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Court could put world's most popular song in the public domain

When Marilyn Monroe sang "Happy Birthday" to President John F. Kennedy on May 19, 1962, in Madison Square Garden, I wonder if the president was thinking about whether the song was protected by copyright.

The copyright status of the song, then and now, is a question of legitimate concern. It is not just an academic question — although it is that, as we shall see — because one of the world's largest music companies continues to collect royalties for public performances and reproductions of the song 120 years after its original melody was published.

In fact, it is thought that Warner/Chappell, the company claiming to own copyright in "Happy Birthday to You," collects \$2 million a year in royalties for the song. Warner/Chappell would have received at least some royalties, through the collective licensing agency ASCAP, for Ms. Monroe's sultry rendition of "Happy Birthday, Mr. President."

The copyright status of the birthday song has long been a problem for independent filmmakers in particular. A filmmaker who wants to include the song in a film is faced with the Hobson's choice of either paying a license fee for the music synchronization rights or cutting the song out of the film and possibly compromising the artistic integrity of the work. One such filmmaker, Jennifer Nelson, is producing a documentary movie about the beloved and oft-performed song.

Warner/Chappell spoiled her party by demanding a \$1,500 license fee for use of the song in the movie. Nelson's company, Good Morning to You Productions (GMTY), was faced with the possibility of paying statutory damages of up to \$150,000 plus Warner/Chappell's attorney fees if it flouted the demand. Dutifully, but reluctantly, GMTY paid the

fee.

But Nelson and GMTY decided the party was not over yet and devised a special goodie bag for Warner/Chappell. In June, GMTY filed a class-action lawsuit in federal court in New York City asking for a declaration that Warner/Chappell does not own a valid copyright of "Happy Birthday to You" and seeking restitution to GMTY and the other class members (i.e., others who have recently paid to use the song).

The table for this shindig was actually set a few years ago in a law review article by professor Robert Brauneis of George Washington University Law School, titled "Copyright and the World's Most Popular Song," 56 J. Copyright Soc'y 335 (2009). In an outstanding piece of historical, investigative and analytic scholarship, Brauneis digs into the origins of the song and its copyright history. He explains that the melody we know as "Happy Birthday to You" was written sometime before 1893 by two sisters, Mildred and Patty Hill, from Louisville, Ky.

Mildred, the elder sister, was an accomplished musician and composer. Patty was a teacher who specialized in early childhood education. The song, titled "Good Morning to All" was written as a greeting for Patty's kindergarten students. The melody of "Good Morning to All" is identical to the now-universally recognized birthday song. The lyrics are also the same, except that the four repeated lines were originally "Good morning to you" rather than "Happy birthday to you." The Hill sisters included the ditty in a songbook collection entitled "Song Stories for Kindergarten."

In 1893, Mildred and Patty sold their rights in the songbook to Clayton F. Summy, who published and copyrighted it. In those days, a copyright lasted for 28 years, so the initial term of copyright would have expired in 1921. If it was properly renewed in 1921 (and it is not clear that it was), the copy-

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right would remain alive for another 28 years, through 1949. Whether properly renewed or not, the copyright in "Good Morning to All" expired long before Marilyn Monroe serenaded her president.

How can Warner/Chappell claim to own a copyright in "Happy Birthday to You"? First, through a concatenation of corporate acquisitions, Warner/Chappell is the successor in interest to the Summy Co., which originally obtained the rights from the Hill sisters. Even though "Good Morning to All" is now in the public domain, Warner/Chappell claims ownership of the birthday song on the theory that it is a combination of an old melody with new words ("happy birthday" instead of "good morning").

Who actually authored the new lyrics (if it can be considered authorship at all) is not clear in the historical record. It does not appear that the Hill sisters ever claimed rights in the "Happy Birthday" lyrics. Whether the combination of a public domain melody with a slightly revised lyric has sufficient originality to sustain a copyright is a dubious proposition.

In 1935, the Summy Co. obtained two copyright registrations

for certain piano and choral arrangements of the melody plus the revised text. Under current copyright law duration rules, those registrations, if they were properly renewed in 1963, would subsist until 2030. That adds up to a grand total of 137 years of copyright protection for a melody originally copyrighted in 1893.

Copyright is not supposed to work that way. If there was any originality in the 1935 versions, it would be limited to the specific arrangements that were registered.

Brauneis' article makes a convincing argument that the 1935 registrations were not properly renewed and that the copyright notice on the 1935 publication was defective. Either of those pitfalls would have put the song in the public domain. There is also substantial doubt that Warner/Chappell can trace its title back to the author of the song that combined the melody with the "happy birthday" words. The professor concludes that "it is doubtful that 'Happy Birthday to You,' the famous offspring of 'Good Morning to All,' is really still under copyright."

Brauneis' detailed research and collection of historical documents is truly a gift to GMTY and members of the class-action lawsuit. Understandably, the allegations of the complaint draw heavily from the information in the professor's 90-page article. This case will allow the court to decide, after all these years, whether the birthday song is in the public domain.

Even more interesting is the question whether Warner/Chappell violated the law by demanding and collecting fees for use of the song and is required to make restitution. If so, there will be much celebrating by those who paid the unwarranted license fees.

We shall see how this plays out. For the time being, I will hold off on my plans to copyright and collect royalties for my new song called "Happy Lawsuit to You."