. Indeed, the Parties consent to this Motion  
10 makes clear that they do not believe they will be prejudiced by the Applicant's  
11 intervention in any way.

12 *Third*, there has not been a delay in seeking intervention. Both ACEI and the  
13 Hill Foundation genuinely believed Defendants represented their interest in this  
14 litigation up until the Court's entry of summary judgment finding that Defendants  
15 did not own valid copyrights to the Happy Birthday lyrics. Dkt. 244. Until this  
16 ruling, the Applicants' reasonably believed Defendants possessed valid copyrights  
17 to the Happy Birthday lyrics - an assumption the parties have operated under since  
18 the death of Archibald Hill. Following the ruling, the Applicants have been  
19 reviewing the decision and evaluating the merits of their claim. The Applicants  
20 have also been considering the significant financial burden hiring legal counsel  
21 would place on the organization. Considering these factors, the Applicants have not  
22 delayed in seeking intervention. This Motion to Intervene is, therefore, timely for  
23 purposes of Rule 24(a).

24 **4. The Applicants Are Not Adequately Represented by**  
25 **Plaintiffs or Defendants.**

26 Lastly, due to this Court's recent Order finding that Defendants do not  
27 possess valid copyrights to the Happy Birthday lyrics, the Applicants' interests are  
28 not adequately represented by the Defendants or the Plaintiffs. The Ninth Circuit

1 has held that the burden of showing inadequacy is minimal; the potential intervener  
2 must only show that “representation of its interests may be inadequate.” Southwest  
3 Center, 268 F.3d at 823; *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th  
4 Cir. 1983) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10  
5 (1972)) (emphasis added). The most important factor in determining the adequacy of  
6 representation “is how the interest compares with the interest of existing parties.”  
7 *Arakak v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

8 Here, the Applicants’ interests differ significantly from the interests of the  
9 Plaintiffs and Defendants. Again, Plaintiffs argue that “Happy Birthday to You” is  
10 part of the public domain. This is directly contrary to the Applicants’ position.  
11 Furthermore, by virtue of this Court’s Summary Judgment Order, the Applicants’  
12 interests are separate from those of Defendants. Although Defendants argue that the  
13 copyrights are valid, Applicants believe they are the rightful owner, while  
14 Defendants continue to contend that they are the proper copyright owners. Indeed,  
15 Defendants have sought reconsideration of the Summary Judgment Order by the  
16 Court. Dkt. 247. To ensure the record is clear for appeal, Defendants will make  
17 arguments at trial to protect their interests, not those of the Applicants, even if the  
18 motion for reconsideration is denied.

19 The Applicants believe they are the rightful owner of the copyright to the  
20 Song. Even though Defendants and Applicants will both contest Plaintiffs’  
21 arguments that the copyrights have been abandoned or that the lyrics are part of the  
22 public domain, both are ultimately motivated for different outcomes in the litigation.  
23 In this regard, the interests of the Applicants and Defendants are directly adverse.  
24 Accordingly, it cannot be said that Defendants will undoubtedly make all of ACEI’s  
25 arguments in favor of ensuring they are determined as the owners of copyright to the  
26 Happy Birthday lyrics.. Because the Applicants’ interests will not be represented by  
27 either the Plaintiffs or Defendants, intervention should be granted.

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1 As detailed above, the Applicants meet the enumerated requirements of Rule  
2 24(a) and the Ninth Circuit to intervene as a matter of right in this action, inasmuch  
3 as the Applicants have a significant, non-speculative, protectable interest in the  
4 copyright at issue, and given the Summary Judgment Order finding that Defendants  
5 have no valid copyright to the Happy Birthday lyrics, the Applicants must seek to  
6 protect themselves which they will be unable to do if this Motion to Intervene is  
7 denied. Accordingly, the Applicants respectfully request that this Court exercise its  
8 broad discretion and grant their Motion to Intervene under Rule 24(a) and enter an  
9 order forthwith.

10 **B. ALTERNATIVELY, APPLICANTS SHOULD BE PERMITTED**  
11 **TO INTERVENE UNDER RULE 24(b).**

12 The Applicants again assert that all of the requirements of intervention as a  
13 right are met under Rule 24(a), as set forth above. In the alternative, however, for  
14 the reasons set forth below, the Applicants respectfully request this Court to exercise  
15 its broad discretion and permit the Applicants to intervene in this action for the  
16 purpose of opposing entry of the proposed consent judgment under Rule 24(b).

17 Rule 24(b)(1)(B) provides, in pertinent part, “[o]n timely motion, the court  
18 may permit anyone to intervene who...has a claim or defense that shares with the  
19 main action a common question of law or fact.” According to the Ninth Circuit, a  
20 court may grant permissive intervention under Rule 24(b) where the applicant for  
21 intervention shows:

- 22 1. Independent grounds for jurisdiction;  
23 2. The motion is timely; and  
24 3. The applicant’s claim or defense, and the main action, have a  
question of law or a question of fact in common.

25 Southwest Center, 268 F.3d at 822.

26 The Applicants satisfy each of the requirements for permissive intervention  
27 pursuant to Rule 24(b).

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1                   **1. Independent Grounds for Jurisdiction Exist.**

2                   This Court may properly exercise jurisdiction over the Applicants’ defenses  
3 and claims. Jurisdiction exists under 28 U.S.C. § 1338 as the claims and defenses  
4 related to this matter primarily arise under the Copyright Act.

5                   **2. The Applicants’ Motion to Intervene is Timely.**

6                   The Applicants have timely filed this Motion to Intervene. “In determining  
7 timeliness under Rule 24(b)(2), we consider precisely the same three factors...[as  
8 are to be considered] under Rule 24(a)(2).” *League of United Latin American*  
9 *Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). As set forth above, the  
10 Applicants timely moved to intervene because settlement discussions and/or trial  
11 have not taken place, intervention will not prejudice the parties, and the Applicants did  
12 not delay in moving to intervene. This Motion to Intervene is, therefore, timely for  
13 purposes of Rule 24(b).

14                   **3. The Applicants’ Claims and Defenses Share Common**  
15                   **Questions of Law and Fact.**

16                   The facts and law in this litigation revolve around the ownership of the  
17 copyright to the Happy Birthday lyrics. The Applicants’ claims and defenses depend  
18 on many of the same laws and many of the same facts which Defendants and  
19 Plaintiffs rely. *See Bureerong v. Uvawas*, 167 F.R.D. 83, 85 (C.D. Cal. 1996)  
20 (noting that the existence of a common question is liberally construed).

21 **III. CONCLUSION**

22                   There is no dispute Applicants have a significant interest in the pending  
23 litigation, and absent intervention the Applicants’ ability to protect such interest  
24 would be significantly impaired. Applicants’ Motion is timely, and the existing  
25 parties to the case will not adequately represent Applicants’ interests. Accordingly,  
26 Applicants, The Hill Foundation, Inc. and the Association for Childhood Education  
27 International, respectfully request that this Court grant this Motion to Intervene.

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1 DATED: November 9, 2015

PAYNE & FEARS LLP

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4 By:                         /s/ Scott O. Luskin                          
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