

The legal brawl over "Happy Birthday To You"

According to plaintiffs' attorney Mark Rifkin, Warner/Chappel earns about \$2 million annually from the song, a figure he told CBS MoneyWatch was "conservative" because it may "underreport the revenue reported by ASCAP (the American Society of Composers, Authors and Publishers, which collects performance royalties)." Warner spokesman James Steven declined to comment for this story, as did ASCAP spokeswoman Cathy Nevins, who said such information was confidential to Warner.

In documents filed with the court, Warner argues that the plaintiffs failed to prove that they "knew, or in the exercise of reasonable care should have known" that they didn't have a valid copyright to the song. Music industry officials worry that if the plaintiffs win, that would make it more difficult for them to collect royalties on songs that have become a ubiquitous part of modern culture.

In 2004, the publishers of Woody Guthrie's "This Land is Your Land" settled a lawsuit against the Internet animation producer Jib Jab Studios over its use of the song in a popular short feature on the presidential election. Jib Jab had claimed its use was permissible because it was a parody and Guthrie's tune was in the public domain. Nonetheless, the studio settled the case by agreeing to pay The Woody Guthrie Foundation 20 percent of the profits it earned from its parody.

"There are other songs out there ... for which this case would set a precedent," said Robert Brauneis, co-director of the Intellectual Property Law Program at George Washington University Law School, who argued in a legal journal article that "Happy Birthday" should never have been copyrighted in the first place. "Copyrights are not bulletproof."

Complicating the "Happy Birthday" case is the peculiar history of the song, which sisters Mildred and Patty Hill wrote in either 1889 or 1890. Clayton Summy later bought the copyright from the Hill sisters and published it in a songbook titled "Song Stories for the Kindergarten." It was then known as "Good Morning to All," and its lyrics are different than the now-familiar tune.

Summy's company Clayton F. Summy Co., copyrighted "Happy Birthday" in 1935, which is at issue in the current case. The plaintiffs claim the copyright covered only piano arrangements, an argument Warner rejects. The plaintiffs argue that the first reference to the song's lyrics was in 1901 and that the first copyrighted work including both the music and lyrics was in 1924. None of these works credited anyone for the lyrics. Warner/Chappel acquired Summy's successor company Birch Tree Ltd. in 1988.

When it comes to copyrights, timing is everything. The law when the song was first registered in 1935 allowed for initial protection of 28 years with a 28-year renewal term. Congress has amended the law several times since then, and now works can be copyrighted for 95 years from when the protection was first secured.

"The question of how far back the damages can go will be something that the parties will vigorously dispute," said plaintiffs' attorney Rifkin. "If the court decides the scope of the copyright in the plaintiffs' favor, the case will move directly to class certification. ... So, I would expect that the question of how far back the damages will recoverable should be decided within six months or so after the decision on the scope of the copyright."

Brauneis of George Washington University Law School believes the plaintiffs have a strong case and has been advising them as an unpaid consultant.

"There are a number of weaknesses in the copyright of 'Happy Birthday,' but in my view the clearest and most significant weakness is this: The renewal registrations for the song, which under then-current copyright law were necessary to maintain copyright after 1962, only cover certain piano arrangements, and do not cover the basic combination of words and music," Brauneis wrote in an email to CBS MoneyWatch.

"I don't think that was inadvertent," he added. "I think that at the time everyone thought that they were only claiming protection for arrangements of an old song, and then later someone had the idea that maybe they could try to claim more. The challengers to the copyright of 'Happy Birthday' have a number of additional grounds for their challenge, including abandonment, because for a very long time, no one enforced the copyright in the song."

It remains to be seen who will be singing a new tune once the case is resolved.

By Jonathan Berr