

DW 20-439
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
Civil Action No. 20-439

THE HILL FOUNDATION, INC.,
Plaintiff,

-vs-

POSTAL TELEGRAPH-CABLE COMPANY,
Defendant.

A N S W E R

DARBY & DARBY,
Attorneys for Defendant
Chrysler Building
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New York, N. Y.

S. DISTRICT COURT
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SAMUEL MANN
Att. for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE HILL FOUNDATION, INC., :
 :
 Plaintiff, :
 : Civil Action
 -vs- :
 : No. 20-439.
 :
 POSTAL TELEGRAPH-CABLE COMPANY, :
 :
 Defendant. :
-----X

A N S W E R

Defendant for answer to the complaint herein, or to as much thereof as it is advised is material or necessary to be answered, says:

1. Defendant admits the allegations of Paragraph 1 of the complaint.

2. Defendant admits the allegations of Paragraph 2 of the complaint.

3. Defendant admits the allegations of Paragraph 3 of the complaint.

4. Defendant admits the allegations of Paragraph 4 of the complaint.

5. Defendant, on information and belief, denies the allegation of Paragraph 5 of the complaint.

6. Defendant denies each and every allegation of Paragraph 6 of the complaint, except that it admits the entry of the songs collectively entitled "Song Stories for the Kindergarten" in the Office of the Register of Copyrights of the United States on the 13th day of October,

1893 under Copyright No. 45,997.

7. Defendant denies each and every allegation of Paragraph 7 of the complaint, except that it admits the entry of the songs collectively entitled "Song Stories for the Kindergarten" in the Office of the Register of Copy-rights of the United States on the 8th day of June, 1896 under Copyright No. 34,260; but defendant avers, on information and belief, that the said work was not duly copyrighted thereby.

8. Defendant denies each and every allegation of Paragraph 8 of the complaint, except that it admits that one of the songs contained in the collection of songs described in Paragraphs 6 and 7 was entitled "Good Morning to All"; but defendant avers that the words of the song "Happy Birthday to You" are entirely different from the words of the song "Good Morning to All".

9. Defendant denies each and every allegation con-tained in Paragraph 9 of the complaint, except that it admits that the song "Happy Birthday to You" has acquired a nationwide popularity and that performances thereof have been given vocally,orchestrally, and over the radio.

10. Defendant is without knowledge or information sufficient to form a belief as to the matters alleged in Paragraph 10 of the complaint and therefore denies them, except that defendant admits the allegations as to the re-nawal registration of the alleged copyrights therein referred to; but defendant denies that copyright in the song "Happy Birthday to You" was included in the renewal copyright registrations in said paragraph of the complaint mentioned.

11. Defendant admits the allegations of Paragraph 11 of the complaint.

12. Defendant admits the allegations of Paragraph 12 of the complaint that it transmitted and delivered birthday greetings by the use of the song "Happy Birthday to You"; but denies that the said song was copyrighted. Defendant kept no record of the number of such birthday greetings transmitted and delivered by it commencing in February 1938 and therefore is without knowledge sufficient to form a belief that it transmitted and delivered the number of said birthday greetings as set forth in the said paragraph of the complaint.

13. Defendant admits that its use of the song "Happy Birthday to You" was without the consent or authority of plaintiff's assignors, but avers, on information and belief, that the consent and authority of the said plaintiff's assignors were unnecessary in that they were not then the owners and proprietors of the said song or any copyrights thereto; and further denies that the said song was copyrighted; and further denies that defendant's use of the said song, as alleged in the said paragraph of the complaint was in infringement of any copyrights owned by plaintiff.

14. Defendant admits the allegation in Paragraph 14 of the complaint of the assignment to plaintiff dated June 2, 1942 and the recording thereof in the Copyright Office of the United States on June 8, 1942 in Copyright Office Book 485 at pages 242-243; but defendant denies that the said assignment was in conformity with the laws of the United States concerning copyrights, and denies that plaintiff by virtue of the said assignment became and was or is the owner of the alleged copyright.

15. Defendant admits the allegations of Paragraph 15 of the complaint, but denies that it was under any obligation to render the accounting demanded of it.

FIRST DEFENSE

16. The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

17. The defendant avers that a copy of the book entitled "Song Stories for the Kindergarten", said book containing a song entitled "Good Morning to All", was deposited and registered in the Copyright Office of the United States on October 13, 1893, under Entry No. 45,997, and that said book deposited in the Copyright Office bears the following notice of copyright: "Copyright, 1893, Clayton F. Summy Co."

18. That a later edition of the said book entitled "Song Stories for the Kindergarten" containing a copy of the identical song entitled "Good Morning to All" was deposited and registered in the Copyright Office by Clayton F. Summy Co., on June 8, 1896, under Entry No. 34,260. That the said book bears a copyright notice reading: "Copyright, 1896, Clayton F. Summy Co.", but that the said work fails to give notice of the copyright registered on the said work by Clayton F. Summy Co. in 1893.

19. That a later work entitled "Song Stories for the Sunday School", containing a copy of the identical song entitled "Good Morning to All", was deposited and registered in the Copyright Office by Clayton F. Summy Co., on March 20, 1899, under Entry No. 20,441. That said book bears a

copyright notice reading: "Copyright 1899, Clayton F. Summy Co.", but that said work fails to give notice of the copyright registered by Clayton F. Summy Co. in 1893.

20. That the identical song entitled "Good Morning to All" was again deposited and registered for copyright in the name of Clayton F. Summy Co., February 7, 1907, under Entry No. C:142648. The said work deposited bears a copyright notice reading: "Copyright 1907, Clayton F. Summy Co.", but fails to give notice of the copyright registered on the said work in 1893 or 1899.

21. Defendant avers that the successive republications of the said song entitled "Good Morning to All" with notices of copyright in 1896, 1899 and 1907 as described therein, and the successive registrations of claims of copyright in the said song by the said Clayton F. Summy Co. in 1896, 1899 and 1907 as described in Paragraphs 18, 19 and 20 hereof, caused a forfeiture of the alleged copyright secured in this work in 1893; that by reason of said successive republications and re-registrations the claimed copyright of 1893 became void, and that the said song entitled "Good Morning to All" or "Happy Birthday to You" became dedicated to public use and is now a part of the public domain.

THIRD DEFENSE

22. On information and belief defendant avers that one, Jessica M. Hill, filed application in the Copyright Office for a renewal of the copyright alleged to have been secured on the 13th day of October 1893, and that said renewal application was filed on September 3, 1921 by the said Jessica M. Hill as "next-of-kin" of Mildred J. Hill,

the alleged composer of the music of the song entitled "Good Morning to All". That at the time of the said filing of the said application for renewal of the alleged copyright Patty S. Hill, one of the alleged authors of the said song, was living. That, in consequence, the renewal copyright claimed by Jessica M. Hill was void in that the said Jessica M. Hill was not a person authorized by law to renew the said copyright and in that the copyright sought to be renewed had theretofore become invalid.

FOURTH DEFENSE

23. Defendant avers that prior to June 2, 1942, the date of assignment from Patty S. Hill and Jessica M. Hill to plaintiff, The Hill Foundation, Inc., as alleged in Paragraph 14 of the complaint, the said Patty S. Hill and Jessica M. Hill had sold, assigned, transferred and conveyed to Clayton F. Summy Co., a Delaware corporation, with its principal office at 321 South Wabash Avenue, Chicago, Illinois, their entire right, title and interest in and to their said copyrights and their then renewals and extensions thereof; and of all other right, title and interest of every kind and character and in and to any rights, claims, demands and causes of action which the said Patty S. Hill and Jessica M. Hill, or either of them, had or might have had against any person or persons who had theretofore infringed any of the alleged copyrights; that the said assignment was dated September 2, 1939 and, on the 21st day of September, 1939, was duly recorded in the assignment records of the Copyright Office of the United States in Volume 425, pages 36, 37 and 38 thereof, all as appears from a copy of the said assignment hereto attached and

made a part hereof; and that the records of the Copyright Office disclose no subsequent assignment from Clayton F. Summy Co. to Patty S. Hill and Jessica M. Hill, wherefore plaintiff is without title to maintain this action.

FIFTH DEFENSE

24. Defendant avers that prior to February 1938 Clayton F. Summy Co. was and since then has continued to be a member of the American Society of Composers and Publishers (generally known as ASCAP), which was and is vested by the copyright owning members thereof (and specifically by Clayton F. Summy Co.) with the right to grant permission and license to use and reproduce works, the copyrights to which are owned by its members. That defendant was expressly licensed by ASCAP to use the words and music of the song "Happy Birthday to You" in the delivery of birthday greetings; that defendant's utilization of the song "Happy Birthday to You" in the delivery of birthday greetings complained of in Paragraphs 11 and 12 of the complaint was under said license from ASCAP.

SIXTH DEFENSE

25. Defendant avers that the utilization of the song "Happy Birthday to You" in delivering birthday greetings was not a public performance and, in consequence, was not in infringement of any copyright.

WHEREFORE defendant denies that plaintiff is entitled to the relief prayed for, or to any relief, and therefore prays that the complaint be dismissed with defendant's costs sustained in connection therewith, together with attorneys' fees, as prescribed by law.

POSTAL TELEGRAPH-CABLE COMPANY

Darby & Darby
Attorneys for Defendant
405 Lexington Av., New York, N.Y.
Samuel E. Darby Jr.
Of Counsel.

By

J. L. Logue
Its

Vice President

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

F. J. Logue, being duly sworn, deposes and says:

That he is *Vice President* of POSTAL TELEGRAPH-CABLE COMPANY, the defendant named in the foregoing bill of complaint; that he has read the same and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is not made by the defendant personally is that the defendant is a corporation.

F. J. Logue

Sworn to and subscribed before me this 12 day of April, 1943.

William J. Callas
Notary Public.

Notary Public, State of New York, No. 111
Cert. of Qual. by the State of New York, Reg. No. 4895
Commission Expires March 30, 1945