



10-1984

## Mills Music, Inc. v. Snyder

Lewis F. Powell Jr.

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Dispute - Could  
John Hesse

Famous song: "Who's Sorry Now" (1923)

Case involves royalties  
from derivative rights of  
the "composer" of song.

CA's decision is sublime,  
but no conflict.

~~Issue~~, however, is  
important - & the judge, entered  
in this case may be wrong.

PRELIMINARY MEMORANDUM

March 2, 1984 Conference  
List 1, Sheet 3

No. 83-1153

MILLS MUSIC, INC. *de*

v.

SNYDER, et al. *de*

Cert to CA 2  
(Oaks, Cardamone,  
Pierce)

Federal/Civil Timely

1. SUMMARY: Whether the "derivative works exception" to  
the termination of transfers provision of the Copyright Act of  
1976, 17 U.S.C. §304(c)(6)(A), entitles a "composer" of a song,  
*rather than*  
~~not~~ the music publishing company, to royalties from certain  
derivative works.

Dony.

There is no conflict, and considering Hollywood's interest, the CA9  
should register its vote rather than ~~wait~~ *wait* a conflict. ~~at~~ This

2. FACTS & DECISION BELOW: In 1976 Congress made major revisions to the copyright laws. The existing copyright laws permitted a copyright holder to exclusive use of the work for two successive terms of 28 years. The revisions to the copyright laws provided that after January 1, 1978, new copyrights would generally last for the life of the author plus 50 years. 17 U.S.C. §302(a). Copyrights already in existence and in their renewal term after the Act's effective date were extended by adding 19 years to the 28 year renewal term. 17 U.S.C. §304(b). Under the revisions, if an author grants one or more of his statutory rights to another, or if, in the case of extended term copyrights, the author had previously made such a grant, he (or his heirs) may, subject to certain limitations, terminate the grant. Grants of copyrights to others made after the Act's effective date may be terminated by the author or his representative after 35 years, 17 U.S.C. §203(a)(3), while grants made before the effective date of the Act may be terminated at the end of the 28 year renewal term. Section 304(c).

One exception to the termination rights of copyright holders is that a derivative work, such as a sound recording, motion picture, or other creation based in part upon a pre-existing copyrighted work and produced pursuant to a grant from the owner of that copyright may "continue to be utilized under the terms of the grant after its termination." Section 304(c)(6)(A).<sup>1</sup>

??  
1 1

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Footnote(s) 1 will appear on following pages.

*famous song*

Resps' father, Ted Snyder, co-authored and was one-third owner of the copyright in the song "Who's Sorry Now." The copyright was originally registered in 1923. In 1940 Snyder assigned his rights in the renewal term to petr, which had by then acquired all of the rights in the initial copyright term. Under the authority of that grant, petr licensed various record companies to create recordings of "Who's Sorry Now." and to make and distribute copies of the sound recordings as phonograph records. From 1951 to 1980, the renewal term of the song's copyright, petr issued 419 licenses to record companies to use the song in a single release or re-release of a sound recording. From the period July, 1971, through June, 1980, the licensees paid \$142,633.53 in royalties, which were shared equally by petr and the composers.

Resps, heirs to Snyder's one-third interest in the copyright, exercised their right of termination. There was a dispute over whether petr could keep one-half of the royalties paid by licensee recording companies which had made recordings of "Who's Sorry Now," even though resps had properly exercised their right to terminate petr's copyright grant.<sup>2</sup> The DC

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<sup>1</sup>The text of 17 U.S.C. §304 (c) (6) (A) reads:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

<sup>2</sup>The suit was initiated by the the Harry Fox Agency as an interpleader action. Fox handled the mechanics of issuing

Footnote continued on next page.

ruled in petr's favor, finding that petr's right to receive royalties on the derivative works it licensed under its now-extinguished authority survived resps' termination of the original grant from Snyder to petr. The DC reasoned that the statutory exception to the power of termination necessarily carried with it the permission by the composer to the terminated grantee to use the terminated work. The DC viewed the legislative history of the provision as ambiguous, but the court thought that Congress had been aware of a partnership between composers and publishers that needed support. The DC concluded that petr was entitled under 17 U.S.C. §304(c)(6)(A) to continue sharing in the royalties gained from licenses granted before its rights were terminated.

The CA2 reversed. It viewed the situation as presenting "two separate grants," one from Snyder to petr and a second grant from petr to the record companies that actually produced the derivative works. The Snyder-petr grant permitted it to retain 50% of the net royalties actually received. The separate grants from petr to the record companies specified that the record companies were obligated to pay 100% of the royalties to petr. The language in the statutory exception stating that a derivative work "may continue to be utilized under the terms of the grant" referred to only the petr-record company grants. Petr was not a utilizer of a derivative work.

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recording licenses for petr and served as the conduit for the licensees' royalties to petr.

Although the CA2 conceded that Congress did not specifically address this situation in enacting the 1976 Copyright Act, the CA2 thought that the legislative history revealed a Congressional intent to protect derivative users through the statutory exception, not publishers who acted as middlemen in facilitating derivative use of a copyrighted item. Congress also intended to benefit the creators of copyrighted works. Thus, while Congress did not specifically address this particular situation, the CA2 reasoned that its interpretation limiting the statutory exception to grantees utilizing a derivative work was consistent with congressional intent in passing the copyright amendments.

3. CONTENTIONS: Petr argues that this is a case of first impression involving an important revision of the 1976 Copyright Act. In the recording and film industries one commonly finds multiple grants of a copyright from the original creator of the artistic work. The CA2's decision essentially cuts across all intermediate grants of the copyright and permits the author or creator to terminate an extensive contractual arrangement to bring the derivative users into direct relationship with him. In the film industry, for example, the CA2's decision raises serious questions concerning the effect of a terminated grant on future uses of a film. For instance, where a film producer's original grant from a novelist or playwright reserves to the producer a share of the royalties under a later grant, does the producer continue to share in royalties because he is a

creator, or is he eliminated, like petr, because only the second grant provides for how the derivative work may be utilized. Many thousands of authors, publishers, and recording companies will be affected while the meaning of the termination provisions and the exception remain unsettled.

Petr's second argument is that the plain language of the statutory exception applies to it. The key word in the statutory provision is the word "grant." Petr argues that this should have a single, controlling meaning and not two different meanings as determined by the CA. Petr argues that the termination from resps to petr terminated only the grant that the original copyright owner had given to petr. It was under that authority that petr had licensed the sound recordings in question. Under the terms of the grant from Snyder to petr, net royalties generated by phono records made from the sound recordings petr licensed were to be shared equally by Snyder and petr. Resps' notice of termination of the "grant" was addressed only to petr, and the termination notice did not affect the terms by which the licensed recording companies "utilized" the sound recordings were prepared under the authority of the grant to petr before its termination. Thus, the plain and unambiguous language of the statute compels the conclusion that the continued utilization of the recordings should result in the equal sharing of royalties between resps and petr. Since the statute covers this factual situation, it is unnecessary to determine what Congress would have intended had it specifically and

explicitly addressed this particular situation. Petr also argues that the legislative history supports its conclusion that Congress intended to benefit a number of interests, not just the owners of derivative works.

Resps take direct issue with petr's assertion that the motion picture industry and other entertainment businesses would be thrown into disarray by the CA2's decision. The vast majority of contractual arrangements in the entertainment business will be absolutely unaffected by the CA 2's decision, since the norm is a direct grant from the original copyright owner to the creator of the derivative work. The statutory exception explicitly applies to the typical direct grant situation. Only in cases in which a middleman is involved will this case have some significance.

Resps also argue that although Congress did not expressly consider this situation, the CA's analysis of congressional intent is fully supported by the legislative history. It is quite clear that the purpose of the termination provision was to confer an economic benefit on authors and their heirs by returning to them for the 19 year extension period all rights that might have been previously granted to promoters at an earlier date, when the full value of the copyrighted works may not have been recognized. The derivative works exception was drafted to solve a particular problem under 1909 Copyright Act, which had been construed to prohibit utilization of derivative works by their owners after reversion of the underlying works under the old copyright renewal system. The



exception conferred a benefit on owners of derivative works, and ultimately on the public, by ensuring continued circulation of such works by those who have a right to utilize them. Middlemen's passive interest in receiving continued royalties is irrelevant in this situation. Finally, grantees such as music publishers, such as petr, have other ameliorative provisions in the Copyright Act to soften the blow of termination.

Petr argues in reply that (1) the case has sweeping implication for the allocation of royalties in the entertainment business. Petrs further argue that the DC's interpretation of the statutory exception is the only coherent reading of the statute, endorsed by leading authorities. See 3 M. Nimmer, Nimmer on Copyright, §11.02[B], at 11.18.2-11.18.3 (1983).<sup>3</sup> Finally, petr argues that resp is incorrect in asserting that Congress was unaware of the multi-grant copyright relationships. The language of the exception covers multi-grant situations, indicating not only that derivative users may continue to utilize their derivative works, but that derivative royalty arrangements should continue.

4. DISCUSSION: The question of further review at this point in time is a close one. Militating against further review is the fact that there is no conflict with any other

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<sup>3</sup>Nimmer concedes that he has entered the fray as partisan, filing an amicus brief in the CA2 on behalf of the National Music Publishers Association supporting the District Court's decision. See 3 Nimmer on Copyrights §11.02[B], at 11-18.1.

circuit on this issue, the CA2 being the first appellate court to address the question. Although some might also argue that the issue is of limited importance because the exemption provision affects only the 19 year extension created by Congress in the 1976 Act, the problems presented by this provision will persist for some time.<sup>4</sup>

Weighing in favor of immediate review is the importance of the question to the entertainment industries. Even if the use of a middleman to promote a song is not the prevailing norm, the use of an intermediary is probably common, petr asserts. Review now will clarify the rights of the parties in multi-grant situations and possibly settle the lingering question, to whom do derivative users turn to obtain permission to make another use of the derivative work, such as a re-release of a recording, or screening of a movie on pay-television? See 3 Nimmer on Copyrights, §11.02, at 11-18.3-18.4. Another factor in favor of review is the closeness of the question. While Nimmer has chosen sides in this case, his arguments in favor of the DC's interpretation §304(C) (6) (A) are strong. Given that the transactions involved here demand certainty, immediate review will settle an important question to the entertainment industry.

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<sup>4</sup>For instance, a copyright renewed in 1975, before the effective date of the Act, was extended for another 19 years. 17 U.S.C. §304(b). The power of termination becomes effective at the end of the original 28 year renewal term. Id., at 304(c). Conceivably, the problems presented by the exception to the termination power may persist past the end of this century.

I recommend granting the petn.  
There is a response and a reply.

2/24/84

Knudson

opns in petn

will give the Court a chance to see how  
the Ad's rule works out.

Rob

March 2, 1984

Court .....  
Argued ....., 19...  
Submitted ....., 19...

Voted on....., 19...  
Assigned ....., 19...  
Announced ....., 19...

No. 83-1153

MILLS MUSIC, INC.

vs.

SNYDER

*no conflict  
But GPS says  
result is outrageous  
& imp. to*

*D*

*Reluctant  
for T.M.  
who could  
provide  
a Grant*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT			MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G		
Burger, Ch. J.			✓									
Brennan, J.			✓									
White, J.		✓										
Marshall, J.												
Blackmun, J.												
Powell, J.												
Rehnquist, J.			✓									
Stevens, J.		✓										
O'Connor, J.			✓									

*Post  
join 3  
join 3*



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 20, 1984

Re: 83-1153 - Mills Music, Inc. v. Snyder

Dear Lewis:

Because this case came up for discussion before you arrived at the conference, I asked to have it relisted. There were two votes to grant (Byron and me), and two join three's, (your and Harry). Both the importance of the issue and the apparent injustice to the owner of the copyright persuaded me that it might be the kind of case that would strike you as certworthy. I am by no means pressing you to vote to grant, but merely felt that the possibility of a grant should not slip by because of your temporary absence at our last conference.

Respectfully,



Justice Powell

Court .....  
 Argued ....., 19...  
 Submitted ....., 19...

Voted on....., 19... March 23, 1984  
 Assigned ....., 19...  
 Announced ....., 19... No. 83-1153

MILLS MUSIC, INC.

VS.

SNYDER

*Grant*

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.													
Powell, J.		✓	✓										
Rehnquist, J.		✓	✓										
Stevens, J.		✓	✓										
O'Connor, J.			✓										

*Jan 3*



LFP/djb 7/31/84

No. 83-1153, Mills Music, Inc. v. Snyder, et al.

Memorandum for File

This is a summary memorandum on the basis of a preliminary reading of the briefs.

The Parties and Terms

In light of my unfamiliarity with Copyright Law, this case is not easy to understand. Nor do I find the opinions below or the briefs (by strong counsel on both sides) easily absorbed on a first reading. This memo will merely be a starting point for me when - with the help of a bench memo - I prepare for the argument.

This case involves a quarrel over the copyright to the song "Who's Sorry Now?". In the music industry, the composer or author of a song usually assigns his copyright to a "publisher". Under the assignment, the publisher issues licenses to record companies known as "record producers". These producers apparently make the records and market them. They pay royalties to the publisher who shares the royalties on a 50-50 basis with the composer.

The parties: The petitioner Mills Music, Inc. is the "publisher" of the Song. Ted Snyder was one of the three composers. Respondents here are his widow and Ted Snyder, Jr. who - as the composer's heirs inherited his one-third interest in the Song - an interest that had been assigned to Mills. (The Harry Fox agency had acted as agent for Mills, but apparently no longer is in the case).

This action was commenced as an "interpleader" brought by Fox to resolve a dispute between the Snyders and Mills Music concerning rights in the Song. Though the amount in controversy here is small, CA 2 stated that substantial sums in future royalties in the music, literary, and movie world will be affected by our decision. There is no dispute as to the facts. The only question is one of statutory construction as to the meaning of certain provisions of the 1976 Amendments to the Copyright Act (The Act). The case was decided by Judge Weinfeld on cross-summary motions. CA 2 unanimously reversed in an opinion by Judge Oaks. Although I am frank to say I do not fully understand these opinions at this time, my impression is that both are well written and reflect a comprehension of Copyright Law that I envy (at least for purposes of this case).

The Act (Adopted in 1976 and Effective 1978)

The Act extended existing copyrights, including the Song, by 19 years to a total of 75 years from the date of copyright. It provided that the composer or his successors may "terminate" previous grants and recapture all rights in the copyright for this 19 years extension. See §304(c). It expressly protected the composer and his heirs by providing that the "termination of the grant may be effected notwithstanding any agreement to the contrary ...". §304(c)(5). But a proviso created an exception

to the recapture provision for "derivative works". My understanding is that this term includes the recording (on a record or tape) of a copyrighted song. The Exception is known as the "derivative works exception".

The respondents (Snyders) exercised their right to terminate the assignment of the one-third interest to Mills. They did so at the beginning of the 19 year extension period as of its effective date, January 3, 1980. The DC held that the notice of termination was in proper form and operated to terminate the grant to Mills of a one-third interest in the renewal copyright in the Song. The termination, however, was subject to the applicability of the Exception.

The DC held that the Exception preserved Mills' rights, as publisher, to share Song royalties from recordings made by record producers who had been licensed by Mills as publisher. Although CA 2 recognized that "reasonable persons" could disagree as to the construction of the statute, it reversed the DC.

I will not address the statutory language in this memo. My understanding, stated simply, is that there are three levels of interest: First, the composer (Snyders); second, the publisher (Mills) who issued licenses to scores of record producers; and finally the producers.

The Court of Appeals held that the only exception to the composer's right to terminate prior grants of copyright, and thereby recapture a right to the royalties, is the Exception that permits continued use of a "derivative work" by its owner. The derivative work, as noted above, is the making of recordings of the Song.

The Court of Appeals concluded that the purpose of the Exception was to insure continued public access to derivative works - i.e. the recordings of the Song - by giving the record producers (the owners of the derivative works) the right to continue utilizing them.

Apparently Mills concedes that it never owned any interest in the sound recordings that were made by its licensees (the producers). Under the holding of CA 2, as a result of the exercise by the Snyders of the termination rights, they will receive 100 percent of the royalties from records sold over the 19 years of the extended period. Mills no longer will be entitled to receive any royalties. CA 2 held its 50 percent interest was "terminated". According to CA 2 and respondents, there no intention is evidenced in the legislative history of the Amended Act to benefit "middlemen" like Mills. The purposes were to reinstate copyright ownership (right to royalties) in the composer, and protect the public interest in being able to purchase the records from the producers who had been licensed by Mills. As a publisher, Mills was a "middle-man" who had assigned his interest to the producers.

No. 83-1153

5.

\* \* \*

At the moment, I am not even sure I fully understand the case, and I have made no attempt to review the portions of the legislative history included in the briefs. I am inclined to think, however, that CA 2's opinion probably is right.

LFP

lgs 08/15/84

Reviewed 9/11. This is a strong memo addressing a difficult statutory quest, as to ~~what~~ Congress intended in its 1976 revision of the Copyright Act.

See p. #3-4 for facts. Respectively & row of the <sup>co-</sup>author of "Who's Sorry Now", inherited Snyder's rights. Pett, a <sup>music publisher</sup> was the assignee of Snyder's 50% royalty rights in both the original & renewal terms of the copyright. Pett. had licensed several music recording cor. to produce records.

The 1976 Act provided for the termination of grants ~~of~~ of the copyright subject to the derivative <sup>works</sup> exception (records of the song were "derivative works").

The Q ~~is~~ (stated generally) is whether this "exception" provided by § 304 applies to protect Pett's rights as grantee of the author's royalty rights, or whether Pett's rights were terminated pursuant to the termination provisions of the 1976 Act.

BENCH MEMORANDUM

To: Mr. Justice Powell August 15, 1984

From: Lynda

Lynda concludes that the "exception"

No. 83-1153, Mills Music, Inc. v. Snyder et al (CA2)

(CA2 reversed DC - of Weinfield)

preserves Pett's rights. She ~~was~~ agrees with DC & would Reverse CA2. Her reasoning ~~is~~ is persuasive

Question Presented

Does the derivative works exception to the termination of transfers provision of the Copyright Act of 1976 apply to a music publisher who received the original grant of copyright renewal rights in a song and who licensed the preparation of derivative works based on the original copyright?

I. Background

A. Statutory Background

In 1976, Congress enacted a major revision of the copyright law, which, among other things, fundamentally redefined the duration of copyrights. In place of the prior law's provision for a term of 28 years followed by a renewal term of the same duration, the 1976 Act provided that new copyrights would extend for the "life of the author plus 50 years". 17 U.S.C. §302(a). Existing copyrights that were in their renewal term before the Act's effective date of January 1, 1978, were extended by adding 19 years to the renewal term. §304(b). The establishment of this new term for old copyrights in effect created new interests in property that had for the most part been disposed of long ago.

*life of author plus 50 yrs, but existing ones in their renewal term of 28 yrs. were extended 19 yrs*

Section 304(c) provides for the allocation of these new property interests. Pursuant to that section, an author (or his heirs) who had transferred rights in a copyright prior to 1978 has the option of recapturing them by terminating the grant after the end of the 28-year renewal term.<sup>1</sup> After termination, all of the previously transferred rights revert to the author or his heirs for the 19-year extension, subject to certain exceptions enumerated in §304.

The scope of one such exception, the so-called "derivative works exception" of §304(c)(6)(A) (hereinafter

*But there is an exception*

<sup>1</sup>This termination right exists regardless of any agreement to the contrary in the grant limiting the author's termination rights. §304(c)(5).

"Exception"), is the subject of this lawsuit. That subsection provides as follows:

(6) . . . In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection . . . . In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

A "derivative work" is defined in §101 of the Act as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." In short, where a work based upon copyrighted material contains sufficient modifications of the original that it represents a separate original work of authorship, it is a derivative work.

*Change must represent a separate work*

#### B. Facts

Ted Snyder, the late husband and father, ~~respectively~~, of respondents Marie and Ted Snyder, Jr., co-authored the popular song "Who's Sorry Now." The copyright was originally registered in 1923; in 1940, Snyder assigned all of his rights in the



renewal term of the copyright (hereinafter "the Snyder-Mills grant") to petr, which had by then acquired all rights in the initial term. That grant provided that petr would pay to Snyder fifty percent of all net royalties received by petr from the mechanical reproduction of the song on phonograph records.

50%

Petr licensed various record companies over the years to produce sound recordings of the song and to make and distribute phonograph records of the recordings. Each licensee paid a stated royalty for each phonograph record it made and sold; in compliance with the terms of the Snyder-Mills grant, petr paid Snyder half of the net royalties it received.

Resps inherited Snyder's interest in the copyright of the song and, pursuant to §304(c) of the Act, exercised their right to terminate the Snyder-Mills grant. The Notice of Termination applied to the "[g]rant or transfer of copyright and the rights of copyright proprietor, including publication and recording rights." See Joint App. at 54. This case arose from a dispute over who was to be paid the royalties received after termination from sound recordings licensed before termination of the Snyder-Mills grant.

} This

### C. Decisions Below

The Harry Fox Agency, Inc. ("Fox"), who for years acted on petr's behalf in issuing licenses for mechanical recordings of the song, filed an interpleader action in SDNY (Weinfeld, J.) to resolve the dispute; petr and the Snyders asserted cross- and

counterclaims. On cross-motions for summary judgment, the DC ruled for *Milk Music* petr. 543 F. Supp. 844. ✓

Beginning with the Exception's language, the DC found that it could be read as covering petr's interest consistent with the purposes of the Act. After conducting an extensive review of the Exception's legislative history, the court found that it was simply unhelpful. It concluded that Congress had not considered the Exception in light of the situation presented here in which a music publisher acts as a middleman licensor between the author of the original copyrighted work and the creators of the derivative works, but instead had focused on the case in which the author transferred his rights directly to the creator of the derivative work. Because it had found that its construction of the statute's language was consistent with the Act's purposes, however, DC was not concerned by the void in the legislative history. Finding that resps' proposed interpretation of the statutory language, in contrast, constituted a "tortured" reading of the statute in order to exclude petr, DC concluded that petr should continue to share in royalties for derivative works prepared and licensed before termination.

DC found no help in leg. hist

CA2 (Oakes, Cardamone, and Pierce, JJ.) reversed. 720 F.2d 733. Acknowledging that "the matter is one on which reasonable minds may well differ," and that Congress did not specifically address the situation in which the grantee from the author has licensed third parties to use the copyright, CA2 set forth three propositions from which it began its analysis: (1) that petr in reality is relying on two grants instead of one for

CA2

Its analysis

its claim to the royalties, (2) that petr is not a utilizer of a derivative work, and (3) that the statute does not specifically address the situation here of a grant of rights to use the derivative work by the author's grantee. From these propositions, CA2 concluded that petr may not share in the royalties earned after termination of the Snyder-Mills grant.

## II. Discussion

The one thing that is clear about this case is that there is no "right" answer. A look at the legislative history convinces me that Congress did not expressly consider the multi-grant situation in enacting the Exception, and the statutory language does not work smoothly to cover the situation, whether you adopt petr's interpretation or resps'. I can find more support in the language and legislative history for petr's position than I can for resps',<sup>2</sup> and therefore, I recommend that you vote to reverse. Either way, however, there will be portions of the language that do not mesh perfectly with the argument.

*true*

*no help from leg hist, + statute not clear.*

*Lynda would Reverse*

### A. The Statutory Language

As the DC noted, the starting point in a question of

<sup>2</sup>In addition, Professor *Nimmer* agrees with petr's construction of the language, although he discloses that he filed a brief on behalf of the National Music Publishers Association as amicus curiae in CA2. See 3 M. Nimmer, Nimmer on Copyright §11.02[B], at 11-18.1 to 11-18.3 (1983).

statutory construction is the statutory language itself. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). The parties' dispute over the language centers primarily on what is meant by the term "grant" as used in the Exception.

*what is meant by "grant"*

Looking at the language of both subsection (6) of §304 and the Exception, it is plain that both provisions speak in terms of only one grant--the grant that has been terminated by the author. Subsection (6) states that "all of a particular author's rights . . . that were covered by the terminated grant revert" to him or his heirs, subject to certain enumerated limitations, including the Exception. Similarly, the language of the Exception, stating that "[a] derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination," may logically refer only to the Snyder-Mills grant, which was the only grant that was terminated.

*only one grant*

This plain language refutes resps' contention that while "grant" in subsection (6) refers to the Snyder-Mills grant, "grant" in the Exception refers to the terms of the licenses granted by petr to the licensees. Those licenses were never terminated. Moreover, there is nothing in the language to justify resps' contention that the effect of subsection (6) is to terminate the Snyder-Mills grant, thereby placing resps in petr's shoes as to the licensees, so that the Exception means that the derivative works "may continue to be utilized" under the terms of the license grants.

Resps continue their argument based on their interpretation of "grant" in the Exception by contending that because it refers to the license grants, the Exception is irrelevant to the question of who, as between the parties to the terminated Snyder-Mills grant, receives the royalties from preexisting derivative works. A reading of subsection (6) and the Exception together as related parts of §304, however, refutes this contention. As noted above, subsection (6) states that "all of a particular author's rights . . . that were covered by the terminated grant revert [to him or his heirs] . . . subject to the following limitations," including the Exception. By its terms, then, the Exception is a limitation upon the rights of the author or his heirs as to preexisting derivative works. The right to receive royalties is, as this lawsuit demonstrates, one of the rights that authors and their heirs are most concerned about under the termination provisions of the new Act. Therefore, it cannot be correct to read the Exception as irrelevant to the question of who receives the royalties after termination.

Emphasizing the "may continue to be utilized" language, resps instead would read the Exception as focusing upon the identity of the utilizer of the derivative work. As noted above, however, the structure of §304 demonstrates that the Exception is a limitation upon the rights of the author; it is not a restriction on the rights of the publisher, or of the derivative work owner, or of the derivative work utilizer, or of any other

*a limitation  
on rights  
of the  
author*

interested party. The question of who may utilize the derivative works is simply never put into focus by the Exception's language.

Nonetheless, resps argue that petr's construction of the Exception does not work because the Exception refers to "utiliz[ation] under the terms of the grant," and the Snyder-Mills grant does not contain provisions governing the utilization of derivative works. Resps claim that only the licenses issued by petr to the derivative work owners provide for utilization within the meaning of the Exception, and therefore, that "grant" must refer to the licenses. Resps find content for their interpretation of "utilization" in §106 of the Act, which contains a list of the things an owner has the exclusive right to "do and to authorize" with respect to his copyright, including preparing derivative works and distributing copies or phonorecords of the copyrighted work. Resps conclude from this that "utilization" engenders an obligation to pay royalties, not to collect them, as petr does; that therefore, petr cannot be a "utilizer" within the meaning of the Exception; and that consequently, the Exception does not apply to petr and parties in its position.

There are several flaws in this argument. One is that resps neglect to quote the entire phrase from the Exception: "utiliz[ation] under the terms of the grant after its termination." As noted above, "grant" in this phrase must logically refer to the terminated Snyder-Mills grant.

Second, there is no justification for defining "utilize" as narrowly as resps do. The only list of defined

terms in the Act is contained in §101; "utilization" is not among them. The validity of referring to §106 for the content of the term is dubious, since that section does not ever employ the term "utilize."

Third, resps cite no authority whatsoever for their theory that "utilization" engenders an obligation to pay, but not to collect, royalties. Although far from dispositive, a statement in the Senate Report suggests the opposite: that "utilize" within the meaning of §203(b)(1)<sup>3</sup> of the Act may include the continued right to license the performance of a derivative work, as petr licenses the use of derivative works. See S. Rep. No. 473, at 111, 94th Cong., 1st Sess. (1975) (hereinafter "S. Rep."). Accord H.R. Rep. No. 1476, at 127, 94th Cong., 2d Sess. (1976) (hereinafter "H.R. Rep."). Cf. Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary on H.R. 2223, Copyright Law Revision, 94th Cong., 1st Sess. 106 (1975) (hereinafter "Hearings") ("[E]veryone besides the author is a user of the author's work.").

*no authority*

Finally, as noted above, the recognition that the Exception is a limitation on authors' rights makes the identity

<sup>3</sup>Section 203(b)(1) provides for the termination of grants executed on or after January 1, 1978, and contains a derivative works exception identical to that in §304(c)(6)(A). The legislative history indicates that the two termination provisions and derivative works exceptions were intended to be applied in substantially the same way; therefore, the legislative history of §203(b)(1) is a valid source for discovering the import of the Exception in §304(c)(6)(A).

of the utilizer of the derivative work much less central to ascertaining the import of the Exception. Under this view of the statute, a broader reading of the "utilization" language permits the following reasonable interpretation: even though the Snyder-Mills grant does not provide guidelines for the utilization of specified derivative works, the derivative works "may continue to be utilized under the terms of the grant after its termination" in the sense that rights in preexisting derivative works are not altered by the termination, as are rights in the underlying copyright and rights to make new derivative works based on that copyright. The old derivative works remain in the public domain as previously created and distributed, and the termination gives the author no more interest in those works than he otherwise would have had: <sup>author</sup> he is entitled to fifty percent of the net royalties from those derivative works, just as before, but he may not cut off the right to use such a derivative work, relicense the right to use the underlying work in an already existing derivative work, or otherwise interfere with the utilization of the derivative work in a way that was not originally provided for in the terminated grant.

*Lynda's interpretation*

Resps also contend that the construction of "grant" as referring to the Snyder-Mills grant does not work because existing derivative works were not "prepared under authority of the grant before its termination," but under the authority of the licenses issued by petr to the derivative work owners. Resps' contention is correct in the limited sense that the Snyder-Mills grant did not set the specific terms for the creation and



distribution of the derivative works in question here. However, the works were prepared under the authority of the Snyder-Mills grant in the sense that in that grant, Snyder ceded the rights to use the underlying copyright, which was a necessary grant of authority before the derivative works could be prepared.

In sum, the construction of the statutory language offered above covers petr's case without doing violence to the language as written, although §304(c)(6)(A) concededly does not read as though it were written with petr's position in mind. As discussed below, I believe this construction also is consistent with the purposes underlying the Exception and the Act as a whole. Resps' construction of the language, in contrast, focusing on the meaning of "utilization" and the identity of the utilizer of derivative works, would require the Court both to read into the Exception a definition of "utilization" for which there is no basis in the statute, and to read out of the Exception the language expressly stating that "grant" means the grant that was terminated, rather than the licenses granted from petr to the licensees.

B. The Purposes of the Act and the Exception

Although as noted above, the legislative history is devoid of any indication that Congress had the multi-grant situation specifically in mind when it enacted the Exception, the history does reveal that the purposes of the Exception and the revised Act as a whole are consistent with permitting petr to

*Petr's*

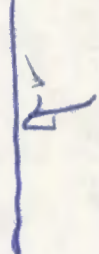
*Mills*

*are consistent with Petr's claim of right to continue to*

*share in royalties*

share in the royalties in question here. The Hearings on H.R. 2223 reveal that the primary concerns of the drafters were to encourage the dissemination of works for profit--benefitting creators, producers, and disseminators of derivative works--while at the same time protecting the rights of authors of original copyrighted works. It was perceived that both of these goals would further a third purpose of the Act of maximizing the public's access to creative works. The public would have available to it more existing works if the Act encouraged investment in the dissemination of both original and derivative works. By the same token, the public would have available more new works if the Act also protected the rights of authors of original copyrighted works. See Hearings, at 106, 116-117.

The history of the Exception reflects a similar recognition of the diverse interests involved and a concern with attempting to accommodate them all. For example, the Senate Report recognized that the termination provisions of §§203 and 304 were necessary to safeguard the author from previous unremunerative transfers he might have made. See S. Rep. at 108. At the same time, the Congress acknowledged that other parties also had a legitimate interest in the new property right that was being created by the 19-year extension. Consequently, the legislative history consistently speaks of reaching in §§203 and 304 a "practical compromise that will . . .recogniz[e] the problems and legitimate needs of all interests involved," id., and of giving the author a right to "share" in the benefits of



the reversionary provisions, id., at 123. Accord H.R. Rep., at 124, 140.

Thus, resps' contention that petr should be denied any rights in royalties from preexisting derivative works because "the [E]xception has a specific and limited purpose [that is to] guarante[e] public access to derivative works after termination," Resps' Brief at 20, misses the point of the legislative history as a whole. If anything, the purposes of the Act and the Exception as described above point toward permitting petr to continue to share royalties for "preexisting" derivative works to encourage others to invest in the dissemination of original works as petr did.

Resp contends that the legislative history shows that the Exception was not meant to apply to the music publishing industry but only to motion pictures, and thus, that petr should be excluded from whatever benefit the Exception provides. This represents a much too narrow view. Although the legislative history uses the example of motion picture producers in discussing the meaning of the Exception, there is no indication in either the language or the legislative history that Congress intended to limit the Exception's applicability to the motion picture industry. The Exception refers to "derivative works," a defined term in §101 of the Act whose meaning is not limited to motion pictures. A defined term generally must be given its stated meaning throughout the Act, absent evidence of an express intent to limit its meaning in a particular context. See Walling v. Portland Terminal Co., 330 U.S. 148, 150-151 (1947). There is

evidence in other contexts in the legislative history that Congress was aware of the situation of music publishers and the existence of other types of derivative works that would be affected by the Exception. Consequently, there is no clear justification for excluding music publishers in petr's position from the operation of the Exception.

Resp argues that there was an agreement between all members of the industry during the drafting sessions before the bill was submitted to Congress that music publishers were to be cut out of the operation of the Exception. Resp cites no evidence that any such agreement was before Congress, however, and as the DC noted, it is therefore irrelevant to what Congress's intent was in enacting the Exception.

*no ev.  
to  
support  
claims  
of an  
agree-  
ment to  
eliminate  
rights of  
music  
publishers*

Finally, resp argues that the sole purpose of the Exception was to overrule existing law that held that once a copyright term ended, rights to utilize any derivative works ceased absent specific approval of such continued use by the author of the underlying copyright. From this proposition, which is correct as far as it goes, resps argue that the Exception had no purpose to protect middlemen such as petr, because once the preparation of a derivative work is licensed, such middlemen play no role in either the utilization or dissemination of the work.<sup>4</sup>

<sup>4</sup>Resps also argue that permitting petr to share in the royalties gives petr a windfall because it never bargained for the rights as to the 19-year extension and because Congress intended to get rid of grants that purported to control post-termination rights. The legislative history cited above, however, shows that Congress recognized that it was creating a

Footnote continued on next page.

The Exception was intended, in part, to overrule existing law that had held that rights to utilize derivative works could be cut off by the end of the copyright term of the underlying work. And, as discussed at page 11, supra, the Exception accomplishes this purpose by providing that an author has no more rights after termination as to existing derivative works than he did before termination. To deduce from this, however, that the Exception had no purpose to benefit music publishers such as petr is to fail to take account of Congress's recognition of the existence of many diverse interests in the reversion of rights at the point of termination and the benefit to be gained in accommodating them all. As noted above, it is true that the Exception was designed to promote continued access to preexisting derivative works. It is also true that once a derivative work is created, publishers such as petr have no further role in the dissemination of that work. It cannot be denied, however, that publishers such as petr, by licensing the use of an original work, play an important role in dissemination. Congress was aware of the need to encourage future investment in the dissemination of creative work, and it is therefore consistent with the purposes of the Act and the Exception to permit petr to share in royalties from past licenses so that others will be encouraged to participate in the dissemination

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new property interest, the rights to which would have to be allocated by the statute in a way that would fairly accommodate the varied interests involved, regardless of previous bargains.

process in the future.

### III. Conclusion

In sum, although the statute and the legislative history indicate that <sup>1</sup> Congress did not have the multi-grant situation presented by this case in mind when it enacted the derivative works exception, <sup>2</sup> there is no indication that Congress intended to exclude middlemen such as petr from the operation of the Exception. The Exception was written to apply to all types of derivative works, <sup>3</sup> and there is evidence that Congress was aware of the music industry and the role of music publishers such as petr. The <sup>suggested</sup> construction of the language offered above accommodates this case in a manner that is consistent with the purposes of the Act and the Exception, without doing the violence to the statutory language that the contrary interpretation compels. Consequently, I recommend that you vote to reverse.

yes

*Snyder*

83-1153 MILLS MUSIC v. SNYDER

Argued 10/9/84

Frankel (Petr - former Fed Judge) { Knows  
case  
well

See Assignment to Mills - JA 41  
(counsel says this was typical  
form in music industry). It  
was framed in absolute terms.  
Relies on J Weinfeld's opinion.

CA2 summer Congress - in  
including the "exception for derivative  
rights" was not aware of the  
~~practices~~ practice in music  
industry.

~~See note the exception~~

7. The exception applies only to  
the original grant. It does not  
refer to the second grant.

7. CA2 thought the exception  
had to be re-written to decide  
for Miller Music. See p 23, 24 of Peh Br.

Absent the extension for 19 yrs,  
the "producers" would be free to  
produce records w/o paying royalties.

Function of "publisher" (Mills) is  
to market the song to record  
producers.

If P.S. asked pertinent Q as to what is  
"source" of Record Cos. duty to continue to pay  
royalties. Counsel noted these Cos. are not in this ca



## Harold Tyler (Resk)

Petr's argument aside primary issue - namely, that there is no language in the Exception that refers to a "second" transfer.

\* CA 2 did not fail to understand the Exception.

Congressional intent is clear.

Snyder ~~was~~ granted to Mills as right to 57 years only. Contrary to Petr's argument, Congress extended this period for 19 years to benefit the author - and also to benefit the public.

Mills is trying to identify itself as a beneficiary of the Exception when there is no evidence of intent to benefit "publishers"

(Tyler said sophisticated counsel for the producers have never claimed that Exception ~~applies~~ applies to benefit ~~any~~ either Publisher or Producer)

*(Received for lunch)*

The Snyder now owns the copyright. Mills ~~is~~ <sup>is</sup> not. This refers to the orig. owner. The ~~is~~ recent ~~is~~ restored ownership to Snyder. The middle-man Mills is now out. The producers retain their right to (see next pg)

*When we came back after lunch, Tyler understood to "clarify" what he had said*

Tyler (cont.)

to produce records of the song.

The producer has a "derivative right," but pays royalties to Snyder rather than Mills.

Thus, the grant from Mills to producer (derivative holder) remains fully effective under the Derivative RTs Exception.

This is the plain purpose of the statute.

(But see SO's question & Tyler's answer confused me, & perhaps what I wrote above is a mistake)

After lunch  
no fee

83-11-9

Question: Whether the "derivative rights exception" of § 304

applies to protect the assignee's rights (Mill's Music), or whether its rights were "terminated" pursuant to termination right accorded the author by 1976 Act?

<sup>Mill's Rts</sup>  
Exception appears to preserve

Close Q and statutory language is not explicit.

Apparently the specific situation ~~was~~ <sup>expressly</sup> covered by Act's language. This case involved ~~two~~ two levels of assignments:

1. Author to middle-man.
2. Middle-man to the record producers.

But the Exception was written to cover all types of derivative works. No intent to exclude middle-man.

83-1153 Mills Music v. Snyder et al

Inclined to agree with DC (J. Weinfeld)  
& this would result in Reversal of CA 2.

I Three interested parties: (1) "Author"  
(Snyder by inheritance), (2) Mills -  
a "Publisher" to whom copyright had  
been assigned & who became its owner,  
& (3) "Producers" who ~~were~~ are  
licensed by publisher Mills to  
make the recordings. ~~to~~

II 1976 Act provides for termination  
of assignments by author (& extends  
copyright for 19 yrs), subject to the  
Derivative Works Exception

→ The ~~recording~~ recording is a derivative right.

III The Question stated generally:

Whether the Exception includes, &  
therefore protects, the rights of Mills  
whose role is that of a middleman  
under the ~~grant~~ original "grant" from author.  
Or whether the middleman's (Publisher's)  
rights were terminated as CA 2 held.

Act  
not clear  
as to  
a "multiple"  
grant  
- but this  
seems to  
have been  
customary  
in this  
business.

IV ~~Act~~ <sup>A</sup> close call. <sup>But</sup> in view of way  
this industry operated - using "publishers"  
to promote recordings, I am inclined  
to hold <sup>that</sup> the Exception ~~protects~~ does not  
exclude publishers. Mills therefore  
had ~~no~~ to share royalties with Snyder.

The Chief Justice

Reserve

Copyright extended 14 yrs. Absent extension there would be no royalties

Not easy case but inclined to agree with D.C. Congress seemed to intend to preserve status quo. All three parties contributed to success.

Justice Brennan

Aff'm - tentative

Close, but inclined to affirm.

The '76 Act was intended to give authors a second chance to benefit. Many authors had sold their work too cheaply.

Mills is not a user - only a middle man.

Justice White

Aff'm

Agrees with WJB

Up to Congress to resolve,

Justice Marshall

Aff'm

CA 2 knows more ~~at~~ about this subject than other CA.

Case involves a "windfall" that Congress intended for authors.

Justice Blackmun

Aff'm

leg. hist. add little. Close case.

Statutory language not conclusive

Agree purpose was to benefit author.

Justice Powell

Reverse

See my notes.

The language of Exception is far from clear. Not in leg. history free from doubt. Agree with C.J.

That Congress probably intended to preserve existing rights & extend them for 19 yrs

Justice Rehnquist

Rev

Agree with CQ & LFP - tho probably would not dissent.

What word "grant" in statute means in the quest. No need to speculate as to what Congress meant

Justice Stevens

Rev

Can't assume Congress overlooked way industry functions

Weinfeld's op. is sound.

Real estate lease is an apt analogy.

Agree with WHR that issue is meaning of "grant".

Prof Nimmer agrees with Weinfeld.

Unjust to exclude middleman

Talk to John  
I write

Justice O'Connor

Rev.

Congress intended to preserve status quo.

Agree with Weinfeld

: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

LJP

From: **Justice Stevens**

Circulated: NOV 20 1984

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1153

**MILLS MUSIC, INC., PETITIONER v. MARIE SNYDER  
AND TED SNYDER, JR., ETC.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

[December —, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

This is a controversy between a publisher, Mills Music, Inc. (Mills), and the heirs of an author, Ted Snyder (Snyder), over the division of royalty income that the sound recordings of the copyrighted song "Who's Sorry Now" (the Song) have generated. The controversy is a direct outgrowth of the General Revision of Copyright Law that Congress enacted in 1976.<sup>1</sup> The 1976 Act gave Snyder's heirs a statutory right to reacquire the copyright<sup>2</sup> that Snyder had previously granted to Mills; however, it also provided that a "derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination."<sup>3</sup> The sound recordings of the Song, which have generated the royalty income in dispute, are derivative works of that kind.<sup>4</sup> Thus, the dispute raises the question

<sup>1</sup> See 17 U. S. C. §§ 101-810. The 1976 Act generally became effective on January 1, 1978.

<sup>2</sup> *Id.*, at § 304(c)(2).

<sup>3</sup> *Id.*, at § 304(c)(6)(A). The full text of this provision is quoted *infra*, at n. 5.

<sup>4</sup> The 1976 Act defines a "derivative work" as follows:

"A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations,

Renewed  
12/2-4  
Join



whether an author's termination of a publisher's interest in a copyright also terminates the publisher's contractual right to share in the royalties on such derivative works.

The key that will unlock this statutory puzzle is an understanding of the phrase "under the terms of the grant" as it is used in § 304(c)(6)(A)—the so-called "derivative works exception" (the Exception) to the "termination of transfer and licenses" provisions found in § 304 of the 1976 Act.<sup>5</sup> Before focusing on the meaning of the key phrase, we shall describe the chain of title to the copyright, the circumstances sur-

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elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U. S. C. § 101.

A sound recording is generally fixed on a master, and then embodied and distributed on phonorecords. The 1976 Act distinguishes "sound recordings" from "phonorecords." The former are defined as follows:

"'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sound accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Ibid.*

In contrast, the 1976 Act provides the following definition of "phonorecords":

"'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." *Ibid.*

Moreover, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

<sup>5</sup>The Exception reads as follows:

"A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." 17 U. S. C. § 304(c)(6)(A).

rounding Congress' adoption of the 1976 Act, and how the pertinent provisions of the 1976 Act affected the relationship among the interested parties in 1978 when Snyder's heirs terminated the grant to Mills. We begin with the early factual history.

## I

Ted Snyder was one of three persons who collaborated in creating "Who's Sorry Now."<sup>6</sup> Although Snyder actually held only a one-third interest in the Song, the parties agree that we should treat the case as if Snyder were the sole author. The original copyright on the Song was registered in 1923 in the name of Waterson, Berlin & Snyder, a publishing company that Snyder partly owned.<sup>7</sup> That company went into bankruptcy in 1929, and in 1932 the trustee in bankruptcy assigned the copyright to Mills.<sup>8</sup>

Under the Copyright Act of 1909, 35 Stat. 1075, the copyright in a musical composition lasted for 28 years from the date of its first publication, and the author could renew the copyright for an additional term of 28 years.<sup>9</sup> Although Mills had acquired ownership of the original copyright from the trustee in bankruptcy, it needed the cooperation of Snyder in order to acquire an interest in the 28-year renewal term. Accordingly, in 1940 Mills and Snyder entered into a written agreement defining their respective rights in the renewal of the copyright. In essence, Snyder assigned his entire interest in all renewals of the copyright to Mills in exchange for an advance royalty and Mills' commitment to pay a

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<sup>6</sup> Snyder composed the music, and Burt Kalmar and Harry Ruby wrote the words. App. 52.

<sup>7</sup> *Id.*, at 49.

<sup>8</sup> *Id.*, at 38.

<sup>9</sup> The renewal application had to be filed before the expiration of the original term. If the author predeceased the last year of the first 28-year term, certain statutory successors could accomplish renewal. 17 U. S. C. § 24 (1976 ed.) (1909 Act); see also *Fisher Co. v. Whitmark & Sons*, 318 U. S. 413, 644 (1943).

cash royalty on sheet music and 50 percent of all net royalties that Mills received for mechanical reproductions.<sup>10</sup>

Mills obtained and registered the renewal copyright in 1951. After filing the required statutory notice,<sup>11</sup> Mills directly, or through the Harry Fox Agency, Inc., issued over 400 licenses to record companies authorizing the use of the Song in specific reproductions on phonograph records. Using a variety of different artists and different musical ar-

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<sup>10</sup>The agreement, which Snyder and respondent Marie Snyder signed, covered Snyder's entire catalogue of songs. It provided, in part:

"In part consideration hereof, I further covenant and agree promptly to apply for renewal copyrights on all of my compositions which from time to time may hereafter fall due and are now part of your [Mills'] catalogue, whether I was the sole author thereof or collaborated with others and which vest in me the right to make copyright applications on all such compositions as provided by the United States Copyright Act and in which I have any right, title and interest or control whatsoever, in whole or in part, and I further covenant and agree with you to stand seized and possessed of all such renewal copyrights and of all applications thereof, and of all rights in or to any such compositions for you and for your sole and exclusive benefit . . . . I further agree that when such renewal copyrights are duly issued and obtained they shall automatically become vested in you as the sole owner thereof, and your successors and assigns.

"After first deducting all advance royalties heretofore paid as above provided for, and any other sums that may have been advanced to me under the terms of this agreement, the following royalties shall be payable to me during your customary semi-annual royalty period each year, as follows: three (3¢) cents per copy upon each and every regular pianoforte copy, and two (2¢) cents per copy for each orchestration sold, paid for and not returned by virtue of the rights herein acquired, and a sum equal to fifty (50%) per cent of all net royalties actually received by you for the mechanical reproduction of said musical compositions on player-piano rolls, phonograph records, disks or any other form of mechanical reproduction, for licenses issued under said renewal copyrights. . . ." App. 41-42.

This agreement, of course, predated this Court's decision in *Fisher Co. v. Whitmark & Sons*, *supra*, which held that the 1909 Act did not prevent an author from assigning his interest in the renewal copyright before he had secured it. *Id.*, at 657.

<sup>11</sup>See 17 U. S. C. § 1(e) (1976 ed.) (1909 Act). Mills filed the required notice with the Copyright Office in 1958. App. 52.

rangements, these record companies prepared separate “derivative works,” each of which was independently copyrightable.<sup>12</sup> Because each of these derivative works was a mechanical reproduction of the Song that was prepared pursuant to a license that Mills had issued, the record companies were contractually obligated to pay royalties to Mills and Mills, in turn, was contractually obligated to pay 50 percent of those royalties to Snyder.<sup>13</sup> Fox acted as an agent for Mills, performing the service of collecting royalties from the licensed record companies and, after deducting its charges, remitting the net receipts to Mills, which in turn remitted 50 percent of that income to Snyder. After Snyder’s death, his widow and his son succeeded to his interest in the arrangement with Mills.

## II

The massive work necessary for the general revision of the copyright law began in 1955, perhaps stimulated in part by this country’s help in the development of, and subsequent membership in, the Universal Copyright Convention.<sup>14</sup> In that year, Congress approved several appropriations for the Copyright Office. The Copyright Office then began building the foundation for the general revision by authorizing a series of 34 studies on major issues of copyright law; these studies were published and included in the legislative history.<sup>15</sup> After issuing a report in 1961, the Copyright Office conducted numerous meetings with representatives of the many

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<sup>12</sup> 17 U. S. C. § 103(b); 17 U. S. C. § 7 (1976 ed.) (1909 Act). The record reveals separate licenses for renditions of the Song by artists such as Judy Garland and Liza Minelli, and Nat King Cole. App. 22, 81.

<sup>13</sup> See n. 10, *supra*.

<sup>14</sup> House Judiciary Committee, Copyrights Act, H. R. Rep. No. 1476, 94th Cong., 2d Sess. 47. Several earlier copyright law revisions had failed “partly because of controversy among private interests over differences between the Berne Convention and the U. S. law.” *Ibid*.

<sup>15</sup> See Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, 86th Cong., 1st & 2d Sess., Copyright Law Revision (H. Judiciary Comm. Prints 1960–1961).

parties that the copyright law affected.<sup>16</sup> In 1964, the Copyright Office issued a preliminary draft revision bill, which contained the essence of the Exception before the Court today.<sup>17</sup> Additional discussions with interested parties followed.<sup>18</sup> Two additional draft revision bills supervened, both containing the Exception.<sup>19</sup> Interested parties submitted commentary following the 1964 draft revision bill.<sup>20</sup>

Congress began its lengthy hearings after the Copyright Office submitted the 1965 draft revision bill.<sup>21</sup> The hearings on the 1965 bill occupied over three weeks during a three-month period and involved well over 100 witnesses. More-

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<sup>16</sup>H. R. Rep. No. 1476, *supra*, at 47. See Report of the Register of the Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (H. Judiciary Comm. Print 1961); Discussion and Comments on Report of the Register of Copyrights on the General Revision of U. S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (H. Judiciary Comm. Print 1963).

<sup>17</sup>Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, at 16 (Alternative A), 21 (H. Judiciary Comm. Print 1964). The twin citations here and elsewhere refer to the derivative-works exception that is now codified at § 304(c)(6)(A) and refer to a similar derivative-works exception that is now codified at 17 U. S. C. § 203(b)(1). We have examined the development of both sections for purposes of this opinion.

<sup>18</sup>See Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law, 88th Cong., 2d Sess., Copyright Law Revision, Part 4 (H. Judiciary Comm. Print 1964).

<sup>19</sup>See H. R. 11947, 88th Cong., 2d Sess., §§ 16(b)(1), 22(c)(3)(A) (1964) (1964 draft revision bill); S. 3008, 88th Cong., 2d Sess., §§ 16(b)(1), 22(c)(3)(A) (1964) (1964 draft revision bill); H. R. 4347, 89th Cong., 1st & 2d Sess., §§ 203(b)(1), 304(c)(5)(A) (1965) (1965 draft revision bill); S. 1006, 89th Cong., 1st Sess., §§ 203(b)(1), 304(c)(5)(A) (1965) (1965 draft revision bill).

<sup>20</sup>See 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., Copyright Law Revision, Part 5 (H. Judiciary Comm. Print 1965).

<sup>21</sup>Hearings on H. R. 4347, 5680, 6831, 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Sen. Judiciary Comm., 89th Cong., 1st & 2d Sess. (1965-1966).

over, the Copyright Office prepared a supplementary report to accompany the 1965 draft revision bill.<sup>22</sup> Although additional hearings were held in subsequent sessions,<sup>23</sup> and revision bills were submitted to Congress in each term for the next ten years,<sup>24</sup> discussion over the termination provisions, and the Exception, was essentially completed at this time. Congress enacted the termination provisions and the Exception in the 1976 Act in virtually the same form as they appeared in the 1965 draft revision bill.<sup>25</sup>

### III

Section 304 of the 1976 Act significantly affected the rights of Mills and the Snyders in three ways. First, § 304(b) provided an automatic extension of the life of the copyright; instead of expiring in 1980 at the end of the second renewal period, the copyright on the Song will endure until 1999.<sup>26</sup>

Second, § 304(c) gave the widow and surviving son of Ted Snyder a right to terminate the grant to Mills of rights in the renewal copyright.<sup>27</sup> That termination could be effected at

<sup>22</sup> Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, Part 6 (H. Judiciary Comm. Print 1965).

<sup>23</sup> H. R. Rep. No. 1476, *supra*, at 48-50.

<sup>24</sup> *Ibid.*

<sup>25</sup> Compare H. R. 4347, 89th Cong., 2d Sess. §§ 203, 304(c) (1965) with 17 U. S. C. §§ 203, 304(c).

<sup>26</sup> That section provides:

"The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured." 17 U. S. C. § 304(b).

<sup>27</sup> Relevant portions of that section read as follows:

"In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section,

any time during the five-year period after January 1, 1978, by serving a written notice on Mills and recording a copy in the Copyright Office before it became effective.

Third, § 304(c)(6) provided that the termination would cause all rights “covered by the terminated grant” to revert to Snyder’s widow and son. That reversion was, however, subject to an exception that permitted a previously prepared derivative work to continue to be utilized after the termination “under the terms of the grant.”<sup>28</sup>

#### IV

On January 3, 1978, the Snyders delivered a written notice of termination to Mills. The notice complied with § 304(c); it identified the Song and stated that the termination applied to the “[g]rant or transfer of copyright and the rights of copyright proprietor, including publication and recording rights.” Additionally, the notice stated that it would become effective on January 3, 1980.<sup>29</sup> On August 11, 1980, the Snyders ad-

otherwise than by will, is subject to termination under the following conditions:

“(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren . . .

“(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

“(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee’s successor in title.

“(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, an agreement to make a will or to make any future grant.” *Id.*, at § 304(c).

<sup>28</sup> *Id.*, at § 304(c)(6)(A).

<sup>29</sup> App. 54. The record identifies Belwin-Mills Publishing Corporation as the grantee whose rights were to be terminated; the parties make no distinction between this entity and “Mills.” *Id.*

vised Fox that Mills' interest in the copyright had been terminated and demanded that the royalties on the derivative works be remitted to them. Fox placed the disputed funds in escrow and initiated an interpleader action in the United States District Court for the Southern District of New York. Mills and the Snyders appeared therein, agreed on the relevant facts, and filed cross-motions for summary judgment. The District Court entered judgment for Mills. 543 F. Supp. 844 (SDNY 1982).

In an exhaustive opinion, the District Court first held that the record companies' derivative works had been "prepared under the authority of the grant" from Snyder to Mills. The court then noted that the statute did not make "any distinction between grantees who themselves make or own derivative works and those who license others to do so." *Id.*, at 854. Accordingly, the court concluded that the terms of the various contracts that had been in effect prior to the termination governed the record companies' obligation to pay royalties and that under those arrangements Mills and the Snyders were each entitled to a 50 percent share in the net royalties. *Id.*, at 867-869.

Relying on three "propositions," the Court of Appeals for the Second Circuit reversed. 720 F. 2d 733 (1983). First, it reasoned that Mills was relying on two separate grants—the 1940 grant from Snyder to Mills and the later grants by Mills to the record companies—but that the Exception preserved only the second set of grants. Because the Snyders' termination caused the ownership of the underlying copyright to revert to them, the court viewed that reversion as carrying with it Mills' right to collect the royalties payable under the grants to the record companies. *Id.*, at 738-740. Second, the court determined that § 304 was enacted for the benefit of authors and that the Exception was designed to protect "utilizers" of derivative works; because Mills as a publisher was neither an author nor a "utilizer," it was not a member of either class that § 304 was intended to benefit. *Id.*, at



739–740. Third, the Court of Appeals read the legislative history as indicating that Congress had not contemplated a situation in which the authority to prepare derivative works was derived from two successive grants rather than a single grant directly from an author to a “utilizer.” *Id.*, at 740–741. The court felt that if Congress had confronted this situation, it would not have wanted “publishers and other noncreative middlemen to share in original derivative works royalties after termination.” *Id.*, at 743.

Having granted Mills’ petition for a writ of certiorari in order to resolve this important question of copyright law, — U. S. —, we now reverse. We are not persuaded that Congress intended to draw a distinction between authorizations to prepare derivative works that are based on a single direct grant and those that are based on successive grants. Rather, we believe the consequences of a termination that § 304 authorizes simply do not apply to derivative works that the Exception defined in § 304(c)(6)(A) protects. The boundaries of that Exception are defined by reference to the scope of the privilege that had been authorized under the terminated grant and by reference to the time the derivative works were prepared. The derivative works involved in this case are unquestionably within those boundaries.

## V

In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed “accurately expresses the legislative purpose.”<sup>30</sup> We therefore start with an examination of the statutory text.

The critical subparagraph—§ 304(c)(6)(A)—carves out an exception from the reversion of rights that takes place when an author exercises his right to termination. A single sen-

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<sup>30</sup>*Park 'n Fly v. Dollar Park and Fly, Inc.*, — U. S. —, — (1984); see also *American Tobacco Co. v. Patterson*, 456 U. S. 63, 68 (1982).

tence that uses the word “grant” three times defines the scope of the Exception. It states:

“A derivative work prepared under authority of the *grant* before its termination may continue to be utilized under the terms of the *grant* after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the *terminated grant*.” 17 U. S. C. §304(c)(6)(A) (emphasis supplied).

The third reference is to “the terminated grant” which, in this case, must refer to Snyder’s grant to Mills in 1940. It is logical to assume that the same word has the same meaning when it is twice used earlier in the same sentence.<sup>31</sup> The reference to a derivative work at the beginning of the Exception is to one that was prepared “under the authority of the grant.” Again, because Mills, or Fox as its agent, authorized the preparation of each of the 400-odd sound recordings while Mills was the owner of the copyright, each of those derivative works was unquestionably prepared “under the authority of the grant.” The 1940 grant from Snyder to Mills expressly gave Mills the authority to license others to make derivative works.<sup>32</sup> Thus, whether the phrase “under the authority of the grant” is read to encompass both the original grant to Mills and the subsequent licenses that Mills issued,

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<sup>31</sup> *Erlenbaugh v. United States*, 409 U. S. 239, 243 (1972) (“a legislative body generally uses a particular word with a consistent meaning in a given context”).

<sup>32</sup> See n. 10, *supra*. Of course, if a license that Mills issued to a record company had authorized the preparation of several derivative works, only one of which had been prepared at the time of Snyder’s termination, the remaining, unexercised portion of the licensee’s authority would constitute a part of the “terminated grant.” In this case, however, each license that Mills issued apparently authorized the preparation of only one derivative work. Thus, at the very least, the “terminated grant” encompassed Mills’ authority to license the preparation of any additional derivative works.

or only the original grant, it is inescapable that the word "grant" must refer to the 1940 grant from Snyder to Mills.<sup>33</sup>

The second use of the word "grant" is in the critical phrase that allows the record companies to continue to utilize previously prepared derivative works "under the terms of the grant after its termination." To give the word a consistent meaning, we must again read it to encompass the original grant from Snyder to Mills, even though it is evident that the relevant terms of the grant for a particular licensee must also include the specific terms of its license.

Although a consistent reading of the word "grant" in the text of § 304(c)(6)(A) encompasses the 1940 grant from Snyder to Mills, the Court of Appeals concluded that the Exception preserved nothing more than the grants from Mills to the record companies. As we have briefly noted earlier, the Court of Appeals rested its conclusion on three separate propositions, each of which merits discussion.

#### *The Two Separate Grants*

The Court of Appeals based its conclusion that Mills could not prevail largely on its view that the grant from Snyder to Mills was entirely separate from subsequent "grants" by Mills to the record companies. It reasoned:

"Since the only grants which have terms that define the circumstances under which derivative works are to be prepared and utilized are the Mills-record company grants, it is the terms of those grants that the Exception preserves, not the grant from the Snyders giving Mills 50% of the mechanical royalties." 720 F. 2d, at 739.

It is undisputed that the 1940 grant did not itself specify the terms that would apply to the use of any particular derivative work. The licenses that Mills, or its agent Fox, exe-

<sup>33</sup>The word "grant" is also used repeatedly in the remainder of § 304. That section is too long to quote in full, but a reading of the entire section discloses that the term is consistently used in a way that must encompass the original grant by an author or his heirs.

cuted contain those terms. But if the underlying grant from Snyder to Mills in 1940 had not authorized those separate licenses, they would have been nullities. Moreover, if the licenses are examined separately from that earlier grant, they merely require that royalty payments be made to Mills or to Fox as the collection agent for Mills.<sup>34</sup> In terms, they do not provide for any payments at all to the Snyders. The source of the Snyders' entitlement to a 50 percent share in the royalty income is the 1940 grant. Thus, a fair construction of the phrase "under the terms of the grant" as applied to any particular licensee would necessarily encompass both the 1940 grant and the individual license executed pursuant thereto.<sup>35</sup>

If the scope of the entire set of documents that created and defined each licensee's right to prepare and distribute derivative works is used to define the relevant "terms of the grant" for purposes of the Exception, those terms include Mills' right to obtain 100 percent of the net royalty income in the first instance and Mills' obligation thereafter to remit 50 percent of those revenues to the Snyders. If, as the Court of Appeals held, the Exception limits the relevant "terms of the grant" to those appearing in the individual licenses, two rather glaring incongruities would result. First, the word "grant" would have inconsistent meanings in the same sentence, and in fact, within the entirety of both § 304(c) and the remainder of § 304. Second, and of greater importance, there would be neither a contractual nor a statutory basis for paying *any* part of the derivative works royalties to the Snyders.

The licenses issued to the record companies are the source of their contractual obligation to pay royalties; viewed apart from the 1940 grant, those licenses confer no rights on the Snyders. Moreover, although the termination has caused

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<sup>34</sup> App. 22-27.

<sup>35</sup> Our construction perhaps should include the Fox agency agreement as well.

the ownership of the copyright to revert to the Snyders, nothing in the statute gives them any right to acquire any contractual rights that the Exception preserves. The Snyders' status as owner of the copyright gives them no right to collect royalties by virtue of the Exception from users of previously authorized derivative works. Stating the same point from the perspective of the licensees, it is clear that they have no direct contractual obligation to the new owner of the copyright. The licensees are merely contractually obligated to make payments of royalties under terms upon which they have agreed. The statutory transfer of ownership of the copyright cannot fairly be regarded as a statutory assignment of contractual rights.<sup>36</sup>

*The "Utilizer" of a Derivative Work*

The second of the Court of Appeals' propositions stated that Mills is not the "utilizer" of a derivative work because

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<sup>36</sup>The District Court concluded that, absent the Mills' licenses to the record companies, the record companies would be infringers. 543 F. Supp., at 850-851. The Court of Appeals accepted this conclusion. 720 F. 2d, at 738, n. 8. Moreover, under the copyright law, both before and after the 1976 Act, the record companies had a statutory right to obtain self-executing compulsory licenses from Mills. See 17 U. S. C. § 115; 17 U. S. C. §§ 1(e), 101(e) (1976 ed.) (1909 Act). In the District Court, the Snyders contended that the Exception was wholly inapplicable because the record companies had statutory compulsory licenses and therefore their sound recordings had not been prepared "under the authority of the grant" within the meaning of the 1976 Act. The District Court rejected this contention, 543 F. Supp., at 851-852, finding that either Mills or its agent, Fox, executed the licenses; therefore, the licenses were not self-executing. This contention was not renewed in either the Court of Appeals or in this Court. Additionally, although the Snyders contended otherwise in the District Court, *id.*, at 850-851, they no longer challenge the proposition that Mills issued the pretermination licenses "under the authority of the grant" within the meaning of the Act. It is the royalty income generated by these 400-odd derivative works prepared before the termination that is at issue in this case. Mills acknowledges that it may not authorize the preparation of any additional works and that its only claim to an interest in royalties is that preserved by the Exception.

"[a]ll that Mills did was to utilize the underlying copyright when it owned it by licensing *others* to create and utilize derivative works." 720 F. 2d, at 739. Building on its erroneous first proposition, the court determined:

"The language of the Exception supports such a conclusion. The Exception provides that the derivative work must be prepared under the authority of the grant, excluding, therefore, unauthorized derivative works. It is only grants from Mills to the record companies which authorize the preparation and creation of the derivative works here involved. The Exception, then, protects creators who utilize derivative works prepared under the authority of the grant authorizing the creation of such derivative works." *Ibid.*

Although not expressly adopting the Court of Appeals' first proposition regarding "two grants," respondents expand on the court's second proposition, urging that the Exception protects only the utilization of derivative works after the underlying copyright has reverted to the author. Br. for Respondents 3-8.

The protection provided to those who utilized previously prepared derivative works is not, however, unlimited. The word "utilized" as written in the Exception cannot be separated from its context and read in isolation. It is expressly confined by "the terms of the grant." The contractual obligation to pay royalties survives the termination and identifies the parties to whom the payment must be made. If the Exception is narrowly read to exclude Mills from its coverage, thus protecting only the class of "utilizers" as the Snyders wish, the crucial link between the record companies and the Snyders will be missing, and the record companies will have no contractual obligation to pay royalties to the Snyders. If the statute is read to preserve the total contractual relationship, which entitled Mills to make duly authorized derivative works, the record companies continue to have a contractual duty to pay royalties to Mills.

*Legislative History*

The Court of Appeals' third, and last, proposition stated that "Congress did not specifically address the situation where the grantee from the author has himself subleased or subgranted or licensed use of the copyright." 720 F. 2d, at 740. It considered the statutory text ambiguous because the statute "speaks in terms of one grant, while . . . we are dealing with two distinct grants." *Id.*, at 740, n. 12. Because the Court of Appeals' review of the legislative history did not disclose any specific consideration of the problem that this case presents, it further concluded that Congress had simply overlooked the possibility that a licensee's authority to prepare derivative works might depend on two separate grants. The Court of Appeals, therefore, predicated its construction of the Exception largely on its evaluation of the legislative purpose: to "protect owners of derivative works like film producers who own derivative copyrights in books or plays." *Id.*, at 741.

Unlike the Court of Appeals, we are persuaded that Congress was well aware of the prevalence of multi-party licensing arrangements in the music-publishing industry, as well as in other industries that the copyright law vitally affected, when it enacted the 1976 Act. There are many references in the legislative history to multi-party arrangements in the music industry, and to the importance of the role of music publishers in the marketing of copyrighted songs. These references dissipate the force of the argument that Congress did not expressly consider the precise multi-party dispute before the Court today.<sup>37</sup> Indeed, there is reason to believe

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<sup>37</sup> See, e. g., Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, *supra*, at 33 ("In practice the authors of musical works generally assign their recording and other rights to publishers, under an agreement for the division of royalties. In most instances the record companies secure licenses from the publishers, thereby avoiding some of the mechanics of notice and accounting required by the statute for exercise of the compulsory license."); H. Henn, *The Compulsory License*

that the 50 percent arrangement between Snyder and Mills that was made in 1940 was a typical example of the form of copyright grant that had been prevalent in this industry for

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Provisions of the U. S. Copyright Law, 86th Cong., 1st Sess., Copyright Law Revision, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm., Study No. 5, at 47 (H. Judiciary Comm. Print 1960) ("the general practice is for the composer to assign his common-law copyright to a music publisher") (footnote omitted); A. Kaminstein, Divisibility of Copyrights, 86th Cong., 2d Sess., Copyright Law Revision, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm., Study No. 11, at 23 (H. Judiciary Comm. Print 1960) ("[i]n the music industry, the prevailing custom is that statutory copyright in sheet music is secured in the name of the publisher"); Copyright Law Revision: Hearings on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, *supra*, at 680 ("Copyrights almost invariably are owned by publishers, whose contracts with songwriters customarily provide for an equal division of royalties received from the exploitation of mechanical reproduction rights. Attempts occasionally are made to create the image of a large record company dealing with an innocent composer, but this is pure myth; the composer turns his manuscript over to a publisher and the latter is the copyright proprietor from which the record company must get its rights.") (footnote omitted) (statement of Record Industry Association of America, Inc.); *id.*, at 1743-1744 (statement of Robert R. Nathan, Music Publishers Protective Association, Inc.); cf. Copyright Law Revision: Hearings on H. R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 1369 (1975) ("There are several distinct groups of people who are involved in bringing about recorded music. There is the composer of the music, there is the publisher, there is the artist who records the music, and there is the record company that produces and distributes the record.") (testimony of Vincent T. Wasilewski, President, National Association of Broadcasters); *id.*, at 1651-1653 (letter of Leonard Feist, National Music Publishers' Association, Inc.); *id.*, at 1653 ("I feel that the argument is not with the publisher because when I went into New York last year to compose the music for 'A Chorus Line.' I did it with a new writer by the name of Ed Kleban. He is not a proven writer yet. He has been subsidized for the last few years, been given money by a publishing company to actually be able to live and to be allowed to write. I think that for every instance where a publisher, say, a person who does not help, I think that there are a vast amount of people who can tell you that there are people getting paid without yet, you know, giving



many years.<sup>38</sup> Rather than assuming that Congress was unaware of a common practice in one of the industries that the general revision of the copyright law, and the termination provisions, most significantly affected we think it more probable that Congress saw no reason to draw a distinction between a direct grant by an author to a party that produces derivative works itself and a situation in which a middleman is given authority to make subsequent grants to such producers. For whether the problem is analyzed from the author's point of view or that of the producer of derivative works, the statutory purposes are equally well-served in either case.

The principal purpose of the amendments in § 304 was to provide added benefits to authors. The extension of the duration of existing copyrights to 75 years, the provision of a longer term (the author's life plus 50 years) for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that

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material, just by having faith in an individual, and obviously, Ed Kleban now has proved that he is good, and the publisher has proved that it was worth the investment. I just want to make sure that you understand that the plight of the composer is not up against the publisher because we have had great success with dealings with publishers. It is elsewhere where we seem to get into trouble." (testimony of Marvin Hamlisch, composer).

<sup>38</sup> See, *e. g.*, W. Blaisdell, *Size of the Copyright Industries*, 86th Cong., 1st Sess., *Copyright Law Revision, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm., Study No. 2*, at 49 (H. Judiciary Comm. Print 1960) ("Music composers and lyricists usually assign all rights in their works, including the right to claim copyright, to a music publisher, subject to the provisions of the contract of assignment. In general the contract provides that the composer-lyricists are to receive not less than 50 percent of the gross returns from the sales of the work in whatever form."); *Copyright Law Revision: Hearings on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, supra*, at 781, 844 ("equal split of copyright license fees between publishers and songwriters is based upon industry practice) (statement of John Desmond Glover).

had been made before the author had a fair opportunity to appreciate the true value of his work product.<sup>39</sup> That general purpose is plainly defined in the legislative history and, indeed, is fairly inferable from the text of § 304 itself.

The exception in § 304(c)(6)(A) was designed, however, to exclude a specific category of grants—even if they were manifestly unfair to the author—from that broad objective. The purpose of the Exception was to “preserve the right of the owner of a derivative work to exploit it, notwithstanding the reversion.”<sup>40</sup> Therefore, even if a person acquired the right to exploit an already prepared derivative work by means of an unfavorable bargain with an author, that right was to be excluded from the bundle of rights that would revert to the author when he exercised his termination right. The critical point in determining whether the right to continue utilizing a derivative work survives the termination of a transfer of a copyright is whether it was “prepared” before the termination. Pretermination derivative works—those prepared under the authority of the terminated grant—may continue to be utilized under the terms of the terminated grant. Derivative works prepared after the termination of the grant are not extended this exemption from the termination provi-

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<sup>39</sup> In explaining of the comparable termination provision in § 203, the House Report states:

“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.” H. R. Rep. No. 1476, *supra*, at 124.

<sup>40</sup> Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law, 88th Cong., *supra*, at 39 (statement of Barbara Ringer). The House report that accompanied the 1976 Act, certainly persuasive legislative history, affirmatively supports this view. Regarding § 203(b), § 304(c)’s counterpart, it stated: “This clause provides that, notwithstanding a termination, a derivative work prepared earlier may ‘continue to be utilized’ under the conditions of the terminated grant.” H. R. Rep. No. 1476, *supra*, at 127.

sions. It is a matter of indifference—as far as the reason for giving protection to derivative works is concerned—whether the authority to prepare the work had been received in a direct license from an author, or in a series of licenses and sublicenses. The scope of the duly authorized grant and the time the derivative work was prepared are what the statute makes relevant because these are the factors that determine which of the statute's two countervailing purposes should control.<sup>41</sup>

The obligation of an owner of a derivative work to pay royalties based on his use of the underlying copyright is not subject to renegotiation because the Exception protects it. The “terms of the grant” as existing at the time of termination govern the author's right to receive royalties; those terms are therefore excluded from the bundle of rights that the author may seek to resell unimpeded by any ill-advised prior commitment. The statutory distinction between the rights that revert to the author and those that do not revert is based on the character of the right—not on the form or the number of written instruments that gave the owner of the derivative work the authority to prepare it. Nothing in the legislative history or the language of the statute indicates that Congress intended the Exception to distinguish between two-party transactions and those involving multiple parties.

The example most frequently discussed in the legislative history concerning the Exception involved the sale of a copyrighted story to a motion picture producer.<sup>42</sup> The Court of

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<sup>41</sup> The legislative history also indicates that Congress intended the termination provisions to produce an accommodation and a balancing among various interests. See H. R. Rep. No. 1476, *supra*, at 124, 140; Senate Judiciary Comm., Copyright Law Revision, S. Rep. No. 473, 94th Cong., 1st Sess. 108 (1975) (accompanying S. 22, 94th Cong., 1st Sess.).

<sup>42</sup> Regarding § 203(b), the House report stated:

“[N]otwithstanding a termination, a derivative work prepared earlier may ‘continue to be utilized’ under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a

Appeals explained the need for the Exception as the interest in protecting the large investment that is required to produce a motion picture, and recognized that record companies similarly must also make a significant investment in compensating vocalists, musicians, arrangers, and recording engineers. Therefore, the court concluded that record companies are clearly within the class that the Exception protects. The court felt, however, that music publishers—as middlemen—were not similarly situated, but rather merely had an ownership interest in the copyright that reverted to the author upon termination. 720 F. 2d, at 742-743. As a matter of fact—or of judicial notice—we are in no position to evaluate the function that each music publisher actually performs in the marketing of each copyrighted song. But based on our reading of the statute and its legislative history,<sup>43</sup> in inter-

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play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a 'derivative work' with respect to every 'preexisting work' incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture." H. R. Rep. No. 1476, *supra*, 127.

See also Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, *supra*, 278 (statement of Barbara Ringer, Register of Copyrights).

<sup>43</sup> The legislative history indicates the usual practice:

"Book authors contract with book publishers for the publication of their works, the publisher taking title to all rights in the work subject to the provisions of the contract. The author usually receives a royalty computed as a percentage of the price at which each book is sold or as a percentage of the total volume of sales." W. Blaisdell, *Size of Copyright Industries*, *supra*, at 88.

Later, the same study indicates:

"In motion picture production creative material from both storywriters and composers is used. Motion picture producers employ creative talent on an employee-for-hire basis and on a freelance basis. However, the business contracts for the writing and adaptation of story material between the Association of Motion Picture Producers and the Writers Guild of America

preting the Exception we find no reason to differentiate between a book publisher's license to a motion-picture producer and a music publisher's license to a record company. Neither publisher is the author of the underlying work. If, as the legislative history plainly discloses, the Exception limits the reversion right of an author who granted his copyright on an original story to a book publisher who in turn granted a license to a motion-picture producer, we can see no reason why the Exception should not also limit the right of a composer, like Snyder, who made such a grant to a music publisher, like Mills, that preceded a series of licenses to record companies.

## VI

Finally, respondents argue that the legislative history demonstrates that the Exception was designed to accomplish a well-identified purpose—to enable derivative works to continue to be accessible to the public after the exercise of an author's termination rights.<sup>44</sup> Specifically, that history dis-

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provide almost exclusively for employees for hire and it is only in unusual cases that freelance contracts are used. *Of course, motion picture producers purchase rights to story material from book publishers who hold copyrights to novels, stories, etc.* In most of these cases, a large portion of the purchase price goes to the original author; generally a book publisher retains only the equivalent of an agent's 10 percent fee." *Id.*, at 55 (emphasis added).

<sup>44</sup>They point out that even without the creation of the termination right in the 1976 Act, there had been concern about the status of certain derivative works. Moreover, they assert that under the 1909 Act, if an author alienated his renewal-term copyright, but died before his renewal-term vested, the author's transfer of his renewal rights was a nullity because the right in the renewal term was exercisable only by the author's statutory successors. Thus, according to respondents, the original-term transferee who had made a derivative work could be enjoined from continuing to use the derivative work because it might infringe the underlying copyright in the renewal term. Some observers apparently believed that the Court of Appeals for the Second Circuit acknowledged support for this view in *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469, 471 (CA2), cert. denied, 342 U. S. 849 (1951), when it wrote that "[a] copyright renewal cre-

closes a concern about the status of a number of motion-picture films that had been prepared pursuant to grants by book publishers. Without the Exception, the reversion that an author's termination effected would have given the author the power to prevent further utilization of the motion picture films, or possibly to demand royalties that the film producers were unwilling to pay. Because the specific problem that the Exception addressed involved a potential confrontation between derivative-works utilizers and authors who had recaptured their copyrights, respondents argue that Congress must have intended its response to the problem to affect only those two interests.

The argument is unpersuasive. It explains why the Exception protects the utilizer of a derivative work from being required to pay an increased royalty to the author. It provides no support, however, for the proposition that Congress expected the author to be able to collect an increased royalty for the use of a derivative work. On the contrary, this history is entirely consistent with the view that the terms of the grant that were applicable to the use of derivative works at the time of termination should remain in effect. The public interest in preserving the status quo with respect to derivative works is equally well served by either petitioner's or respondents' reading of the Exception. Respondents' argument thus sheds no light on the meaning of the phrase "the terms of the grant." Surely it does not justify the replacement of contractual terms that unambiguously require payment of royalties to a publisher with a new provision directing payment to an author instead.

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ates a new estate, and the few cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright." Therefore, respondents reason that there was confusion after *Ricordi* regarding whether the law allowed a derivative-work owner to utilize the work after the expiration of the underlying copyright or whether the law prohibited all utilization of the derivative work.

Under the terms of the grant in effect at the time of termination, Mills is entitled to a share of the royalty income in dispute.

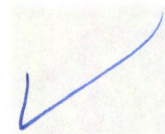
The judgment of the Court of Appeals is reversed.

*It is so ordered.*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 3, 1984



No. 83-1153

Mills Music, Inc. v. Snyder

Dear John,

I'll await the dissent in the  
above.

Sincerely,

A handwritten signature in cursive script that reads "Bill".

Justice Stevens

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

December 3, 1984

No. 83-1153 Mills Music, Inc. v. Synder

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

December 4, 1984

Re: No. 83-1153 Mills Music, Inc. v. Snyder

Dear John,

Please join me.

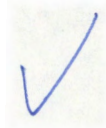
Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 4, 1984

83-1153 - Mills Music, Inc. v. Snyder

---

Dear John,

In due course, I shall circulate a  
dissent in this case.

Sincerely yours,

Justice Stevens

Copies to the Conference

December 4, 1984

83-1153 Mills Music, Inc. v. Snyder

Dear John:

Please join me.

Sincerely,

Justice Stevens

Copies to the Conference

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 4, 1984

Re: No. 93-1153-Mills Music v. Snyder

Dear John:

I await the dissent.

Sincerely,

*J.M.*  
T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 12, 1984

Re: No. 83-1153, Mills Music, Inc. v. Snyder

Dear John:

I am awaiting the dissent in this case.

Sincerely,



Justice Stevens

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 21, 1984



Re: No. 83-1153, Mills Music, Inc. v. Snyder

Dear Byron:

Please join me in your dissent.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry", is written below the word "Sincerely,".

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543



CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 27, 1984

No. 83-1153

Mills Music, Inc. v. Marie Snyder  
and Ted Snyder, Jr., etc

Dear Byron,

Please join me.

Sincerely,

Justice White

Copies to the Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 27, 1984

Re: No. 83-1153-Mills Music v. Snyder

Dear Byron:

Please join me in your dissent.

Sincerely,

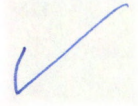
*T.M.*  
T.M.

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE



December 28, 1984

Re: No. 83-1153 - Mills Music, Inc. v. Marie Snyder  
and Ted Snyder, Jr.

Dear John,

I join.

Regards,

A handwritten signature in black ink, appearing to read "L. Powell, Jr.", is written below the typed word "Regards,".

Justice Stevens

Copies to the Conference

83-1153 Mills Music v. Synder (Lynda)

JPS for the Court 10/12/84  
1st draft 11/30/84  
2nd draft 12/4/84  
3rd draft 12/20/84  
    Joined by SOC 12/3/84  
              WHR 12/4/84  
              LFP 12/4/84  
              CJ 12/28/84

BRW dissenting  
1st draft 12/20/84  
2nd draft 1/3/85  
    Joined by HAB 12/21/84  
              WJB 12/27/84  
              TM 12/27/84

BRW will dissent 12/4/84  
WJB will await dissent 12/3/84  
TM awaiting dissent 12/4/84  
HAB awaiting dissent 12/12/84