

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

THE HILL FOUNDATION, INC.,

Plaintiff,

-against-

CLAYTON F. SUMMY CO.,

Defendant.

MC 273869 A

(Original)

AMENDED COMPLAINT.

SAMUEL MANN,

Attorney for Plaintiff,

70 PINE STREET,
BOROUGH OF MANHATTAN,
CITY OF NEW YORK.

S. DISTRICT COURT
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DEMAN, LAWYER
ATTY FOR Defendant

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

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THE HILL FOUNDATION, INC.,

Plaintiff,

-against-

AMENDED COMPLAINT.

CLAYTON F. SUMMY CO.,

Civil 19-377.

Defendant.

-----X

Plaintiff, for its amended complaint, respectfully shows to the Court and alleges upon information and belief:

FOR A FIRST CAUSE OF ACTION.

FIRST: That at the time of the execution and delivery of the hereinafter mentioned and described assignment, plaintiff was and still is a domestic corporation.

SECOND: That the defendant herein was organized as a corporation under the laws of the State of Delaware on or about August 31st, 1931; and that subsequent to the aforesaid date of the filing of its certificate of incorporation but at a time presently unknown to plaintiff or its hereinafter named assignors it became and still is engaged in the business of publishing and generally dealing in music and musical compositions in sheet music and book form in the City of Chicago, State of Illinois.

THIRD: That prior to October 13th, 1893, one PATTY S. HILL and her sister, MILDRED J. HILL, composed and wrote the music and words of a number of songs which were collectively entitled "SONG STORIES FOR THE KINDERGARTEN" by them, and thereby became the proprietors of the music and words of said songs entitled as aforesaid.

FOURTH: Reposing the utmost, faith, confidence and trust in one CLAYTON F. SUMMY who was then engaged in the business

of publishing and dealing in music and musical compositions in sheet music and book form, the said PATTY S. HILL and MILDRED J. HILL executed and delivered to the said CLAYTON F. SUMMY (who is hereinafter called SUMMY) a license to publish and sell said book, and to copyright said book in his own name; and in consideration of said license SUMMY agreed to accept, copyright and publish, and to offer for sale in the usual course of business the aforesaid book, and from the proceeds of such sales, if any, to pay to the said PATTY S. HILL and MILDRED J. HILL the sum of ten percent of the retail price per copy for each and every copy so sold.

FIFTH: In accordance with said license SUMMY entered said songs collectively entitled as aforesaid in the United States Patent Office in his own name under copyright number 45,997 on the 13th day of October, 1893; and thereby became a trustee thereof.

SIXTH: That thereafter the said SUMMY formed or caused to be formed a corporation under the laws of the State of Illinois which was known as CLAYTON F. SUMMY CO. and whose charter or certificate of incorporation was filed in the office of the Secretary of State of Illinois on or about January 14th, 1895. Said corporation is hereinafter referred to as "the first corporation."

SEVENTH: That thereafter the said SUMMY and the first corporation published and offered for sale and did sell in book form the songs copyrighted as aforesaid and as in said license provided.

EIGHTH: Said book or work was subsequently revised and enlarged by the said PATTY S. HILL, and a new edition thereof so revised and enlarged was duly copyrighted in the name of SUMMY on the 8th day of June, 1896, under copyright number 34,260.

NINTH: Thereafter and on or about April 17th, 1899, the aforesaid MILDRED J. HILL licensed the first corporation to

publish certain songs from the book entitled "SONG STORIES FOR THE KINDERGARTEN" in a new book to be entitled "SONG STORIES FOR THE SUNDAY SCHOOL", and to copyright the same; and in consideration thereof, said corporation agreed to pay to the said MILDRED J. HILL \$1.20 per hundred for all copies sold of said work, excepting the first three hundred copies.

TENTH: That one of the songs contained in the works mentioned and described in paragraphs "FOURTH" to "EIGHTH" inclusive hereof is one entitled "GOOD MORNING TO ALL" which, with words written by the said PATTY S. HILL, was later entitled "HAPPY BIRTHDAY TO YOU" and was included among the songs copyrighted as aforesaid by the said SUMMY.

ELEVENTH: The said song, "HAPPY BIRTHDAY TO YOU", written and composed by the said PATTY S. HILL and MILDRED J. HILL, thereafter acquired a nation-wide popularity which has continued down to the present time; performances thereof being given vocally, by orchestras, in various dramatic performances on the stage, and in various forms over the radio; all of which was and still is known to this defendant.

TWELFTH: The aforesaid MILDRED J. HILL having thereafter died prior to the expiration of the original copyrights mentioned and described in paragraphs "FIFTH", "SEVENTH", "EIGHTH" and "NINTH" hereof, renewals of said copyrights were thereafter obtained from the Register of Copyrights in the United States Patent Office as follows:

a. Original copyright number 45,997:
renewal registration in the name of JESSICA M. HILL,
(a sister of the said MILDRED J. HILL and PATTY S.
HILL) as next of kin under number R 19,043 on the 3rd
day of September, 1921.

b. Original copyright number 34,260:

renewal registration in the name of the aforesaid JESSICA M. HILL as next of kin under number R 25,771 on the 9th day of January, 1924; and

c. Original copyright number 20,441:

renewal registration in the name of the aforesaid PATTY S. HILL under number R 36,618 on the 3rd day of January, 1927.

THIRTEENTH: That subsequent to the commencement of this action plaintiff and plaintiff's hereinbelow mentioned assignors were informed for the first time and now allege that the duration of the first corporation was for a period of twenty-five years and that its charter under the laws of the State of Illinois expired on January 14th, 1920; that thereafter and on or about April 15th, 1925, another corporation known as CLAYTON F. SUMMY CO. (and hereinafter referred to as the second corporation) was organized under the laws of the State of Illinois.

FOURTEENTH: Continuing to repose faith, confidence and trust in Summy individually, the said PATTY S. HILL and JESSICA M. HILL as next of kin and individually (and hereinafter referred to as plaintiff's assignors), acquiesced in the continued publication and sale by said Summy of the books or works mentioned and described in paragraphs "THIRD", "EIGHTH" and "NINTH" hereof under the renewals of copyrights mentioned and described in paragraph "TWELFTH" hereof, without any express license therefor; and said Summy thereby agreed to continue and did continue to publish and sell said books or works only upon the terms and conditions contained in and contemplated by the express licenses originally granted to it.

FIFTEENTH: That at the time of the granting of the aforesaid licenses to SUMMY under the original and renewal copyrights above mentioned and described, sound motion pictures were

unknown commercially, and the licenses granted to SUMMY did not contemplate the use of the aforementioned songs in sound motion pictures or dramatic performances or in any other wise or manner except in sheet music form; nor did such licenses contemplate or contain any agreement that SUMMY should have the right to grant licenses or sub-licenses to the producers of sound motion pictures or dramatic performances in respect to the use of any of said songs therein and in particular the aforesaid song "HAPPY BIRTHDAY TO YOU"; the only rights acquired at any time by SUMMY under the original express licenses and the oral renewals thereof being those of publication and sale of said songs or works in sheet music form.

SIXTEENTH: That thereafter SUMMY and the second corporation continued to publish and offer for sale said books or works upon the terms and conditions above set forth and contemplated by the parties to such arrangement.

SEVENTEENTH: That thereafter, as plaintiff is now informed, the said SUMMY retired from business prior to the date of the incorporation of the defendant herein; and on or about May 17th, 1933, the second corporation was dissolved by action of the Attorney General of the State of Illinois for non-payment of taxes.

EIGHTEENTH: That thereafter the defendant herein, without notifying plaintiff's assignors or this plaintiff that it was a newly created business entity separate and distinct from the above-mentioned first and second corporations, but on the contrary representing that it was the same enterprise but with merely new management, and without the knowledge, permission or consent of plaintiff's assignors or of this plaintiff, secretly entered into various agreements with the producers of sound motion pictures and of stage or dramatic performances and others presently unknown to plaintiff for the sound and dialogue rights for the use of the song "HAPPY BIRTH-

DAY TO YOU" and purported to hold itself out as having the right to grant licenses or sub-licenses in respect to the use of the aforesaid song; whereas in truth and in fact no such licenses had been granted to it by plaintiff's assignors and by this plaintiff; and in consequence thereof this defendant received from various producers of sound motion pictures and stage or dramatic performances and from others presently unknown to plaintiff and its assignors substantial sums of money by way of royalties for the use of said song without disclosing the same.

NINETEENTH: Plaintiff's assignors did not learn of the wrongful acts and conduct of this defendant in disposing of the sound and dialogue rights to said song until about November, 1941; and upon acquiring knowledge thereof, due demand was made upon the defendant for an accounting of all sums received by them as royalties, and for payment of the amounts collected by them, which was refused.

TWENTIETH: That as the plaintiff is informed and verily believes, this defendant has collected upwards of five thousand dollars or more by way of royalties from producers of sound motion pictures and of stage or dramatic performances and from others; that it is continuing to grant, without the knowledge, permission or consent of plaintiff's assignors or of this plaintiff such sound and dialogue rights to the aforesaid song, all in violation of the rights conferred upon plaintiff's assignors and this plaintiff by the copyright laws of the United States of America; that it has collected and will continue to collect and receive royalties therefrom in amounts which are within its peculiar knowledge and which it will not disclose to plaintiff.

TWENTY-FIRST: Plaintiff has no adequate remedy at law.

TWENTY-SECOND: Prior to the commencement of this action,

plaintiff's assignors, by an instrument in writing bearing date the 2nd day of June, 1942, duly assigned to the plaintiff herein all their right, title and interest, joint and several, in and to the above-mentioned and described copyrights and renewals thereof, together with all their right, title and interest in and to licenses, agreements and contracts for the publication and sale of said works, and in and to any and all rights, demands, claims and causes of action heretofore accrued or which may at any time hereafter accrue, for unpaid royalties, or by reason of any infringements of said copyrights or renewal copyrights, and howsoever arising; which assignment was duly recorded in the Copyright Office of the United States of America on June 8th, 1942, in Copyright Office Book 485, at pages 242-243, in conformity with the laws of the United States respecting copyrights; and plaintiff is still owner and holder thereof.

FOR A SECOND CAUSE OF ACTION.

TWENTY-THIRD: Plaintiff repeats and reiterates the allegations contained in the paragraphs of the complaint herein numbered "FIRST" to "FOURTEENTH" inclusive.

TWENTY-FOURTH: That during the calendar years 1934 and 1935, the aforesaid JESSICA M. HILL as owner of the copyright of the said book or work entitled "SONG STORIES FOR THE KINDERGARTEN", in the belief that the defendant herein was the same business entity as the first and second corporations above-mentioned and described and in whom she had reposed faith, trust and confidence, granted to this defendant a number of licenses for the publication, sale and performance of various piano arrangements of the song variously entitled "GOOD MORNING TO ALL" or "HAPPY BIRTHDAY TO YOU"; in consideration of which the defendant agreed to pay to the said JESSICA M. HILL, five per cent of the marked retail price on the first 700 copies sold of each work in respect to which a license was granted;

and ten per cent on all subsequent sales.

TWENTY-FIFTH: That said licenses contained a provision that an accounting should be rendered and payment made once each year if desired, but that no accounting should be required unless and until 500 copies of each work licensed as aforesaid, had been sold.

TWENTY-SIXTH: Each said license contained a further provision that should the defendant receive any payment for the publication of said work in any foreign country; or for the mechanical reproduction or performance thereof in any country; or for any arrangements permitted to be published by any other publishing house under royalty contract, that one-half of the amount so received was to be paid to the said JESSICA M. HILL.

TWENTY-SEVENTH: That said work entitled "GOOD MORNING TO ALL" (which included the said song known as "HAPPY BIRTHDAY TO YOU") was duly copyrighted in the name of the aforesaid CLAYTON F. SUMMY under number C-142,468, on the 7th day of February, 1907; and a renewal thereof was obtained from the Register of Copyrights of the United States Patent Office in the name of the aforesaid JESSICA M. HILL and PATTY S. HILL as next of kin, under number R34,877, on the 2nd day of January, 1935.

TWENTY-EIGHTH: Plaintiff repeats and reiterates the allegations contained in the paragraph of the complaint numbered "TWENTY-SECOND" with the same force and effect as if set forth at length herein.

TWENTY-NINTH: That the licenses granted herein to the defendant by the said JESSICA M. HILL are by their terms revocable at the will of the said licensor, JESSICA M. HILL; that by reason of this defendant's breach of duty and wrongful conduct as alleged in the paragraphs of this amended complaint designated "EIGHTEENTH"

to "TWENTIETH" inclusive, plaintiff's assignors and plaintiff have elected and do hereby elect to terminate and cancel said licenses and desire that this defendant may be made to account in respect to the sales made by it of the various piano arrangements of said song "GOOD MORNING TO ALL", and for any moneys received by it for the publication of said work in any foreign country, or for mechanical reproductions or performances thereof in any country; or for any arrangements permitted to be published by any other publishing house under a royalty contract.

THIRTIETH: Plaintiff has no adequate remedy at law.

FOR A THIRD CAUSE OF ACTION.

THIRTY-FIRST: Plaintiff repeats and reiterates the allegations contained in the paragraphs of the complaint numbered "FIRST" to "ELEVENTH" inclusive, with the same force and effect as if set forth at length herein.

THIRTY-SECOND: The aforesaid MILDRED J. HILL died intestate on June 5th, 1916, a resident of Louisville, Kentucky, leaving her surviving as her sole heirs and next of kin two sisters, the above mentioned PATTY S. HILL and JESSICA M. HILL and a brother WILLIAM WALLACE HILL, all of whom were of full age at the date of her death.

THIRTY-THIRD: Thereafter and in October, 1916, the said PATTY S. HILL, JESSICA M. HILL and WILLIAM WALLACE HILL, as the sole heirs and next of kin of the said MILDRED J. HILL, deceased, requested the first corporation to pay all royalties properly payable to the said MILDRED J. HILL under the licenses mentioned and describe in the paragraphs hereof numbered "FOURTH" to "NINTH" inclusive, to the said JESSICA M. HILL; it being the intention of the parties there 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, JESSICA M. HILL, and vested in her absolutely as her sole property; of all of which the first corporation had due notice and in which it acquiesced.

THIRTY-FOURTH: In accordance with said request payments of royalties which might otherwise have been payable to the said WILLIAM WALLACE HILL or to his estate upon his decease were made by the first corporation, by SUMMY, by the second corporation and by the defendant herein subsequent to the date when it commenced doing business.

THIRTY-FIFTH: On or about April 4th, 1923, the aforesaid WILLIAM WALLACE HILL died a resident of Chicago, Cook County, Illinois, leaving a last will and testament which was admitted to probate in the Probate Court of Cook County, Illinois.

THIRTY-SIXTH: By his said last will and testament said WILLIAM WALLACE HILL gave, devised and bequeathed all property of which he died seized, to his widow, CORINNE DOROTHY HILL, who was nominated and appointed Executrix under said will, and who thereafter qualified as such Executrix.

THIRTY-SEVENTH: Said CORINNE DOROTHY HILL died intestate in September, 1934, leaving her surviving no children and no known heirs at law or next of kin.

THIRTY-EIGHTH: That at no time during her lifetime did said CORINNE DOROTHY HILL, either individually or as Executrix under the last will and testament of said WILLIAM WALLACE HILL, deceased, assert any claim, interest in, or title to the copyrights or the renewals thereof more specifically mentioned and described in paragraphs numbered "FIFTH", "EIGHTH" and "TWELFTH" of this complaint.

THIRTY-NINTH: That the defendant, well knowing the premises, and while a relationship of trust existed between it and the aforesaid PATTY S. HILL and JESSICA M. HILL, and while the legal title to the hereinbelow mentioned and described copyrights and renewals thereof was vested in the said PATTY S. HILL and JESSICA M. HILL, purchased or purported to purchase, without the knowledge, permission or consent of the said PATTY S. HILL and JESSICA M. HILL, at Chicago, Illinois, in March, 1939, from one ALLEN DAVY as administrator de bonis non with the will annexed of the estate of the aforesaid WILLIAM WALLACE HILL, deceased, and for a recited consideration of twenty-five dollars, all of the right, title and interest of the said ALLEN DAVY as administrator aforesaid, and all of the right, title and interest of the said WILLIAM WALLACE HILL, deceased, and of the estate of WILLIAM WALLACE HILL, deceased, in and to the following property, to wit: an undivided one-quarter (1/4) legal and equitable interest in the following copyrights and renewal copyrights to the following books and musical compositions written by the aforesaid MILDRED J. HILL and PATTY S. HILL:

- 1) Song Stories for the Kindergarten. Original United States copyright registration, October 13, 1893, entry #45997 or #45997Y; renewal registration, September 3, 1921, renewal registration #19043.
- 2) Song Stories for the Kindergarten. New edition, revised, illustrated and enlarged. Original United States copyright registration, June 8, 1896, entry #34260 or #34260B2; renewal registration, January 9, 1924, renewal registration #25771.
- 3) Song Stories for the Sunday School. Original United States copyright registration, March 20, 1899, entry #20441; renewal registration January 3, 1927, renewal registration #36618.
- 4) Good Morning to All. Original United States copyright registration, February 7, 1907, entry #142468 or #C142468; renewal registration January 2, 1935, renewal registration #34877 or #R34877,

and in any rights, claims, demands and causes of action which may have heretofore accrued or which may hereafter accrue because of infringements of said copyrights and renewal copyrights.

FORTIETH: That the copyrights and the renewals thereof described in paragraph "THIRTY-NINTH" hereof are the same copyrights and renewals under which this defendant has heretofore purported to act as licensee and under which it is still purporting to act as such licensee in granting licenses and sub-licenses more particularly mentioned and described in the first cause of action of this amended complaint.

FORTY-FIRST: That the defendant herein furnished the money to pay the aforesaid purchase price of \$25.00 recited by the said ALLEN DAVY as administrator as the consideration for the conveyance by him to this defendant; that this defendant claims to be the holder of some interest in and to the aforesaid copyrights and the renewals thereof wrongfully and without any color of right thereto and in violation of its duty to the said PATTY S. HILL and JESSICA M. HILL as trustee of any copyrights as to which licenses were heretofore granted to it.

FORTY-SECOND: Plaintiff repeats and reiterates the allegations contained in the paragraph of the complaint numbered "TWENTY-SECOND" with the same force and effect as if set forth at length herein.

FORTY-THIRD: Plaintiff has no adequate remedy at law.

WHEREFORE plaintiff demands judgment as follows:

a) That the defendant may be required to account to the plaintiff for its acts, conduct and receipts of all moneys received by it from all sources whatsoever as royalties for the sound and dramatic rights of the song "HAPPY BIRTHDAY TO YOU."

b) That upon such account being had, the defendant be directed to pay over to this plaintiff the amount thereof together with all interest properly payable thereon.

c) That the defendant may be required to account to the plaintiff for all royalties payable to the plaintiff by reason of the publication and sale in the regular course of business of the copyrighted books or works mentioned and described in the complaint herein.

d) That the defendant, its officers, agents, and employees, may be enjoined and restrained, during the pendency of this action, from licensing any person, firm or corporation whatsoever to use the song described as aforesaid and entitled "HAPPY BIRTHDAY TO YOU" in sound motion pictures, dramatic performances, or otherwise, without the written permission and consent of this plaintiff.

e) That the defendant, its officers, agents and employees be adjudged and decreed to deliver into Court for cancellation any and all written instruments of license mentioned and described in the second cause of action herein.

f) That it may be adjudged and decreed that the purchase or the purported purchase by this defendant of the alleged interest of WILLIAM WALLACE HILL, deceased, in and to the aforesaid copyrights and renewals thereof, is null and void, and of no force and effect in law or in equity; and that the defendant be adjudged and decreed to execute, acknowledge and deliver to this plaintiff, in due form for recording, any and all instruments which by reason of the premises shall or may be necessary to convey to the plaintiff herein any outstanding interest which this defendant has or claims to have in and to said copyrights and the renewals thereof.

g) That the defendant, its officers, agents and employees, may be permanently enjoined and forever restrained from licensing or granting licenses to, any person, firm or corporation whatsoever, and wheresoever located, in respect

to the use of the song "HAPPY BIRTHDAY TO YOU" in sound motion pictures, dramatic or stage performances, or otherwise.

h) That the plaintiff may have such other further and different relief during the pendency of this action and upon the trial hereof as to the Court may seem just, proper and equitable, together with the costs and disbursements of this action.



SAMUEL MANN,
Attorney for Plaintiff,
Office & P. O. Address,
No. 70 Pine Street,
Borough of Manhattan,
New York City.