

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

THE HILL FOUNDATION, INC.,

Plaintiff,

-against-

CLAYTON F. SUMMY CO.,

Defendant.

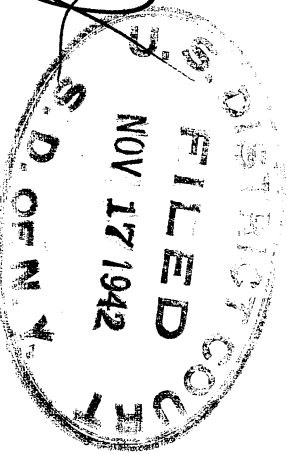
(Original)

ANSWERING AFFIDAVIT.

SAMUEL MANN,

Attorney for Plaintiff, .....

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



UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

-----X

THE HILL FOUNDATION, INC.,

Plaintiff,

Civil 19-377.

-against-

CLAYTON F. SUMMY CO.,

Defendant.

AFFIDAVIT IN OPPOSITION  
TO DEFENDANT'S MOTION  
TO VACATE NOTICE FOR  
ITS EXAMINATION BEFORE  
TRIAL.

-----X

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) SS.

SAMUEL MANN, being duly sworn, deposes and says, that he is the secretary of THE HILL FOUNDATION, INC., the plaintiff herein; and that he is duly authorized to make this affidavit in answer to defendant's motion to limit an examination before trial of its president to items "1" and "2" in a notice therefor dated November 6th, 1942.

That this action was brought in equity to have this defendant, a Delaware corporation, decreed a constructive trustee by reason of its wrongful conduct in entering into various agreements with producers of sound motion pictures and of stage or dramatic performances for the sound and dialogue rights, for the use of the song entitled "HAPPY BIRTHDAY TO YOU", a duly copyrighted work, without the knowledge, permission or consent of this plaintiff or of plaintiff's assignors, the owners of the copyright. The defendant, whose principal office and place of doing business is in Chicago, Illinois, acquired or purported to acquire in some manner unknown to plaintiff and its assignors certain licenses which were originally granted to one CLAYTON F. SUMMY, president of an Illinois corporation known as CLAYTON F. SUMMY COMPANY, organized in January, 1895; and thereafter suc-

ceeded by another Illinois corporation known as CLAYTON F. SUMMY CO. which was organized in April, 1925.

From inquiries made by deponent in the office of the Secretary of State of Illinois, it appears that the company organized in April, 1925, was dissolved by action of the office of the Attorney General of Illinois in the Superior Court of Cook County, Illinois. The defendant herein was organized in Delaware on or about August 31st, 1931; prior to the dissolution of the Illinois corporation in May, 1933.

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 collectively entitled "SONG STORIES FOR THE KINDERGARTEN"; thereby becoming the proprietors of the music and words of these songs. Reposing the utmost faith, confidence and trust in the president of the first Illinois corporation (which was organized in 1895), the aforesaid CLAYTON F. SUMMY, the authors executed and delivered to SUMMY a license to publish and sell said book and to copyright it in his own name in consideration of the payment to the authors of a fixed royalty for each copy sold. SUMMY obtained a copyright of said book on October 13th, 1893; another copyright on June 8th, 1896 of a revised and enlarged edition thereof; and on April 17th, 1899, MILDRED J. HILL licensed him to publish certain songs from the book in question in a new book entitled "SONG STORIES FOR THE SUNDAY SCHOOL", and to copyright the new book in consideration of the payment to her of a fixed royalty.

That one of the songs contained in the works mentioned was one entitled "GOOD MORNING TO ALL" which, with words entitled "HAPPY BIRTHDAY TO YOU" and written by PATTY S. HILL, thereafter acquired a world-wide popularity and which has continued down to the present time; performances thereof having been given vocally, by orchestras, in various dramatic performance on the stage, and in various forms over the radio.

That thereafter but prior to the expiration of said copyrights, MILDRED J. HILL died and the original copyrights were renewed in 1921, 1924 and 1927 in the name of JESSICA M. HILL, another sister, and PATTY S. HILL, one of the original authors. The defendant in this action was not in existence at the time of such renewals and its president, MR. JOHN F. SENGSTACK, was not, to the best of deponent's knowledge, information or belief, in any wise or manner associated with CLAYTON F. SUMMY CO. at the time of such renewals. Between 1920 and 1925, when two of the three original copyrights were renewed, there was no corporation in existence by the name of either CLAYTON F. SUMMY CO. or CLAYTON F. SUMMY COMPANY.

In November, 1941, deponent discovered that the defendant herein was granting sub-licenses to motion picture producers in respect to the use of the song "HAPPY BIRTHDAY TO YOU" in sound films, and that it had been engaged in so doing for a number of years last past. It is important to point out that the licenses (which were prepared by the publishers of the books above referred to) do not mention the defendant as an incorporation organized in Delaware, or in any other state for that matter; nor are said licenses by their terms assignable. It is further important to point out to the Court that no notice was ever given to plaintiff's assignors, the ~~MISSESPATTYS~~ and JESSICA M. HILL, or to plaintiff that the two Illinois corporations were no longer in existence, or that the present defendant had been organized in Delaware and had in some manner acquired or purported to acquire the licenses described above. On the contrary it now appears that this defendant preferred to have plaintiff's assignors and plaintiff believe that they were dealing with the original Illinois corporation at all times, as is more fully evidenced by the following extract from a letter dated February 25th, 1942, addressed to MISS PATTY S. HILL by this defendant and reading as follows:

Reproduced from NARA Records, Region New York

"Except for a change in ownership of capital stock of the company, the Clayton F. Summy Company operates as always since 1888 (the same name and, until recently, most of the personnel). Mr. Roy Murphy, an employee of the company for over 35 years, died last year, but until that time he had been active in the affairs of the company. Mr. Foster, who has been with the company for over 40 years, is still in charge of many of the Chicago activities. Other employees who were with the company during Mr. Summy's lifetime are still active in its affairs.

I am merely giving you the above information to better acquaint you with the personnel of the company.

Sincerely yours,

CLAYTON F. SUMMY CO.,  
J. F. Sengstack."

The stationery of the defendant herein bears the name, "CLAYTON F. SUMMY CO." and in small letters under the name "ESTABLISHED 1888." Defendant's answer herein admits that it is a Delaware corporation and denies that it is an Illinois corporation; and it becomes obvious that the purpose of this defendant in concealing its original incorporation in Delaware was to create the impression that plaintiff's assignors were dealing with the company in whose president they reposed trust, faith and confidence.

That in view of the fact that neither this plaintiff nor plaintiff's assignors had no knowledge or information as to the existence of this Delaware corporation, and in view, further, of the fact that the defendant deliberately attempted to convey the impression that it was the original Illinois corporation, it becomes material and necessary for this plaintiff to not only know when and where it commenced doing business and how it acquired the licenses from the Illinois corporation, (the right to which is not disputed by defendant, Items "1" and "2" of the notice); but it is further material and necessary that the plaintiff know when the defendant began to grant sub-licenses, to whom they were granted, the terms and conditions upon which they were granted, and from whom it is collecting royalties (Items "3" to "6" inclusive.)

That no information is sought by plaintiff as to the amounts heretofore collected by this defendant or when such sums by way of royalties were collected; but on the contrary that this defendant acted or purported to act without the knowledge, permission or consent of plaintiff's assignors (the original owners of the copyrights and the renewals thereof) and this plaintiff, in granting sub-licenses, and that it in fact did grant such sub-licenses. That without such information being furnished in advance of the trial, plaintiff will not be able to establish a prima facie case as to its first cause of action.

That deponent is informed and verily believes that this defendant secretly granted such sub-licenses for some eight years or more; that is, since about 1934, and since this defendant has never made any disclosure as to its acts and conduct during all these years, it is necessary that a full and complete examination thereof be had.

WHEREFORE, deponent prays that the defendant's motion may be denied in its entirety, and that the examination be directed to proceed forthwith.

Sworn to before me this  
17th day of November, 1942.

*Grace D. Gordon*

GRACE D. GORDON  
Notary Public, Kings County  
Kings Co. Clk's No. 617  
N. Y. Co. Clk's No. 583  
Commission Expires Mar. 30, 1943

*Samuel Mann*  
SAMUEL MANN.