

# 14-0182-cv

---

United States Court of Appeals  
for the  
Second Circuit

---

GLORIA COOTS BALDWIN, PATRICIA BERGDAHL,  
CHRISTINE PALMITESSA, Individuals,

*Plaintiffs-Appellants,*

– v. –

EMI FEIST CATALOG, INC., a New York corporation,

*Defendant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**PETITION FOR PANEL REHEARING  
OR REHEARING *EN BANC***

---

DONALD S. ZAKARIN  
FRANK P. SCIBILIA  
ROSS M. BAGLEY  
PRYOR CASHMAN LLP  
*Attorneys for Defendant-Appellee*  
7 Times Square  
New York, New York 10036  
(212) 421-4100

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

RULE 35(b)(1) STATEMENT ..... 1

RULE 40(a)(2) STATEMENT ..... 3

THE DECISION & RELEVANT FACTS ..... 5

ARGUMENT ..... 9

    I. The Decision Incorrectly Concluded That A Grant  
    Of The “Extended Renewal Term” Includes The  
    Remainder Of The 1909 Act’s 28-Year Renewal Term ..... 9

    II. The Decision Conflicts With *Mewborn* ..... 12

    III. The Decision’s Interpretation of “Publication” Under Section  
    203 Is Contrary To The Language And Policy Of The ‘76 Act ..... 13

CONCLUSION ..... 15

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE(s)</u></b>
<i>Classic Media, Inc. v. Mewborn</i> , 532 F.3d 978 (9th Cir. 2008) .....	3, 12
<i>Conn. Nat’l Bank v. Germain</i> , 503 U.S. 249 (1992) .....	13
<i>Mills Music, Inc. v. Snyder</i> , 469 U.S. 153 (1985) .....	10, 14
<i>Milne v. Stephen Slesinger, Inc.</i> , 430 F.3d 1036 (9th Cir. 2005) .....	12
<i>Tasini v. N.Y. Times Co.</i> , 206 F.3d 161 (2d Cir. 1999), <i>aff’d</i> , 533 U.S. 483 (2001) .....	13
<i>Woods v. Bourne Co.</i> , 60 F.3d 978 (2d Cir. 1995) .....	11
 <b><u>STATUTES</u></b>	
FRAP 35.....	1
40 .....	1
17 U.S.C. § 101 .....	13
§ 104 .....	13
§ 104A .....	13
§ 203 .....	<i>passim</i>
§ 203(a) .....	1
§ 203(a)(3).....	<i>passim</i>
§ 203(a)(4)(A) .....	6
§ 203(b)(4).....	2, 6, 15
§ 304 .....	<i>passim</i>
§ 304(a) .....	6
§ 304(b) .....	2, 10
§ 304(c) .....	<i>passim</i>
§ 304 (c)(3).....	2, 5, 10
§ 304(c)(6)(A) .....	14
§ 304(c)(6)(4)(A).....	6

§ 304(c)(6)(D) .....	2, 6, 14, 15
<b><u>STATUTES</u></b>	<b><u>PAGE(s)</u></b>

§ 304(c)(6)(F) .....	6, 8, 10
§ 304(d) .....	6, 7, 15
§ 401 .....	13
§ 408 .....	13
§ 409 .....	13
§ 410 .....	13
§ 412 .....	13

**LEGISLATIVE HISTORY**

H.R. Rep. No. 94-1476 at 140 (1976).....	11
--	----

Pursuant to FRAP 35 and 40, defendant/appellee EMI Feist Catalog, Inc. (“EMI”) respectfully seeks a panel rehearing or rehearing *en banc* of the decision of this Court (Pooler, Livingston, Droney, C.J.) entered on October 8, 2015 (the “Decision”) in this appeal (the “Appeal”) concerning ownership of the copyright in the musical composition *Santa Claus is Comin’ to Town* (the “Song”).

### **RULE 35(b)(1) STATEMENT**

The Decision and this Appeal raise questions of exceptional importance affecting far more than ownership of one song. The Decision is premised on interpretations of §§ 304 and 203 of the U.S. Copyright Act that are contrary to precedent, rewriting the statute. The Decision also upends New York contract law, converting a “plausible” interpretation of a contract into one the Panel labels “clear and unambiguous,” disregarding provisions of the contract inconsistent with such interpretation as well as all contemporaneous extrinsic evidence confirming that the parties’ understanding of the contract was exactly contrary to such interpretation.

In interpreting the meaning of publication “*under the grant*” in § 203(a)(3), the Panel excised the phrase “*under the grant*,” rewriting it to say “*first publication under any grant*.” The Panel’s interpretation has far-reaching consequences, shortening, by up to five years, the duration of pre-existing grants already paid for by a publisher or future grants designed by Congress to be the lesser of 40 years

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.