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MEDIA

# An Old Songbook Could Put 'Happy Birthday' in the Public Domain

By **BEN SISARIO** AUG. 4, 2015

It is one of the most beloved and famous of all songs, belted out at countless gatherings for infant and octogenarian alike. Yet “Happy Birthday to You,” far from being as free as a piece of cake at a party, is actually private property.

A federal lawsuit filed by a group of independent artists is trying to change that, and lawyers in the case, in a filing last week, said they had found evidence in the yellowed pages of a nearly century-old songbook that proves the song’s copyright — first issued in 1935 — is no longer valid.

A judge may rule in the case in coming weeks. If the song becomes part of the public domain, it would cost the Warner Music Group, which holds the rights, millions of dollars in lost licensing fees. It would also be a victory for those who see “Happy Birthday to You” as emblematic of the problems with copyright — a song that has long since survived anyone involved in its creation, yet is still owned by a corporation that charges for its use.

“It is one of the few songs that you’ve heard for as long as you’ve lived, and you kind of think of it as a folk song,” said Robert Brauneis, a professor at the George Washington University Law School who in 2010 published a skeptical study of the copyright of “Happy Birthday to You.”

The case also highlights the centrality of copyright claims to media businesses

like the music industry, where the issue of who owns the rights to a song can be worth millions of dollars. In March, a jury verdict in a case involving Robin Thicke's song "Blurred Lines" rattled the industry, when the song was found to have copied "Got to Give It Up," a 1977 hit by Marvin Gaye.

Part of the dispute over "Happy Birthday" derives from the song's byzantine publishing history. Its familiar melody was first published in 1893 as "Good Morning to All," written by Mildred Hill and her sister Patty, a kindergarten teacher in Kentucky. Birthday-themed variations began to appear in the early 1900s, and soon "Happy Birthday to You" was a phenomenon, popping up in films and hundreds of thousands of singing telegrams in the 1930s.

Its appearance in a scene in Irving Berlin's show "As Thousands Cheer" in 1933 led to a lawsuit, and in 1935 the copyright for "Happy Birthday to You" was registered by the Clayton F. Summy Company, the Hill sisters' publisher. The song changed hands and Warner acquired it when buying the owner, Birchtree Ltd., in 1988 as part of a publishing deal reported at the time to be worth \$25 million. According to some estimates, the song now generates about \$2 million in licensing income each year, mostly from its use in television and film.

Yet while the song is widely performed at private gatherings, its copyright status leads to peculiar workarounds in public settings. Restaurants often substitute public-domain songs, like "For He's a Jolly Good Fellow," to avoid being stung by licensing fees. On live television, it is not uncommon for an impromptu performance to be quickly silenced by producers.

Jennifer Nelson, who is making a documentary about the song and first filed the lawsuit against Warner two years ago, said that the company charged her \$1,500 to use the song. The case, which has been joined by other artists and seeks class-action status, is being heard in federal court in Los Angeles. Plaintiffs want the song to be declared part of the public domain, and for Warner to return licensing fees dating to at least 2009.

"Our clients want to give 'Happy Birthday to You' back to the public, which is

what Patty Hill wanted all along,” said Mark C. Rifkin, a lawyer for the plaintiffs.

Warner, which declined to comment for this article, contends in court filings that its copyright is valid. And while Warner may be one of the music industry’s biggest corporate powers, the song also generates hundreds of thousands of dollars each year for a nonprofit group, the Association for Childhood Education International.

Yet “Happy Birthday to You” has long been a prime target for critics of copyright law. Thanks to an extension made under the Sonny Bono Copyright Term Extension Act of 1998 — which was lobbied for heavily by Hollywood — the song remains under protection through 2030.

“The fact that ‘Happy Birthday to You’ is still under copyright is the most symbolic example of how copyright has expanded and overreached beyond its Constitutional purpose,” said Kembrew McLeod, a communications professor at the University of Iowa who has written about the song.

Mr. Brauneis contended in his 2010 study that the song’s copyright may not have been properly renewed when its initial term expired, in 1963. But lawyers for the plaintiffs in the “Happy Birthday” suit — for whom Mr. Brauneis said he was working as an unpaid consultant — now say they have proof of deeper problems.

Last week, they submitted evidence that they called “a proverbial smoking gun”: a 1922 songbook containing “Good Morning and Birthday Song,” with the birthday lyrics in the third verse. While other songs in the book are given with copyright notices, “Good Morning and Birthday Song” says only that it appears through “special permission” of the Summy Company. Under the laws of the time, an authorized publication without proper copyright notice would result in forfeiture of the copyright, according to lawyers involved in the case. Furthermore, under the 1998 law, anything published before 1923 is considered part of the public domain.

Warner argued that while earlier versions of the birthday song may have been published, they were not authorized by the sisters themselves. Also, no copyright

covered “Happy Birthday,” the label argues, until it was registered in 1935, so there was no copyright to be invalidated in 1922.

Both sides have asked for summary judgment, and the judge, George H. King of United States District Court in Los Angeles, is expected to rule soon. Judge King could deny both motions and hold a trial — raising the possibility of a strange proceeding in which all principal witnesses are long dead.

As part of the evidence submission last week, the plaintiffs included a paper trail showing how they tracked down the songbook. It started with electronically scanned images from Warner of a 1927 edition of the same book, but with the publisher’s crucial permission line about “Good Morning and Birthday Song” blurred. Lawyers for the plaintiffs searched for other copies of the book and found one at the University of Pittsburgh; another edition dated 1922 was located.

In a series of emails about the 1927 edition, a Pittsburgh librarian told Mr. Rifkin that the songbook had been found in a university storage facility.

“Here you go,” she wrote in sending it to him. “Surely the copyright hasn’t lasted this long.”