

## Tracing the Ownership of “Happy Birthday to You” (Draft)

### I. Tracing Ownership I: “Good Morning to All” and the GMTA/HBTY combination to 1935

**A. “Good Morning to All.”** Mildred and Patty Smith Hill may have assigned copyright in “Good Morning to All” before publication in 1893, but the first term of copyright had ended in 1921. Under the Copyright Act of 1909, the right to the renewal term belonged, not to the owner of the original term of federal copyright, but to the author if she survived until the beginning of the renewal term,<sup>1</sup> or to her statutory successors.<sup>2</sup> The author could assign her renewal term in advance,<sup>3</sup> but if she died before the beginning of the renewal term, her successors could obtain the renewal term free of any such assignment.<sup>4</sup> Patty Hill lived through the beginning of the renewal term, but Mildred Hill did not. On June 5, 1916, Mildred Hill suffered a heart attack and died in Chicago, at the house of her brother William Wallace Hill.<sup>5</sup> She was 56 years old.<sup>6</sup>

If the original assignment to Clayton F. Summy of copyright in “Song Stories to the Kindergarten” purported to assign renewal term rights,<sup>7</sup> then Patty Hill would have bound by that assignment.<sup>8</sup> I don’t have access to that document, but it does not appear that any of the

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<sup>1</sup> There is actually an unresolved split on the issue of how long an author needs to live before renewal rights vest in her rather than in the statutory successor classes. *Compare* *Marascalco v. Fantasy, Inc.*, 953 F.2d 469 (9<sup>th</sup> Cir. 1991) (author must survive until beginning of renewal period), *cert. denied*, 504 U.S. 931 (1992) *with* *Frederick Music Co. v. Sickler*, 708 F. Supp. 587 (S.D.N.Y. 1989) (author must survive until renewal application is filed anytime within the last year of the original term); *see* *Nimmer on Copyright §9.05[C][1][b]* (discussing this split). In this case, the split doesn’t matter, since Mildred Hill died long before the last year of the original term of copyright in “Song Stories for the Kindergarten,” and Patty Hill died long after the beginning of the renewal term.

<sup>2</sup> Under the “work-made-for-hire” doctrine of copyright law, employers may be considered authors of works created by their employees within the scope of their employment, and as such may be entitled to the renewal term. That doctrine, however, was first judicially suggested in the 1903, in Justice Holmes’s opinion for the Court in *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239, 248-49 (1903), and was not introduced into statutory law until 1909, *see* Act of March 4, 1909, 35 Stat. 1075, Chap. 320, § 26. Thus, “Song Stories for the Kindergarten,” published and registered in 1893, could not have been a work made for hire for Clayton F. Summy; the renewal right belonged to Mildred and Patty Hill as individual authors.

<sup>3</sup> *See Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

<sup>4</sup> *See Miller Music Co. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

<sup>5</sup> *See* [D8] “Services Today for Miss Mildred J. Hill,” *Louisville Courier-Journal*, June 6, 1916; Robert Bruce French, “Hill, Mildred Jane,” in John Kleber, ed. in chief, *The Encyclopedia of Louisville* 386 (2001).

<sup>6</sup> *See* Robert Bruce French, *supra* note 131.

<sup>7</sup> Courts have generally been quite reluctant to infer assignment of renewal term rights, even from such language as “all right, title and interest.” *See, e.g., Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975) (when “there is no specific reference in [the] assignment to the renewal term ... [t]his deficiency has generally been held as a matter of law, absent contrary evidence, to preclude a holding that a transfer of renewal rights was intended.”); *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co., Inc.*, 255 F.2d 518, 521 (2d Cir. 1958) (holding that a conveyance of “all [my] ‘right, title and interest by way of copyrights or otherwise’” was not sufficient evidence of an intent to transfer renewal rights)

<sup>8</sup> *See Sweet Music Inc. v. Melrose Music Corp.*, 189 F.Supp. 655 (S.D. Cal. 1960); *but see* *Nimmer on Copyright §9.06 [B][3]* (arguing that when two co-owners transfer renewal rights in a single instrument, they may not have intended to transfer the rights of the surviving co-owner if the rights of the other co-owner passed to statutory successors upon her death before the beginning of the renewal term).

concerned parties acted as if Patty Hill's rights in the renewal term belonged to the Clayton F. Summy Company, and I will assume that they did not.<sup>9</sup>

It is clear that since Mildred Hill died five years before the beginning of the renewal term, her renewal rights would go to her successors. The Copyright Act of 1909 provided its own rules of succession for renewal rights, preempting any state law that would otherwise govern. Those rules granted the renewal right first to any surviving spouse or children (overriding even the author's will), then if no spouse or child survived to the executors of the author's will, and if the author left no will disposing of his or her copyright interests, to the author's "next of kin."<sup>10</sup> Courts held that "next of kin" was defined by the law of intestate succession of the state in which the author was residing when he or she died.<sup>11</sup> Mildred Hill never married or had children, and did not leave a will. Because she had traveled to Chicago to visit her brother (and perhaps to seek medical attention) only two weeks before her death,<sup>12</sup> she was still considered a resident of Kentucky.

Under the Kentucky statute of intestate succession, Jessica Hill received a one-fifth interest in Mildred Hill's renewal rights.<sup>13</sup> That is because Mildred was survived by one brother, William; three sisters, Mary, Patty, and Jessica; and by Archibald Anderson Hill, the only son of her brother Archibald Alexander, who had died in 1908. Under Kentucky law, when there was no surviving spouse or children, siblings inherited in equal shares, and children of deceased siblings inherited "per stirpes," taking equal parts of the share of their deceased parent.<sup>14</sup> Thus Jessica and each of the other survivors just named took a one-fifth share in the renewal term.<sup>15</sup>

Just a few months after Mildred Hill's death, her younger sister Mary died in Louisville at the age of 53.<sup>16</sup> Because she did not leave a will either, her interest in Mildred's estate was

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<sup>9</sup> For example, the Clayton F. Summy Company obviously facilitated Jessica Hill's renewal application, and arranged that the renewal registration would be mailed, not to her, but to it. See [R2]. If the Summy Company believed that it owned Patty Hill's renewal rights by virtue of the 1893 assignment, why wouldn't it have gotten Patty Hill to execute the renewal, and then claim its rights as co-owner of the renewal term? Nor does the Summy Company ever allege in its answers in the Hill Foundation v. Clayton F. Summy litigation that it owned Patty Hill's interest in the renewal term. See [HFVS 2], [HFVS 4].

<sup>10</sup> Act of March 4, 1909, 35 Stat. 1075, Chap. 320, § 24.

<sup>11</sup> See *DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956).

<sup>12</sup> See [D8]

<sup>13</sup> Did next of kin have to survive until the renewal rights vested, or not? Check.

<sup>14</sup> See Kentucky Statutes §§1393, 1403 (5<sup>th</sup> ed. 1915). Inexplicably, in *Hill Foundation v. Clayton F. Summy Company*, the Hill Foundation's complaints allege that Patty, William and Jessica were Mildred Hill's sole heirs after Mary died, thus excluding Archibald Alexander. See [HFVS 1a] p. 8; [HFVS 3]. P. 9. The Summy Company answers, I think correctly, that Archibald Alexander was also Mildred's heir. See [HFVS 2], p.9; [HFVS 4], p.9. The complaints may have just contained an error. They are certainly inconsistent with the final settlement of Mary's estate, which identifies Archibald Alexander as an heir along with Patty, William, and Jessica. See [MDH2], p. 524. They are also inconsistent with the fact that four years before the complaint was filed, Patty and Jessica had Archibald Alexander transfer his interest in all copyrights relating to "Good Morning to All" to them. See [RA1].

<sup>15</sup> They would each have taken a one-fifth share in the original term of copyright as well, not due to the incorporation of the Kentucky intestate succession statute by the Copyright Act of 1909, but due to its direct application, since the original term of copyright would have been considered personal property of the decedent.

<sup>16</sup> See [D9] "Funeral of Miss Hill Tomorrow Morning," Louisville Courier-Journal, September 18, 1916 (Mary Hill died two days previously, on September 16, 1916).

distributed equally among the remaining four Hill siblings and nephew, and their share in Mildred's renewal rights increased to one-quarter.<sup>17</sup>

In 1921, Jessica Hill filed a timely application to renew the copyright in "Song Stories for the Kindergarten," the collection that contained "Good Morning to All."<sup>18</sup> Under prevailing precedent, Jessica became the owner of legal title to the renewal term, but she held that title in trust for all of the other co-owners of renewal rights, whose interests were preserved by her timely application.<sup>19</sup> Thus, Patty Smith Hill would have owned a five-eighths beneficial interest in the renewal term, and William Wallace Hill, Jessica Hill, and Archibald Anderson Hill would each have owned a one-eighth beneficial interest.

In 1922, William Wallace Hill died as a resident of Illinois, leaving a will that devised all of his property to his wife, Corinne Dorothy Hill.<sup>20</sup> Corinne herself died intestate in September of 1934,<sup>21</sup> probably without ever knowing of her interest in any copyrights of Mildred Hill. Corinne was survived by her mother, Louise Altenhofen, and her sister, Sophia A. Smith.<sup>22</sup> Under Illinois law, Altenhofen would take a two-thirds interest in her estate, and Smith a one-third interest;<sup>23</sup> they were both still alive in 1939.<sup>24</sup> Thus, in 1935, ownership in the renewal term in "Good Morning to All" would have in theory been divided between five people. Patty Smith Hill would have owned a five-eighths interest; Jessica Hill, and Archibald Anderson Hill would each have owned a one-eighth interest; Louise Altenhofen would have owned three thirty-seconds; and Sophia A. Smith would have owned one thirty-second.<sup>25</sup> As the person who filed the renewal application, Jessica Hill owned legal title, and would have been in a position to

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<sup>17</sup> The final settlement of Mary Hill's estate does identify William, Patty, Jessica, and Archibald Alexander as Mary Hill's heirs at law. See [MDH2], p. 524. On the other hand, neither it nor the Inventory and Appraisal of Mary Hill's estate, see [MDH1], identify Mildred Hill's copyrights as an asset of Mary Hill's estate.

<sup>18</sup> See [R2] (renewal application); [R3] (renewal record).

<sup>19</sup> [cite Nimmer]

<sup>20</sup> [cite to William Wallace Hill will] In *Hill Foundation v. Clayton F. Summy Company*, the Hill Foundation's complaints allege that William Wallace Hill transferred his interest in "Good Morning to All" to Jessica in 1916, by means of a letter that he, Jessica, and Patty sent to the Summy Company, requesting that all royalties payable by Summy to Mildred Hill be paid to Jessica. See [HFVS 1a], p. 9; [HFVS 3], pp. 9-10. The Summy Company's answers quote the language of the letter, supposedly in full: "The undersigned, Patty S. Hill, Jessica M. Hill, and William Wallace Hill, being the sole heirs at law of the late Mildred J. Hill, and all of legal age, hereby request you to make payment of any royalties due under contracts with the late Mildred J. Hill, to Jessica M. Hill, 620 West 116<sup>th</sup> Street, New York City, N.Y., and we hereby indemnify you and hold you harmless against all claims whatsoever by reason of your action in making such payments as herein requested." [HFVS 2], pp. 9-10; [HFVS 4], p. 10. If the quote is accurate, and I have no reason to doubt that it is, the letter certainly does not manifest sufficient intent to assign William Wallace's interest in the copyrights in Mildred Hill's works to Jessica – neither in the original terms of copyright, nor in the renewal terms.

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<sup>23</sup> Under the Illinois intestacy statute, Louise Altenhofen, Corinne Dorothy Hill's mother, would have been entitled to a double share as the sole surviving parent; thus she would have taken a 3/32 interest, while Sophia A. Smith, Corinne's sister, would have taken a 1/32 share. See Ill. Rev.Code. ch. 39, §1 (originally passed as "An act in regard to the descent of property," April 9, 1872).

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<sup>25</sup> As we will see, in 1939 the Clayton F. Summy Company managed to have the estate of William Wallace Hill reopened, and to purchase his interest in "Good Morning to All" at a private sale approved by the Cook County Probate Court. See *infra* p. xx.

authorize the Clayton F. Summy Company to use the “Good Morning to All” melody when publishing the Forman and Orem versions of “Happy Birthday to You.”

## **B. The GMTA/HBTY Combination**

Assuming that Mildred and Patty Hill were also joint authors of the GMTA/HBTY combination, that combination would have remained an unpublished work protected by common-law copyright until some owner of the work authorized publication. When Mildred died in 1916, her interest in the unpublished work would have been treated as personal property, and would have been distributed under the Kentucky intestacy statute in the same fashion as her interest in “Good Morning to All” was – in this case, not because federal law incorporated that statute, but because the Kentucky law applied directly. The other events that affected the distribution of ownership of “Good Morning to All” – the intestate deaths of Mary Hill and later Corinne Hill, and the intervening death of William Wallace Hill with a will leaving all of his property to Corinne – would have equally affected the ownership distribution of any unpublished works of Mildred and Patty Hill.

Thus in 1935, again barring any inter vivos transfers, the exact same five people who owned interests in the renewal term of “Good Morning to All” would have owned interests in the unpublished works of Mildred and Patty, in the same proportions. Jessica Hill would not have the special status that she had as the sole legal owner of the renewal term in “Good Morning to All.” As a co-owner of an unpublished work, however, she would have been able either to license it, or to assign her interest, without the permission of the other co-owners. Therefore, Jessica could have authorized the Clayton F. Summy Company to use the GMTA/HBTY combination as published in the Forman and Orem arrangements.

The upshot, then, is that Jessica Hill could have authorized the Summy Company to use “Good Morning to All” in 1935, and could also have authorized it to use GMTA/HBTY combination if Mildred Hill was either the sole author or a joint author of that combination.

**II. Tracing Ownership II: Mildred Hill’s interest in the GMTA/HBTY combination and “Good Morning to All,” 1935 to 1962.** Assuming that Mildred and Patty Smith Hill were co-authors of the GMTA/HBTY combination, Mildred Hill’s one-half interest in that combination and in “Good Morning to All” each had been divided up into five parts by 1935. Patty Smith Hill owned a one-eighth interest in both works as an heir of Mildred and Mary Hill (in addition to her own one-half interest as co-author); Jessica Hill and Archibald Anderson Hill also each owned a one-eighth interest in both works; and, as heirs of William Wallace Hill’s wife, Corinne Dorothy Hill, Louise Altenhofen and Sophia A. Smith owned a combined one-eighth interest in both works.<sup>26</sup>

**A. William Wallace Hill’s interest.** The 1935 division of ownership persisted until 1939, when, in one of the most dubious chapters in the history of “Happy Birthday to You,” the Clayton F. Summy Company acquired for the shockingly low sum of twenty-five dollars the one-eighth interest in “Good Morning to All” that had been owned by William Wallace Hill.

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<sup>26</sup>See *supra* p. xx.

In his will, William Wallace Hill had named his wife Corinne Dorothy Hill as executrix of his estate, but she had died in 1934. In 1939, the attorney who had represented Corinne Dorothy Hill as executrix, Leo B. Lowenthal, petitioned the Probate Court of Cook County, Illinois to withdraw from that representation, and to have the court appoint one Allen Davy as an “Administrator de bonis non with will annexed” of William Wallace Hill’s estate, replacing the deceased executrix. The court granted those petitions, and Allen Davy, presumably bankrolled by the Clayton F. Summy Company,<sup>27</sup> took an oath that as Administrator he would “make . . . a true and perfect inventory” of all of William Wallace Hill’s property of which he knew, and would “pay and deliver to the persons entitled thereto, all the legacies and bequests contained in said will . . . according to the value thereof . . . .”<sup>28</sup>

Allen Davy proceeded to approve an inventory that valued William Wallace Hill’s one-eighth interest in “Good Morning to All” at \$15, and then, when there was some doubt whether William Wallace Hill might have a one-quarter interest, valued the one-quarter interest at \$15 as well.<sup>29</sup> In 1939, of course, the melody of “Good Morning to All” had featured in over 400 performances of a musical on Broadway; in a series of radio broadcasts; and in several motion pictures. Jessica Hill and the Clayton F. Summy Company had thought the song was valuable enough to pay the cost of bringing two infringement lawsuits in federal court, and taking them all the way to trial. Three years later, in 1942, the Clayton F. Summy Company admitted that it had by then collected over \$5000 in licensing fees for the song, not counting revenues from the sale of sheet music. Fifteen dollars was an absurdly low estimate of the value of William Wallace Hill’s interest.

Allen Davy then petitioned the probate court to hold a private sale of the interest, representing to the court that a public sale would generate no more revenue than a private one. The court approved the petition, and, on March 22, 1939, Davy sold William Wallace Hill’s interest in “Good Morning to All” to the Clayton F. Summy Company for \$25 – a generous ten dollars over the inventory value of that interest.<sup>30</sup> To make matters worse, Louise Althenhofen and Sophia A. Smith, Corinne Dorothy Hill’s heirs, did not get one penny of that \$25. It all went to Leo Lowenthal, Corinne Dorothy Hill’s attorney, who represented to the court that he had unpaid legal bills for services provided to her in excess of that amount. Presumably, the Clayton F. Summy Company paid Allen Davy well for his services, and may well have also paid Leo Lowenthal something. All Althenhofen and Smith got was a mailed copy of the cryptic, brief

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<sup>27</sup> Mr. Lowenthal told the court that he was “informed that there are certain parties willing to purchase [William Wallace Hill’s copyright interests] and to bear such further expense as may be involved in completing the administration of the estate of WILLIAM WALLACE HILL.” [WWH 1], [http://docs.law.gwu.edu/facweb/rbrauneis/happybirthday/wwhill/Petition\\_For\\_Letters\\_Of\\_Administration.pdf](http://docs.law.gwu.edu/facweb/rbrauneis/happybirthday/wwhill/Petition_For_Letters_Of_Administration.pdf).

<sup>28</sup> [WWH 2], p.3.

<sup>29</sup> Why did the lawyers working on this transaction think that William Wallace Hill might have a one-quarter interest in the renewal term of “Good Morning to All”? He owned one-quarter of Mildred Hill’s interest in that song, but she herself only owned a one-half interest in the song, since it was a joint work co-authored by her sister Patty. Perhaps there was some thought that Jessica’s 1921 renewal application was not sufficient to renew Patty’s interest; but in retrospect, at least, it seems clear that the Second Circuit has decided as early as 1921 that a renewal by one co-owner of copyright was sufficient to secure the renewal term interests of all of the other co-owners. *See Silverman v. Sunrise Pictures Corp.*, 273 F. 909 (2d Cir. 1921), *cert. denied*, 262 U.S. 758 (1923). Of course, there was no disadvantage to getting court approval of a sale of William Wallace Hill’s interest as a one-quarter interest; if it turned out to be merely a one-eighth interest, the heirs of Corinne Dorothy Hill certainly couldn’t complain.

<sup>30</sup> [WWH 26], p.1

notice of the hearing at which Allen Davy would present his report as administrator and ask to be discharged; that notice did not identify the property that had been sold.<sup>31</sup>

By those suspect means, the Clayton F. Summy Company gained at least a colorable claim in a one-eighth interest in the copyright in “Good Morning to All.”<sup>32</sup> According to the complaint filed in 1943 in *The Hill Foundation v. Clayton F. Summy Co.*, it did so without the “knowledge, permission, or consent” of either Jessica or Patty Smith Hill.<sup>33</sup> Of course, their permission and consent wasn’t needed, but Jessica and Patty Smith Hill viewed this as a breach of trust.

Did the Clayton F. Summy Company also obtain William Wallace Hill’s interest in the GMTA/HBTY combination? I can’t see how it could have. The interests that it bought for \$25 were interests in copyrights identified by a list of four registrations and their respective renewals – two in “Song Stories for the Kindergarten,” representing the 1893 and 1896 published versions of that book; one in “Song Stories for the Sunday School,” published in 1899; and one in the 1907 publication of “Good Morning to All.”<sup>34</sup> Summy-Birchard’s claim that the GMTA/HBTY combination is still under copyright rests on the argument that it is a completely separate derivative work that was first published in 1935. The assignment from Allen Davy to the Clayton F. Summy Company makes no mention of any unpublished works, or of the 1934 and 1935 registrations, but confines itself to the earlier registrations.<sup>35</sup> Thus, it did not transfer any interest in the GMTA/HBTY combination to the Clayton F. Summy Company.

There is no later recorded assignment of William Wallace Hill’s interest in the GMTA/HBTY combination, and no record of any further proceedings involving his estate in the Probate Court of Cook County. Thus, it seems quite likely that there is at least one big loose end involving the ownership of the GMTA/HBTY combination. Louise Altenhofen and Sophia A. Smith have in all likelihood died, but their heirs or legatees may have a claim to a one-eighth interest in a song that generates close to \$2 million per year.

**B. Archibald Anderson Hill’s interest.** There is one recorded assignment from Archibald Anderson Hill to Jessica and Patty Smith Hill, also executed in 1939.<sup>36</sup> It contains the same list of four registrations and their respective renewals as the assignment from Davey to the Clayton F. Summy did, and it does not mention rights in unpublished works or in the 1934 and

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<sup>31</sup> See [WWH 32]

<sup>32</sup> In its complaint in *The Hill Foundation, Inc. v. Clayton F. Summy Co.*, The Hill Foundation alleges that in October 1916, William Wallace Hill requested the Clayton F. Summy Company “to pay all royalties property payable to . . . Mildred J. Hill . . . to . . . Jessica M. Hill, it being the intention of the parties thereto that all the right title and interest of the said William Wallace Hill as one of the heirs and next of kin of the said Mildred J. Hill, in and to the aforesaid copyrights and the royalties payable thereunder should be deemed assigned to his sister, the said Jessica M. Hill and vested in her absolutely as her sole property.” [HFVS 1a] p. 9. Was this request sufficient to transfer to Jessica Hill any interest of William Wallace Hill in the renewal term copyright in “Song Stories for the Kindergarten,” which did not vest until five years later, in 1921? Probably not, and in any case, it certainly was not sufficient to transfer William Wallace Hill’s potential interest in “Happy Birthday to You” as an unpublished work of Mildred Hill, since no one was thinking about “Happy Birthday to You” back in 1916.

<sup>33</sup> [HFVS 1a], p. 10.

<sup>34</sup> [RA2], p. 2

<sup>35</sup> See *id.*

<sup>36</sup> See [RA1].

1935 registrations. It does contain slightly broader language than the Davey assignment: one paragraph states that the assignment “constitutes a sale . . . of all copyrights to the above enumerated books and musical compositions; and renewals and extensions of such copyrights; which may have been omitted from the descriptions of copyrights, renewals, and extensions of copyrights appearing in the above specific enumeration.”<sup>37</sup> There is no doubt that the second semicolon in this excerpt is a typographical error and should be a comma. With such a correction made, it is clear that the language captures renewals and extensions of “Good Morning to All” (and of other songs published in “Song Stories for the Kindergarten” and “Song Stories for the Sunday School”), but it does not cover the GMTA/HBTY combination. It is possible that Archibald Anderson Hill assigned his interest in the GMTA/HBTY combination in some other instrument that has never been recorded; but if he did not, then upon his death in 1992, that interest would have passed through his will to Ms. Muriel Lydia Wright.<sup>38</sup>

**C. The interests of Jessica and Patty Hill.** On September 15, 1939, Jessica and Patty Hill executed an assignment of their interests in “Good Morning to All” to the Clayton F. Summy Company.<sup>39</sup> In the Hill Foundation’s lawsuit against the Summy Company in 1943, the Hill Foundation alleges that even though this assignment was on its face permanent and unconditional, the Hill sisters and the Summy Company had agreed that the assignment was temporary, and was made for the purpose of allowing the Summy Company to pursue litigation against several alleged infringers.<sup>40</sup> After two extensions of an initial one-year period, the Hill sisters notified the Summy Company sometime shortly after February 28, 1941 that their assignment was null and void.<sup>41</sup> Unbeknownst to them, the Summy Company had recorded the facially unconditional assignment at the Copyright Office on September 20, 1939, five days after the Hill sisters had executed it. The Hill Foundation first learned of the recorded assignment on April 12, 1943, when the Postal Telegraph-Cable Company raised it as a defense in an infringement action brought by the Hill Foundation. Because of the prior conveyance by the Hill sisters to the Summy Company, argued the Postal Telegraph-Cable Company, the Hill Foundation did not own copyright in “Good Morning to All,” and could not maintain an infringement action. That caused that litigation to come to an abrupt halt; without proceeding any further, it was discontinued in 1944.<sup>42</sup>

The litigation between The Hill Foundation and the Clayton F. Summy Company went to trial, but before a final judgment issued, the parties settled. As part of the settlement, Jessica and Patty Smith Hill executed another assignment of their interests to the Hill Foundation, and the Hill Foundation executed an assignment of its interests to the Clayton F. Summy Company.<sup>43</sup> Unlike the 1939 assignments, which had covered only the four registrations in “Good Morning to All,” these 1944 assignments were extremely thorough. They covered Jessica and Patty Smith Hill’s interests in all six of the versions of “Happy Birthday” and “Happy Birthday to You” registered in 1934 and 1935; in any renewals and extensions thereof; and in any further arrangements that might be made of those works in the future.

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<sup>37</sup> [RA1], p. 3.

<sup>38</sup> [AAH 1], p.1

<sup>39</sup> See [RA3].

<sup>40</sup> See [HFVS 5]

<sup>41</sup> *Id.* at

<sup>42</sup> [HFVPT 7]

<sup>43</sup> See [RA5], [RA6].

There is good authority that the Hill Foundation made this conveyance in exchange for the right to receive one-third of all royalties generated by the songs.<sup>44</sup> The strong custom of the time was to split royalties evenly between the music publisher and the authors,<sup>45</sup> and indeed, the agreement between Jessica Hill and the Summy Company under which the 1934 and 1935 versions of “Happy Birthday to You” were originally published provided for such an even split.<sup>46</sup> Thus a conveyance reserving only one-third of the royalties suggests that the Summy Company convinced the Foundation that it had some grounds for claiming a pre-existing ownership interest in the songs. In other words, the Summy Company’s maneuverings to procure William Wallace Hill’s interest, as well as its recording of the 1939 conveyance that Mildred and Patty Smith Hill argued was merely temporary, were, if nothing else, good hardball negotiating tactics.

Through these 1944 conveyances, the Clayton F. Summy Company had finally undeniably become a proprietor of copyright in the GMTA/HBTY combination. Each sister had inherited a one-eighth interest in the both “Good Morning to All” and in the GMTA/HBTY combination from their sisters Mildred and Mary; in 1939, Archibald Anderson Hill conveyed to them at least his one-eighth interest in “Good Morning to All.” The 1944 conveyances gave the Summy Company those interests.<sup>47</sup>

The Clayton F. Summy Company assembled all of Mildred Hill’s interest in the renewal term of “Good Morning to All,” but of course that term came to an end in 1949. It also, however, obtained at least one-half of Mildred Hill’s interest in the original term of copyright in the GMTA/HBTY combination. Since the GMTA/HBTY combination was, with respect to Mildred Hill, a posthumous work, the right of renewal in her interest belonged to the owner or owners of her interest in the original term. As one of the owners of that interest during the last year of the original term, the Clayton F. Summy Company was among the parties entitled to file a renewal application in the GMTA/HBTY combination.

### **III. Tracing Ownership III: Patty Smith Hill’s interest as an author of “Good Morning to All” and in the GMTA/HBTY combination, 1935-1962.**

As noted above, in 1935 Patty Hill was a co-owner of “Good Morning to All” and the GMTA/HBTY combination by virtue of being an heir of Mildred and Mary Hill. She also, however, owned her own one-half interest in the renewal term of “Good Morning to All” as co-author, and a one-half interest in any unpublished works that she might have co-authored with

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<sup>44</sup> [JMH 14], pp. 3-4.

<sup>45</sup> See, e.g., Biederman et al, *Law and Business of the Entertainment Industries* 642 (5<sup>th</sup> ed. 2007) (“For many years music publishing revenues have essentially been divided equally between the writer and publisher, a practice followed through most of the world. Thus, in theory, 50 cents of every dollar collected by the publisher will be paid to the songwriter and 50 cents will be retained by the publisher in most deals.”).

<sup>46</sup> See [HFVS 3], p. 8 (paragraph 26 of the Hill Foundation’s amended complaint); [HFVS 4], p. 8 (the Summy Company’s amended answer, admitting the 50/50 royalties split).

<sup>47</sup> We will consider below the fate of Patty Smith Hill’s own one-half interest as co-author of the GMTA/HBTY combination, which turns out to be more complicated. [The 1944 conveyances also gave it Patty Smith Hill’s own one-half interest in the combination as co-author, at least for the original term of copyright. Although Patty Smith Hill also attempted to convey her renewal interest, that conveyance would only be effective if she survived until the time the renewal application was filed in 1962. She did not; she died two years after the Hill Foundation – Summy litigation was settled, in 1946.]

her sister Mildred, which we assume for this part of this Article includes the GMTA/HBTY combination. Who owned the rights to the renewal term corresponding to Patty Hill's interest in the GMTA/HBTY combination, and who was the proper party to file a renewal application?

In 1944, Patty Hill, along with her sister Jessica, conveyed all of her interests in all of the registered versions of "Good Morning to All" and "Happy Birthday to You" to the Hill Foundation, which in turn conveyed those interests to the Clayton F. Summy Company. Those conveyances were sufficient to irrevocably convey her interests in the renewal term of "Good Morning to All," and in the original term of the GMTA/HBTY combination. Yet, although they quite explicitly purported to convey Patty Smith Hill's interest in the renewal term of the GMTA/HBTY combination, they did not. Conveyances of the renewal term by the author are enforceable if the author was still alive when the renewal application was filed – or so ruled the Supreme Court in the 1943 case of *Fred Fisher Music Publishing Co. v. M. Witmark & Sons*.<sup>48</sup> But if the author died before then, the line of succession in the Copyright Act overrode any purported conveyance by the author -- a phenomenon that Francis Nevins has dubbed "contract-bumping."<sup>49</sup> Since Patty Smith Hill died in 1946, long before any renewal application could have been filed in 1962, her 1944 attempt to convey her interest in the GMTA/HBTY renewal term to the Hill Foundation was ineffective. Recall that first in line for renewal term interests under the 1909 Act were spouses and children,<sup>50</sup> but Patty Smith Hill had neither. That meant that her interest in the renewal term would vest "in the author's executors, or in the absence of a will, [her] next of kin."<sup>51</sup>

Patty Hill did leave a will, and it named Samuel Mann as executor.<sup>52</sup> When Samuel Mann died in 1958,<sup>53</sup> Patty Hill's estate was still open, because it was continuing to receive royalties, namely, payments from ASCAP for performances of "Happy Birthday to You." Her will designated her nephew Archibald Alexander as an alternate executor, and in March of 1959, the New York County Surrogate's Court granted his application for letters testamentary.<sup>54</sup> Thus, during the renewal year, from late 1962 through late 1963, Archibald Alexander Hill would have been the proper party to renew Patty Hill's interest in the GMTA/HBTY combination.

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<sup>48</sup> 318 U.S. 643 (1943). Many argue that the Supreme Court was wrong. See, e.g., Francis M. Nevins, "Little Copyright Dispute on the Prairie, Unbumping the Will of Laura Ingalls Wilder," 44 St. Louis U. L.J. 919, 920 (2000) ("[T]he Supreme Court nullified Congressional intent in the interest of contractual freedom"). But if Congress really wanted the author's interest in the renewal term not to be transferable in advance, maybe it should have said so really, really clearly. In 1871, the Supreme Court decided that an author could be bound by a prior conveyance of renewal term rights under the Copyright Act of 1831 if he lived into the renewal term. See *Paige v. Banks*, 80 U.S. (13 Wall.) 608 (1871). And the tradition of judicial hesitance to override a surviving author's intent goes back even further: in 1786, the High Court of Chancery ruled that an author who lived into the renewal term under the 1710 Statute of Anne could likewise be bound by a prior conveyance of renewal term rights. See *Carnan v. Bowles*, 2 Bro. C.C. 80, 29 Eng. Rep. 45 (Ch. 1786); Francis M. Nevins, Jr., "The Magic Kingdom of Will-Bumping," 35 J. Copy. Soc. U.S.A. 77, 82, 85 (1987).

<sup>49</sup> See Francis M. Nevins, "Little Copyright Dispute on the Prairie," *supra* note 56, at 921.

<sup>50</sup> See *supra* TAN 31, 38; Act of March 4, 1909, 35 Stat. 1075, Chap. 320, § 24.

<sup>51</sup> Act of March 4, 1909, 35 Stat. 1075, Chap. 320, § 24.

<sup>52</sup> See [PSH 1], p.6.

<sup>53</sup> See New York Times, Sept. 8, 1958, p. 29.

<sup>54</sup> [add cite to PS Hill probate document granting letters testamentary to AA Hill]

As executor, Archibald Alexander would have been renewing copyright, not for his own benefit, but for the benefit of Patty Hill's legatee, which in this case was Jessica Hill. Jessica Hill, in turn, had in 1944 conveyed her interest in the GMTA/HBTY combination to the Hill Foundation, which had in turn conveyed it to the Clayton F. Summy Company. I assume that the Summy Company would have a claim that that transfer was effective under some form of the doctrine of after-acquired title. Thus, the ultimate owner of the renewal term corresponding to Patty Hill's interest as co-author of the GMTA/HBTY combination was likely Summy-Birchard. It would not have been the proper party to file the renewal application corresponding to that interest, since the 1909 Act requires the author's executor to file the application. As explained above, however, Summy-Birchard was a proper party to file a renewal application by virtue of its co-ownership of a posthumously published work of Mildred Hill, and any renewal application filed would be sufficient to obtain renewal term copyright for all co-owners.

**IV. Termination of Transfer.** When Congress retroactively extended copyright term in 1976, and again in 1998, it bestowed a windfall on copyright owners. Unless Congress enacted some special provision, that windfall would not benefit authors, but only their assignees – typically, publishers – in cases in which the authors had assigned the entire remaining term of copyright at a time when the expected term was shorter. The special provisions that Congress enacted, codified at 17 U.S.C. §§304(c) and (d), allow the author, and certain designated successors, to terminate transfers that the author or the successors made before copyright term was extended. The transfers can be terminated for a five-year period after the end of the original 28-year renewal period, or if that opportunity wasn't taken, for another five-year period after the end of the 47-year renewal term under the original 1976 Act.<sup>55</sup> Are any of the transfers of rights in “Happy Birthday to You” subject to this power of termination? I think not.

Consider, first, Patty Smith Hill's interest in “Happy Birthday to You.” In 1944, she herself attempted to transfer her renewal rights in the song to the Hill Foundation, which then purported to transfer them to the Clayton F. Summy Company.<sup>56</sup> But since she died before the commencement of the renewal year, the renewal rights never vested in her, and her attempted transfer was simply void ab initio.<sup>57</sup> The issue of terminating her transfer never arises, because under the 1909 Act there was no valid transfer in the first place. Instead, under the 1909 Act's “contract-bumping” provisions, those renewal rights vested in the executor of her will, Archibald Anderson Hill, for the benefit of her sister Jessica, her residuary legatee. Jessica Hill, of course, also executed a transfer of renewal rights to the Hill Foundation in 1944. Under certain conditions that transfer would also be subject to termination. However, the most important of those conditions is that Jessica would have to have survived until the earliest date that she could have filed a notice of termination under §304(c).<sup>58</sup> That date is January 1, 1982, because the original renewal term of “Happy Birthday to You” would have expired at the end of the fifty-sixth year after it was copyrighted – December 31, 1991 – and the notice of termination can be

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<sup>55</sup> See 17 U.S.C. §§304(c), (d).

<sup>56</sup> The Hill Foundation would not have a termination right, because §304 grants termination rights only to the author and his or her widow, widower, children, executors, and next of kin.

<sup>57</sup> See 17 U.S.C. §24 (1975) (renewal rights vest in the author only if the author is “still living”).

<sup>58</sup> See 17 U.S.C. §304(c)(1) (“In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the *surviving* person or persons who executed it”) (emphasis added).

filed up to ten years before that date.<sup>59</sup> Why does the statute impose a survival condition for the author's successors? The termination right is intended to benefit only either the author herself, or the author's immediate successors. If both the author and her immediate successors are dead, the balance of equities, in Congress's view, shifts to the assignee. In this case, that means Jessica Hill's assignee, now known as the Summy-Birchard Company, gets the entire benefit of the 1976 and 1989 copyright extensions.

In the case of Mildred Hill's interest in "Happy Birthday to You," the only one of her next of kin to survive long enough to conceivably file a notice of termination of transfer was Archibald Anderson Hill. He did execute a transfer, to Jessica and Patty Hill, in 1939. As I have detailed above, I don't think that that transfer covers his share of Mildred's interest in "Happy Birthday to You" – it concerns only the published and registered work "Good Morning to All." If, however, that transfer were interpreted to extend to Archibald's interest in "Happy Birthday to You," he could have filed a notice of termination on January 1, 1982, or anytime during the following 13 years. However, he did not file a notice of termination before he died on March 29, 1992.<sup>60</sup> Once he died, the power to terminate that transfer came to an end. Thus, although under §304(d) another window of termination of qualifying transfers of copyright in "Happy Birthday to You" would open on January 1, 2010, there are no transfers that would qualify. The upshot is that the termination of transfer provisions will not affect the ownership of the GMTA/HBTY combination.

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<sup>59</sup> See 17 U.S.C. § 304(c)(3) (setting the termination period); 17 U.S.C. §304(c)(4)(A) (setting the period for filing the termination notice).

<sup>60</sup>Section 304(c)(4)(A) of the Copyright Act provides: "A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect." 17 U.S.C. §304(c)(4)(A). A search of the Copyright Office's database does not reveal any such recorded notice. For Archibald Anderson Hill's date of death, as well as a detailed tribute to his career as a linguistics professor, see <http://www.utexas.edu/faculty/council/2000-2001/memorials/Hill,%20A/hill,%20a.pdf>.