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IP Practice specializing in trademark and copyright law; IP counseling; domestic and international maintenance and protection of IP portfolios; Internet issues; social media; IP audits and strategies relating to IP portfolios; drafting and negotiating IP and IT-related agreements

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Do I Need to Pay Someone to Sing "Happy Birthday To You"?

The song "Happy Birthday to You" boasts a number of accolades including the most sung melody in history and the most popular song of the 20th Century. While many believe that this iconic song was created out of folk tradition, the song's origins can be traced back to two sisters who created it in the early 1890's. The song is now owned by Warner/Chappell Music, a subsidiary of Warner Music Group, one of the largest music publishers in the world. In 1988, Warner/Chappell acquired a smaller music publishing group for $25 million, whose holdings included the song. The song alone collects an estimated $2 million a year in licensing fees.

It is alleged that "Happy Birthday To You" has passed into the public domain.

Not everyone believes that Warner/Chappell should still be collecting licensing fees for the song, and this largely shared sentiment led to the recent filing of a class action lawsuit in a New York court. In this case, *Good Morning to You Productions Inc. v. Warner/Chappell Music*, a New York filmmaker disputes the $1,500 she was charged to use the song in her documentary, because she alleges that the song has crossed into the public domain, and it can be freely used by anyone. Unless Warner/Chappell ends up on the favorable side of the verdict, it will continue to profit off its popular birthday song by charging licensing fees that amount to upwards of $2 million annually.

A work of authorship is said to have crossed into the "public domain" if the term of copyright protection has expired or it has failed to meet the requirements to attain copyright protection. The term of copyright protection lasts the life of the author plus 70 years or 95 years in the case of a copyright owned by a corporation. Works in the public domain can be used without

permission or payment of a licensing fee.

So, until this case is resolved, how will you know whether you need to pay a fee to sing "Happy Birthday to You"? Will you be sued for copyright infringement if you don't license the right to use and sing the song? The answer to that question is likely "no," especially if you are singing the song in the privacy of your home.

Copyright law allows for certain private, non-commercial uses of copyrighted works – uses that would not qualify as a "public performance" as set forth in the copyright statute. In general the law states that a "public performance" means a public performance in an open place or anywhere where a substantial number of people outside a normal circle of family and friends have gathered. Using a song in a movie is considered to be a public performance, and so is the use (or broadcast) of a song in a restaurant. Movie producers and restaurant owners need to obtain a license to broadcast or publicly perform the "Happy Birthday to You" song. You are safe if you sing this song in your home, or even at your office, since neither setting would constitute a "public performance" for copyright purposes.

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Good Morning to You Productions Inc. v. Warner/Chappell Music presents other interesting and complex copyright law issues that we won't delve into here. We just wanted you to be aware of how copyright law can affect our everyday lives, and things that you typically don't give much thought to – like singing "Happy Birthday To You," may actually make you stop and think now. It may be quite some time before this case is resolved, but we will be sure to update you when that happens.