

**Before the
UNITED STATES COPYRIGHT OFFICE
THE LIBRARY OF CONGRESS
Washington, D.C.**

In the Matter of |

Termination Rights and the Music
Modernization Act's Blanket License

Docket No. 2022-5
Submitted January 5, 2023

**REPLY COMMENTS OF THE
MOTION PICTURE ASSOCIATION, INC.**

I. INTRODUCTION

The Motion Picture Association, Inc. (“MPA”) appreciates the opportunity to provide these reply comments to the Copyright Office’s Notice of Proposed Rulemaking concerning Termination Rights and the Music Modernization Act’s Blanket License, published at 87 Fed. Reg. 64,405 (Oct. 25, 2022) (the “NPRM”), which involves the administration of termination rights by the Mechanical Licensing Collective (“MLC”) under the Section 115 compulsory blanket license for musical works created by the Music Modernization Act (“MMA”) (“Section 115 blanket license” or “blanket license”).

The MPA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. The MPA’s member companies are: Netflix Studios, LLC; Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. These companies and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPA has a particular interest in the proper interpretation of the Copyright Act as a fair, balanced, and predictable copyright system is essential to its mission. Because the MPA’s members produce movies and other content based on grants of rights in books, screenplays, and other works, they are especially attentive to the termination provisions of the Copyright Act, including the derivative works exception (“DWE”) under both Sections 203 and 304(c) that allows for continued use of pre-termination derivative works under the terms of the underlying grants.

The MPA is mindful of the significant ongoing efforts of the Copyright Office to implement the MMA and provide regulatory guidance to the MLC. The MPA also appreciates

the need for clarity regarding the MLC’s administration of statutory termination rights. Apart from suggesting a technical edit to ensure that the rule is clearly limited to the MLC’s duties under the MMA, the MPA takes no position on the proposed regulation as set forth in the NPRM.

The MPA does, however, have significant concerns with portions of the NPRM supporting the proposed rule to the extent they could be read to limit the application of the DWE beyond the Section 115 blanket license. In particular, the Office’s discussion of the Supreme Court’s decision in *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985), and follow-on Second Circuit case, *Woods v. Bourne Co.*, 60 F.3d 978 (2d Cir. 1995), could be read as narrowing the holdings by injecting a “direct chain” limitation on the pre-termination grants preserved under the DWE. *Mills* and *Woods* are the legal cornerstones on which film studios and other producers of derivative works have relied for decades to structure their economic expectations and licensing activities in relation to the derivative works they produce during their stewardship of the underlying properties.

While the MPA is aware that the Office’s preambular discussion is not legally binding on courts or others, its discussion of *Mills* is not limited to the Section 115 context and—as already evidenced by some of the comments filed herein¹—could be invoked in a wide range of circumstances beyond the blanket license. For this reason, while we assume it is not the Office’s intent, the MPA is concerned that the Office’s analysis could be viewed as significantly narrowing *Mills* and *Woods* which, in turn, would sow confusion, doubt, and perhaps even litigation with respect to past and future licensing activities involving pre-termination derivatives.

By contrast, the Office’s first rationale for the rule—that the Section 115 blanket license does not constitute a “grant” by the author, so neither the termination provisions nor the DWE can apply—appears to provide a reasonable and sufficient basis for the proposed rule. In basing its rule upon such a rationale, the Office would seem to be operating within its statutory purview by promulgating a regulation that clarifies whether the DWE applies when rights in a musical work administered by the MLC are terminated. In addition, it would be achieving its goal without impacting post-termination practices in other industries.

Should the Office proceed to adopt the proposed rule, in addition to the technical amendments suggested below, the MPA respectfully requests that the Office clarify the record by expressly declining to rely on any construction of *Mills* as a basis for the rule.

¹ See, e.g., National Music Publishers’ Association Initial Comments at 10 (Dec. 1, 2022) (“[T]he USCO’s legal reasoning for the Proposed Rule arguably could apply to, and could potentially be cited as persuasive authority for, a number of voluntary licenses and non-blanket compulsory license.”); Linda Edell Howard Initial Comments at 5 (Dec. 1, 2022) (suggesting proposed rule should apply not only to the blanket license but all other licenses administered by the MLC, including voluntary licenses); Rights Recapture, LLC Initial Comments (Dec. 1, 2022) (proposed rule should also cover voluntary licenses so authors benefit even if publishers choose to avoid rule by departing from the MLC).

II. DISCUSSION

As explained above, the MPA takes no position on the substance of the proposed rule, but is concerned about how the Office’s discussion of the Supreme Court’s holding in *Mills* as justification for the rule could be interpreted, which could have repercussions beyond the Section 115 blanket license.

In the NPRM, the Office identifies two sources of statutory authority for the proposed rule: 17 U.S.C. §115(d)(12)(A), which allows the Office to adopt regulations “as necessary or appropriate to effectuate” the blanket license, and 17 U.S.C. §702, which permits the Register to establish regulations “not inconsistent with the law” for administration of her responsibilities under the Copyright Act. NPRM at 64,407–08. The Office then articulates two distinct, and somewhat contradictory, legal theories as justification for the rule. The Office posits that:

- (i) a statutory license under Section 115 is not subject to termination under Sections 203 or 304(c) because it is a “self-executing” license that does not represent a grant by or with the consent of the author or author’s successors, so the DWE cannot apply; and
- (ii) *Mills* should be read as limiting the applicability of the DWE to grants in the “direct chain” of authority resulting in preparation of a pre-termination derivative, and not to any grant outside of this “direct chain” (such as to a digital platform that did not prepare the derivative).

See NPRM at 64,409–10.

In the NPRM, the Office indicates that it is “necessary . . . to squarely resolve” the question of whether the Section 115 blanket license is subject to the termination provisions of the Copyright Act to ensure the MLC’s proper administration of the license. *See id.* at 64,407 (clarity on the applicability of the termination provisions “will enable the MLC to appropriately operationalize the distribution of post-termination royalties”). Accordingly, the Office’s first rationale for the proposed rule—that Section 115 is not an author-executed grant and therefore not terminable or subject to the DWE—directly answers the question posed by the Office and seems appropriately tailored to the perceived need for a rule. The Office’s explanation of its conclusion focuses on the unique qualities of the statutory compulsory license and finds support in the treatises of leading commentators Professors Nimmer and Goldstein. *See id.* at 64,409–10 & nn. 63, 65. As the Office recognizes, this first justification appears to provide sufficient support for the proposed rule. The NPRM explains that even if its alternative “direct chain” rationale were inapplicable, “the [DWE] still would not apply [to the blanket license] . . . [A] blanket license cannot be terminated; it simply continues in effect under its terms.” *Id.* at 64,411 n.76.

The second rationale advanced by the Office—which can be read as a limiting interpretation of *Mills*—is unnecessary and has the potential to be interpreted in ways that go beyond the context of the Section 115 license.

As an initial matter, if the Section 115 license cannot be terminated, the DWE is irrelevant and the Office’s first rationale is wholly sufficient to support the Office’s conclusions and draft rule. As explained above, the Office’s discussion of the Supreme Court’s holding in *Mills* is open to an interpretation that could have implications beyond the MLC, creating uncertainty with respect to long-established licensing practices for pre-termination derivatives outside of the blanket license regime, including in the motion picture industry. As the Office points out in the NPRM, it is exercising its regulatory authority under Section 115 and its related authority under Section 702 in order to promulgate rules to facilitate the administration of the blanket license. *See* NPRM at 64,407–08. The MPA accordingly respectfully suggests that the Office avoid unnecessarily addressing issues outside the scope of this purpose that could have the potential to affect longstanding background rules for the licensing of derivative works.

To the extent that the Office’s discussion of *Mills* could be read to limit the DWE solely to a “direct chain” of grants, such a reading would appear to be in tension not only with the DWE—which provides that a derivative work prepared under authority of a grant “may continue to be used under the terms of the grant,” 17 U.S.C. §§203(b)(1), 304(c)(6)(A)—but also the Supreme Court’s interpretation of that language in *Mills*, as well as the Second Circuit’s further explication of the DWE in *Woods v. Bourne*. *Mills* held that, as used in the DWE, “the terms of the grant” means the “*entire set of documents* that created and defined *each licensee’s* right to prepare and distribute derivative works.” 469 U.S. at 167. The DWE thus encompasses the original grant from author to publisher, as well as the succeeding grants derived therefrom, potentially involving multiple licensees. *See id.* at 165–67 (emphasis added).

In some cases, an initial grant by an author to a movie studio or music publisher, and that entity’s subsequent grants to third parties to for the use and distribution of derivative works, will generate “branches” of licensing authority rather than a simple linear chain. For example, as the NPRM observes, within the music industry, a record label typically licenses the use of its sound recording derivative separately from the music publisher’s rights in the musical work as embodied in that derivative. *See* NPRM at 64,410 (observing that a digital music service cannot “make use of sound recording derivatives without musical work licenses”). There is nothing in the DWE or *Mills*—which held that the original music publisher grantee was entitled, post-termination, to collect royalties generated by a pre-termination sound recording—to suggest that a pre-termination publisher is entitled to royalties only if the pre-termination license falls within a single “direct chain” to the party that prepared the derivative.

That *Mills* is not so limited is further confirmed by *Woods*, in which the Second Circuit considered a series of licenses for use of a musical work to determine whether the pre- or post-termination publisher was entitled to the royalties flowing therefrom. As further explicated in *Woods*, the Supreme Court’s holding in *Mills* established that “where multiple levels of licenses

govern use of a derivative work, the ‘terms of the grant’ encompass *the original grant from author to publisher and each subsequent grant necessary to enable the particular use at issue*. . . . The effect of *Mills* is to preserve during the post-termination period the panoply of contractual obligations that governed pre-termination uses of derivative works by derivative work owners or their licensees.” 60 F.3d at 987 (emphasis added). Consistent with its understanding of *Mills*, the *Woods* court upheld the pre-termination publisher’s right to collect public performance royalties from ASCAP for post-termination performances in movies and television programs even though ASCAP’s licensing relationship was outside of the “direct chain” of authority by which the original publisher had granted synch rights to the producers of those shows. *Id.* at 984. Pointing to *Mills*, the court explained that the “terms of the grant” included “the provisions of the grants from [the publisher] to ASCAP and from ASCAP to the television stations” in place at the time of termination.” *Id.* at 987–88. Further, “[t]he fact that the performance right in the Song [was] conveyed separately through ASCAP [was] simply an accommodation” that did not negate the applicability of the DWE. *Id.* at 987–88.

Although typical licensing practices in the motion picture industry differ from those in music, a contrary interpretation of *Mills* could prove disruptive for producers of movies and television programs. The NPRM states that “where no sound recording derivative is prepared pursuant to a [digital service’s] blanket license, that license is not part of any preserved grants that make the [DWE] applicable.” NPRM at 64,410. Such an interpretation of the DWE is at odds with the more expansive language of *Mills* and *Woods*—which, as explained above, looks to the entire “set” or “panoply” of grants governing use of a pre-termination derivative. Neither the DWE, nor *Mills* or *Woods*, limits post-termination utilization of a derivative based on the particular configuration of the relevant pre-termination grants. In considering the applicability of the DWE, the correct question is not whether the user prepared the derivative pursuant to some “direct chain” of authority, but whether the use is permitted under the entire “set” or “panoply” of grants emanating from the original grant by the author.

III. CONCLUSION

Should the Office proceed to adopt the proposed rule, to avoid confusion and disruption of longstanding industry practices with respect to licensing and utilization of pre-termination derivative works, the MPA recommends that the Office refrain from relying upon an interpretation of *Mills* as a basis for the rule. The rule will be on much better footing if grounded in the Office’s straightforward alternative justification that, because the Section 115 blanket license is not subject to termination, the DWE is inapplicable.

The MPA takes no position on the proposed rule itself, except to suggest that, should the Copyright Office proceed to adopt it, the Office slightly amend the final sentence of section 201.29(b)(4)(i) to clarify that the “blanket license” referred to therein is a blanket license obtained under Section 115(d):

The derivative works exception contained in 17 U.S.C. 203(b)(1) and 304(c)(6)(A) does not apply to any blanket license obtained under 17 U.S.C. 115(d) and no individual or entity may be construed as the copyright owner of a musical work (or share thereof) used pursuant to such a blanket license based on such exception.

NPRM at 64,412.

The MPA appreciates the Office's consideration of these reply comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Sheffner", with a long horizontal stroke extending to the right.

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