

out illegal repair restrictions.⁵ The Commission has since brought numerous right to repair cases, addressing unlawful repair restrictions affecting a variety of products, including motorcycles and outdoor electric power generators.⁶

I thank our staff for their work on this important matter and look forward to hearing from the public during this rulemaking proceeding.

Concurring Statement of Commissioner Christine S. Wilson

Seventh time's a charm.

Today the Commission issues an advance notice of proposed rulemaking (ANPR) seeking comment on possible revisions to the Energy Labeling Rule. Specifically, the ANPR asks whether the Commission should add consumer products to the labeling program, whether the label location and other requirements should be updated to reflect current shopping patterns, and whether the label content should be revised to reduce unnecessary burdens. The document also addresses issues related to reporting and refrigerator labels.

Since 2018, I have urged the Commission to seek comment on the more prescriptive aspects of this Rule.¹

⁵ Press Release, Fed. Trade Comm'n, FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions (July 21, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-ramp-law-enforcement-against-illegal-repair-restrictions>.

⁶ Press Release, Fed. Trade Comm'n, FTC Takes Action Against Harley-Davidson and Westinghouse for Illegally Restricting Customers' Right to Repair (June 23, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-action-against-harley-davidson-westinghouse-illegally-restricting-customers-right-repair-0>; Press Release, Fed. Trade Comm'n, FTC Takes Action Against Weber for Illegally Restricting Customers' Right to Repair (July 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-takes-action-against-weber-illegally-restricting-customers-right-repair>.

¹ See Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018) (expressing my view that the Commission should seek comment on the prescriptive labeling requirements), <https://www.ftc.gov/public-statements/2018/12/dissenting-statement-commissioner-christine-s-wilson-notice-proposed>; Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Oct. 22, 2019) (urging the Commission to seek comment on the labeling requirements), https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf; Concurring Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Mar. 20, 2020) (commending the Commission decision to seek comment on some of the more prescriptive rule requirements), https://www.ftc.gov/system/files/documents/public_statements/1569815/r611004_wilson_statement_energy_labeling.pdf; Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 22, 2020) (dissenting due to the Commission's decision not to make changes to the Rule requirements in response to the March 2020 publication), https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf.

The Commission has a statutory mandate to issue a labeling Rule. I strongly believe, however, that this mandate does not require the Rule to include the highly detailed and prescriptive requirements in the current Rule. For example, the Rule specifies the trim size dimensions for labels, including the precise width (between 5¼" to 5½") and length (between 7¾" and 7⅝"); the number of picas for the copy set (between 27 and 29); the type style (Arial) and setting; the weight of the paper stock on which the labels are printed (not less than 58 pounds per 500 sheets or equivalent); and a suggested minimum peel adhesive capacity of 12 ounces per square inch.

In 2020, the Commission sought comment on some of these prescriptive provisions and received some helpful and thoughtful comments. Unfortunately, the Commission did not make changes based on those comments but instead chose to make only required conforming changes at that time.² I applaud the decision today to seek comment on the Rule more broadly, to ask specifically about these highly prescriptive requirements, and to consider making changes to streamline the Rule. I look forward to reviewing the comments.

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22, 2020) (dissenting due to the Commission's decision not to make changes to the Rule requirements in response to the March 2020 publication), https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf; Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Amendments to the Energy Labeling Rule (Oct. 6, 2021) (urging again seeking comment on the rule requirements), https://www.ftc.gov/system/files/documents/public_statements/1597166/commission_wilson_dissenting_statement_energy_labeling_rule_2021-10-04_final.pdf; Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking to the Energy Labeling Rule (May 11, 2022) (encouraging the Commission to seek comment on the more prescriptive requirements of the Rule), https://www.ftc.gov/system/files/ftc_gov/pdf/Commission%20Wilson%20Dissenting%20Statement%20Energy%20Labeling%20Rule%205.11.22%20FINAL.pdf.

² See Dissenting Statement of Commissioner Christine S. Wilson on the Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 22, 2020) (dissenting due to the Commission's decision not to make changes to the Rule requirements in response to the March 2020 publication), https://www.ftc.gov/system/files/documents/public_statements/1585242/commission_wilson_dissenting_statement_energy_labeling_rule_final12-22-2020revd2.pdf.

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 210

[Docket No. 2022–5]

Termination Rights and the Music Modernization Act's Blanket License

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking regarding the applicability of the derivative works exception to termination rights under the Copyright Act to the new statutory mechanical blanket license established by the Music Modernization Act. The Office invites public comments on this proposed rule.

DATES: Written comments must be received no later than 11:59 p.m. Eastern Time on November 25, 2022. Written reply comments must be received no later than 11:59 p.m. Eastern Time on December 27, 2022.

ADDRESSES: For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office's website at <https://copyright.gov/rulemaking/termination>. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Megan Efthimiadis, Assistant to the General Counsel, by email at mef@copyright.gov or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the “MMA”) substantially modified the compulsory “mechanical” license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.¹ It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the “license availability date”),²

¹ Public Law 115–264, 132 Stat. 3676 (2018).

² 17 U.S.C. 115(e)(15).

administered by a mechanical licensing collective (the “MLC”) designated by the Copyright Office (the “Office”).³ Digital music providers (“DMPs”) are able to obtain this new statutory mechanical blanket license (the “blanket license”) to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as “covered activity” where such activity qualifies for a blanket license), subject to various requirements, including reporting obligations.⁴ DMPs also have the option to engage in these activities, in whole or in part, through voluntary licenses with copyright owners.

The MMA did not address or amend the Copyright Act’s rules governing termination or derivative works. The Copyright Act permits authors or their heirs, under certain circumstances and within certain windows of time, to terminate the exclusive or nonexclusive grant of a transfer or license of an author’s copyright in a work or of any right under a copyright.⁵ The statute, however, contains an exception with respect to “derivative works.” A derivative work is “a work based upon one or more preexisting works, such as a . . . musical arrangement, . . . sound recording, . . . or any other form in which a work may be recast, transformed, or adapted.”⁶ The derivative works exception (the “Exception”) states 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, 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.”⁷ The Second Circuit observed that:

[The] Exception reflects Congress’s judgment that the owner of a derivative work should be allowed to continue to use the derivative work after termination, both to encourage investment by derivative work

proprietors and to assure that the public retains access to the derivative work. Without the Exception, the creator of a derivative work (and, indeed, the public at large) could be held hostage to the potentially exorbitant demands of the owner of the copyright in the underlying work.⁸

A question has arisen regarding the application of the Exception in the context of the blanket license when a songwriter exercises her right to terminate her agreement with a music publisher. Because the statute is silent on this issue and no court has addressed it, the Office is engaging in a rulemaking to ensure that there is a full airing of the issue and development of the relevant facts. The Office is undertaking this rulemaking to provide definitive guidance regarding the appropriate application of the Exception to the blanket license and to direct the MLC to distribute royalties consistent with the Office’s guidance.

II. Procedural Background

On September 17, 2020, as a part of its work to implement the MMA, the Office issued an interim rule adopting regulations concerning reporting requirements under the blanket license (the “September 2020 Rule”).⁹ During proceedings to promulgate the September 2020 Rule,¹⁰ the MLC submitted comments and a regulatory proposal directly implicating the Exception. The MLC proposed to require DMPs to report the date on which each sound recording is first reproduced by the DMP on its server. The MLC reasoned that, as a result of the new blanket licensing system, the server fixation date is “required to determine which rights owner is to be paid where one or more grants pursuant to which a musical work was reproduced in a sound recording has

been terminated pursuant to Section 203 or 304 of the [Copyright] Act.”¹¹

As the MLC explained it, “because the sound recording is a derivative work, it may continue to be exploited pursuant to the ‘panoply of contractual obligations that governed pre-termination uses of derivative works by derivative work owners or their licensees.’”¹² The MLC took the position that the new blanket license can be part of this “panoply,” and therefore, if the blanket license “was issued before the termination date, the pre-termination owner is paid. Otherwise, the post-termination owner is paid.”¹³ The MLC further explained that “under the prior NOI regime, the license date for each particular musical work was considered to be the date of the NOI for that work,” but “[u]nder the new blanket license, there is no license date for each individual work.”¹⁴ The MLC believed that “the date that the work was fixed on the DMP’s server—which is the initial reproduction of the work under the blanket license—is the most accurate date for the beginning of the license for that work.”¹⁵

The MLC’s proposal attracted significant attention from groups representing songwriter interests, who were concerned with protecting termination rights and ensuring that those rights were not adversely affected by anything in the rulemaking proceeding or any action taken by the MLC.¹⁶ For example, the Recording Academy voiced concerns that the MLC’s proposal “would diminish termination rights” and urged that the “rulemaking should not imply or assume that a terminated party

¹¹ MLC NOI Reply Comments at 19; *see also* MLC NOI Initial Comments at 20; MLC *Ex Parte* Letter at 6–7 (Feb. 26, 2020); MLC *Ex Parte* Letter at 6–7 (Apr. 3, 2020).

¹² MLC NOI Reply Comments at 19 (quoting *Woods v. Bourne Co.*, 60 F.3d 978, 987 (2d Cir. 1995)); *see also* MLC *Ex Parte* Letter at 6–7 (Feb. 26, 2020); MLC *Ex Parte* Letter at 6–7 (Apr. 3, 2020). The “panoply” concept is discussed in greater detail below.

¹³ *See* MLC *Ex Parte* Letter at 6–7 (Feb. 26, 2020); MLC *Ex Parte* Letter at 6–7 (Apr. 3, 2020).

¹⁴ MLC *Ex Parte* Letter at 6–7 (Apr. 3, 2020). In this context, “NOI” is referring to notices of intention to obtain a statutory mechanical license under section 115. Under the pre-MMA song-by-song statutory licensing regime, DMPs needed to serve an NOI on a copyright owner (or file one with the Office, in certain situations) to obtain a statutory mechanical license for a musical work. *See* 37 CFR 201.18 (2017).

¹⁵ MLC *Ex Parte* Letter at 6–7 (Feb. 26, 2020).

¹⁶ *See, e.g.*, SONA & MAC NPRM Comments at 8–12; Recording Academy NPRM Comments at 3; MAC *Ex Parte* Letter (June 26, 2020); Recording Academy *Ex Parte* Letter (June 26, 2020); Songwriters Guild of America *Ex Parte* Letter (June 26, 2020); SONA *Ex Parte* Letter (June 26, 2020); Nashville Songwriters Association International *Ex Parte* Letter (June 26, 2020).

³ As permitted under the MMA, the Office also designated a digital licensee coordinator (the “DLC”) to represent licensees in proceedings before the Copyright Royalty Judges (the “CRJs”) and the Office, to serve as a non-voting member of the MLC, and to carry out other functions. 84 FR 32274 (July 8, 2019).

⁴ 17 U.S.C. 115(d).

⁵ *Id.* at 203, 304(c).

⁶ *Id.* at 101. A derivative work does not need to be the same type of work as the original work. For example, a movie is frequently a derivative work of a novel. If someone were to make a derivative work from a musical work, the new work could be another musical work, a sound recording, or other type of work (e.g., a music video).

⁷ *Id.* at 203(b)(1), 304(c)(6)(A).

⁸ *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 22 (2d Cir. 1998) (internal quotation marks and citations omitted).

⁹ 85 FR 58114 (Sept. 17, 2020).

¹⁰ That proceeding involved multiple rounds of public comments through a notification of inquiry (NOI), 84 FR 49966 (Sept. 24, 2019), a notice of proposed rulemaking (NPRM), 85 FR 22518 (Apr. 22, 2020), and an *ex parte* communications process. Guidelines for *ex parte* communications, along with records of such communications, including those referenced herein, are available at <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html>. All rulemaking activity, including public comments, as well as educational material regarding the MMA, can currently be accessed via navigation from <https://www.copyright.gov/music-modernization>. References to public comments are by party name (abbreviated where appropriate), followed by “NOI Initial Comments,” “NOI Reply Comments,” “NPRM Comments” or “*Ex Parte* Letter,” as appropriate.

necessarily continues to benefit from the blanket license after termination.”¹⁷ Songwriters of North America (“SONA”) and Music Artists Coalition (“MAC”) jointly expressed “serious reservations about [the MLC’s] approach, which would seemingly redefine and could adversely impact songwriters’ termination rights.”¹⁸ The Office shared those concerns and sought to account for them in its September 2020 Rule.

There, the Office adopted reporting requirements for DMPs, including the sound recording’s “server fixation date,” “street date,” and “estimated first distribution date.”¹⁹ However, the Office explained that it was requiring DMPs to provide such information to the MLC because the record suggested that the transition to the blanket license represented a significant change to the status quo that may eliminate certain dates, such as NOI dates, that may have historically been used in post-termination activities, such as the renegotiation and execution of new agreements between the relevant parties to continue their relationship on new terms.²⁰ The Office further made clear that it was not adopting or endorsing a specific proxy for a grant date with respect to termination.²¹ As the Office explained, “[t]he purpose of this rule is to aid retention of certain information that commenters [including groups representing songwriter interests] have signaled may be useful in facilitating post-termination activities, such as via inclusion in letters of direction to the MLC, that may not otherwise be available when the time comes if not kept by the DMPs.”²²

In adopting the September 2020 Rule, the Office did not expressly address the question of how the blanket license interacts with the statutory termination provisions. There was no need to offer the Office’s interpretation because that particular proceeding was focused on DMP reporting requirements rather than termination issues. The Office stressed that it was not making any substantive judgment about the proper interpretation of the termination provisions, the Exception, or their application to section 115. Nor was the Office opining on how the Exception, if applicable, may operate in the context of the blanket license, including with respect to what information may or may

not be appropriate to reference in determining who is entitled to royalty payments.²³

At the same time, the Office cautioned the MLC that it was not convinced of the need for a default process for handling termination matters.²⁴ Rather, the Office agreed with other commenters that “it seems reasonable for the MLC to act in accordance with letters of direction received from the relevant parties, or else hold applicable royalties pending direction or resolution of any dispute by the parties.”²⁵ The Office explained that having a default method of administration for terminated works in the normal course “might stray the MLC from its acknowledged province into establishing what would essentially be a new industry standard based on an approach that others argue is legally erroneous and harmful to songwriters.”²⁶ Additionally, as requested by several commenters representing songwriter interests, the Office adopted express limiting language in the regulations to make clear that nothing in the related DMP reporting requirements should be interpreted or construed as affecting termination rights in any way or as determinative of the date of the relevant license grant.²⁷

In 2021, the MLC adopted a dispute policy concerning termination that does not follow the Office’s rulemaking guidance. Instead, its policy established a default method for determining the recipient of post-termination royalties in the ordinary course where there is no resolution via litigation or voluntary agreement.²⁸ Declining to heed the Office’s warning, the MLC’s policy assumes that the Exception applies to the blanket license and uses various proxy dates to determine who to pay under the blanket license.²⁹ In meetings with the Office, the MLC described its policy as a middle ground and

explained that the policy was intended, in part, to avoid circumstances where parties’ disputes could cause blanket license royalty payments to be held, pending resolution of the dispute, to the disadvantage of both songwriters and publishers. The Office appreciates the MLC’s interest in advancing the overarching goal of ensuring prompt and uninterrupted royalty payments. But, having reviewed the MLC’s policy, the Office is concerned that it conflicts with the MMA, which requires that the MLC’s dispute policies “shall not affect any legal or equitable rights or remedies available to any copyright owner or songwriter concerning ownership of, and entitlement to royalties for, a musical work.”³⁰

Because the MLC’s policy embodies a legal interpretation of the Exception that conflicts with the Office’s prior guidance, it is necessary to revisit the termination issue more directly and to squarely resolve the unsettled question of how termination law intersects with the blanket license. Specifically, the Office seeks to provide clarity concerning the application of the Exception to the blanket license. Doing so would provide much needed business certainty to music publishers and songwriters. It would enable the MLC to appropriately operationalize the distribution of post-termination royalties in accordance with existing law. Moreover, without the uniformity in application that a regulatory approach brings, the Office is concerned that the MLC’s ability to distribute post-termination royalties efficiently would be negatively impacted. The Office appreciates that the MLC “welcomes guidance from the Office on the interpretation of the law [of termination]”³¹ and hopes this proceeding will resolve the uncertainty surrounding this issue.

III. The Copyright Office’s Regulatory Authority

The Office believes that it is properly within its authority under the MMA and section 702 of the Copyright Act to resolve this unsettled question of law. To carry out the MMA’s new blanket licensing regime, Congress invested the Office with “broad regulatory

¹⁷ Recording Academy *Ex Parte* Letter at 2 (June 26, 2020).

¹⁸ SONA & MAC NPRM Comments at 8–11.

¹⁹ 37 CFR 210.27(m)(3) and (4); see 85 FR 58134–35.

²⁰ 85 FR 58133.

²¹ *Id.* at 58134.

²² *Id.* at 58133–34.

²³ *Id.* at 58132.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (further explaining that the information that may be relevant in administering termination rights may not be the same as what the MLC may be able to most readily obtain and operationalize); see *id.* at 58133 (observing that “while the MLC does not see its function as enforcing termination rights or otherwise resolving disputes over terminations or copyright ownership, stating repeatedly that it takes no position on what the law should be and that it is not seeking to change the law, its position on the proposed rule may unintentionally be in tension with its stated goals,” and concluding that “it does not seem prudent to incentivize the MLC to make substantive decisions about an unsettled area of the law on a default basis”).

²⁷ See 37 CFR 210.27(m)(5); 85 FR 58132.

²⁸ See The MLC, Notice and Dispute Policy: Statutory Terminations (Sept. 2021, revised Aug. 2022), <https://www.themlc.com/dispute-policy>.

²⁹ *Id.* at Ex. A.

³⁰ See 17 U.S.C. 115(d)(3)(K)(iii); see also Recording Academy *Ex Parte* Letter at 1–2 (June 26, 2020) (“Despite stating repeatedly that the MLC has no interest in altering, changing, or diminishing the termination rights of songwriters, it was clearly conveyed that one of the primary reasons for seeking this data is to determine the appropriate payee for the use of a musical work that is the subject of a termination. The Academy’s view is that using the data in this way would diminish termination rights.”).

³¹ MLC *Ex Parte* Letter at 2 (June 26, 2020).

authority”³² to “conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of [the MMA pertaining to the blanket license].”³³ The Office is to exercise this authority “in a manner that balances the need to protect the public’s interest with the need to let the [MLC] operate without over-regulation.”³⁴ As Congress anticipated, “[a]lthough the legislation provides specific criteria for the [MLC] to operate, it is to be expected that situations will arise that were not contemplated by the legislation. The Office is expected to use its best judgment in determining the appropriate steps in those situations.”³⁵

Under the MMA, the MLC is to adopt (and has adopted) various policies and procedures in connection with its administration of the blanket license. Congress “expected that such policies and procedures will be thoroughly reviewed by the Register to ensure the fair treatment of interested parties in such proceedings given the high bar in seeking redress” under the MLC’s limitation on liability contained in section 115(d)(11)(D).³⁶ In entrusting the Office with express authority to fill statutory gaps in connection with the blanket license, Congress recognized that “[t]he Copyright Office has the knowledge and expertise regarding music licensing through its past rulemakings and . . . assistance . . . during the drafting of [the MMA].”³⁷

While this proposed rule is primarily focused on termination issues, this rulemaking ultimately reflects the

Office’s oversight and governance of the MLC’s reporting and payment obligations to copyright owners. The Office has previously promulgated regulations regarding the MLC’s reporting and distribution of royalties to copyright owners.³⁸ In doing so, the Office observed that “[t]he accurate distribution of royalties under the blanket license to copyright owners is a core objective of the MLC” and concluded that “it is consistent with the larger goals of the MMA to prescribe specific royalty reporting and distribution requirements through regulation[and] that the Register of Copyrights has the authority to promulgate these rules under the general rulemaking authority in the MMA.”³⁹

Beyond the MMA, the Office also has relevant authority under section 702 of the Copyright Act to “establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under [title 17].”⁴⁰ Courts have concluded that the Office has both authority to “issue regulations necessary to administer the Copyright Act” and “interpret the Copyright Act,” and its interpretations of the Copyright Act have been granted deference.⁴¹ The Office’s authority to interpret title 17 in the context of statutory licenses in particular has long been recognized and courts routinely defer to the Office’s interpretations.⁴²

³⁸ 37 CFR 210.29; see 85 FR 58160 (Sept. 17, 2020); 85 FR 22549 (Apr. 22, 2020).

³⁹ 85 FR 22550–52 (“There appears to be no dispute regarding the propriety or authority of the Office to promulgate regulations related to royalty statements issued by the MLC.”).

⁴⁰ 17 U.S.C. 702.

⁴¹ *Motion Picture Ass’n of Am., Inc. v. Oman*, 750 F. Supp. 3, 6 (D.D.C. 1990) (“The Copyright Office has authority to interpret the Copyright Act, and its interpretations of the act are due deference.”), *aff’d*, 969 F.2d 1154 (D.C. Cir. 1992); see *SoundExchange, Inc. v. Muzak, LLC*, 854 F.3d 713, 718–19 (D.C. Cir. 2017) (“[S]ince we have held that a Register’s opinion is entitled to deference under *Chevron*, it is conceivable that should this exact issue come up during a rate proceeding, the Register might legitimately differ with us.”) (citations omitted).

⁴² See, e.g., *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490 (3d Cir. 2003) (deferring to the Office’s interpretation of the section 114 sound recording license); *Fox Tel. Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1012–15 (9th Cir. 2017) (deferring to the Office’s interpretation of the section 111 cable license); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 283–84 (2d Cir. 2012), *cert. denied*, 568 U.S. 1245 (2013) (same); *Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 345, 347–48 (11th Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (same and stating that “[a]lthough the new regulations conflict with our interpretation . . . , they are neither arbitrary, capricious, nor in conflict with the clear meaning of the statute” and “[t]hey are therefore valid exercises of the Copyright Office’s statutory authority to interpret the provisions of the compulsory licensing scheme, and

IV. Legal Background

A. The Copyright Act’s Termination Provisions

The current termination provisions were adopted as part of the Copyright Act of 1976 and grew out of frustration with the prior law’s attempted protections against inadequate author remuneration. Those earlier provisions provided that, after an initial twenty-eight-year copyright term, the copyright in a work could be extended by the author or their heirs for a renewal term, if they complied with certain formalities.⁴³ As the Office had noted, these earlier provisions “largely failed to accomplish the purpose of protecting authors and their heirs against improvident transfers, and has been the source of much confusion and litigation.”⁴⁴ This was, in part, because it was “a common practice for publishers and others to take advance assignments of future renewal rights” at the time of the original license.⁴⁵

The aim of the revisions made by the 1976 Copyright Act “was to protect authors against unremunerative transfers and to get rid of the complexity, awkwardness, and unfairness of the renewal provision.”⁴⁶ In particular, Congress sought to address problems stemming from “the unequal bargaining position of authors and from the impossibility of determining a work’s value until it has been exploited.”⁴⁷ The current termination

are binding on this circuit”); *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 602, 607–12 (D.C. Cir. 1988), *cert. denied*, 487 U.S. 1235 (1988) (deferring to the Office’s interpretation of the section 111 cable license and stating that “[t]he Copyright Office certainly has greater expertise in such matters than do the federal courts”).

⁴³ 17 U.S.C. 24 (1975).

⁴⁴ Copyright Law Revision, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 92 (Comm. Print 1961), https://www.copyright.gov/history/1961_registers_report.pdf.

⁴⁵ *Id.* at 53.

⁴⁶ U.S. Copyright Office, *General Guide to the Copyright Act of 1976*, ch. 6:1 (1977), <https://www.copyright.gov/reports/guide-to-copyright.pdf>.

⁴⁷ *Id.*; see H.R. Rep. No. 94–1476, at 124 (1976) (“The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal . . . should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. 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.”); *id.* at 140 (“The arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.”).

³² H.R. Rep. No. 115–651, at 5–6 (2018); S. Rep. No. 115–339, at 5 (2018); Report and Section-by-Section Analysis of H.R. 1551 by the Chairmen and Ranking Members of Senate and House Judiciary Committees, at 4 (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf (“Conf. Rep.”).

³³ 17 U.S.C. 115(d)(12)(A).

³⁴ H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

³⁵ H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12; see *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (“We have previously pointed out that the power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”) (quotations omitted) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (discussing an agency’s congressionally delegated authority and stating that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion”).

³⁶ H.R. Rep. No. 115–651, at 5–6; S. Rep. No. 115–339, at 5; Conf. Rep. at 4.

³⁷ H.R. Rep. No. 115–651, at 14; S. Rep. No. 115–339, at 15; Conf. Rep. at 12.

provisions that resulted were the subject of much debate prior to their enactment.⁴⁸ When adopting the new provisions, Congress explained that the termination provisions “reflect[] a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.”⁴⁹ The Supreme Court would later comment on Congress’s purpose in creating a termination right, stating:

[T]he concept of a termination right itself, [was] 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 had been made before the author had a fair opportunity to appreciate the true value of his work product. That general purpose is plainly defined in the legislative history and, indeed, is fairly inferable from the text of [the statute] itself.⁵⁰

B. Application of the Exception by the Courts

While the application of the Exception can often be straight-forward (e.g., “a film made from a 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”⁵¹), there are instances where the Exception’s operation is less clear. Few courts have addressed the Exception and, to the Office’s knowledge, no court has dealt directly with the application of the Exception to a statutory license either before or after the passage of the MMA. Instead, the cases address the termination of voluntary licenses.

The most notable case addressing the Exception is the 1985 decision by the Supreme Court in *Mills Music, Inc. v. Snyder*.⁵² In this case, a songwriter (Snyder) had assigned his copyright in a musical work to a publisher (Mills Music) and the publisher, pursuant to that grant, had then issued voluntary

mechanical licenses to record companies. The sound recordings embodying the musical work prepared by the record companies pursuant to these mechanical licenses were the relevant derivative works. The songwriter’s heirs timely terminated his grant to the publisher. In a 5–4 decision, the divided Court found that, under its interpretation of the Exception, the publisher was entitled to continue receiving royalties from the record companies under the voluntary mechanical licenses even after the songwriter’s heirs terminated the underlying assignment with the publisher. The Court concluded that Congress did not intend for the Exception only to apply where there is a single direct grant (e.g., from songwriter to publisher) and not to apply where there is a chain of successive grants (e.g., from songwriter to publisher to record company). Rather, the Court reasoned that, where a derivative work had been prepared, the statute should be read “to preserve the total contractual relationship.”⁵³

The Court elaborated that, with respect to the particular facts in the case, defining the relevant “terms of the grant” as “the entire set of documents that created and defined each licensee’s right to prepare and distribute derivative works” meant preserving not only the record companies’ right to prepare and distribute the derivative works, but also their corresponding duty to pay the publisher any due royalties and the publisher’s duty to pay the songwriter’s heirs any due royalties.⁵⁴ The Court surmised that if the underlying assignment from the songwriter to the publisher is not included as part of the relevant “terms of the grant” preserved under the Exception, then there would be no contractual or statutory obligation on the publisher or record companies to pay the songwriter’s heirs any royalties.⁵⁵ The Court also explained that the Exception is defined by both the

terms of the grant and when the derivative work was prepared.⁵⁶

The *Mills Music* dissent would not have interpreted the Exception to permit the publisher to continue to benefit from the terminated grant (i.e., continuing to collect its share of the royalties due from the record companies under their licenses with the publisher).⁵⁷ The dissent reasoned that the Copyright Act’s termination right “encompasses not only termination of the grant of copyright itself, but also termination of the grant of ‘any right under’ that copyright,” which in this case, included the right “to share in royalties paid by [the record company] licensees.”⁵⁸

In support of its conclusion, the dissent noted, among other points, that the majority’s analysis of the Exception was inconsistent with the statutory mechanical license, observing that statutory mechanical license royalties are “payable to the current owner of the copyright,” who “[i]n this case, as all agree, . . . are the [songwriter’s heirs].”⁵⁹ The majority opinion responded to this critique by explaining that no statutory license was at issue in the case.⁶⁰ It is noteworthy in connection with the current rulemaking that the majority did not disagree with the dissent’s reasoning as it applies to the statutory mechanical license.⁶¹ In discussing such licenses, the majority calls them “self-executing” and distinguishes them from the voluntary mechanical licenses at issue in the case.⁶²

In reviewing the Copyright Act’s termination provisions and *Mills Music*, the Nimmer copyright treatise agrees with the Court that because the statutory mechanical license “is executed by operation of law,” rather than “by the consent of the author or his successors,” it is “not subject to termination.”⁶³ Nimmer observes that because a songwriter who terminates an

⁵⁶ *Id.* at 164 (“[T]he 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.”).

⁵⁷ *Id.* at 178 (White, J., dissenting).

⁵⁸ *Id.* at 178–79 (White, J., dissenting) (citing 17 U.S.C. 304(c)).

⁵⁹ *Mills Music*, 469 U.S. at 185 n.12 (White, J., dissenting) (citing 17 U.S.C. 115(c)(1) (1985)).

⁶⁰ *Mills Music*, 469 U.S. at 168 n.36.

⁶¹ The majority expressly agrees that “the termination has caused the ownership of the copyright to revert to the [songwriter’s heirs].” *Id.* at 167–68. With respect to the implication for a section 115 license, the majority merely says that the dissent is “incorrect because it seems to assume that the case involves self-executing compulsory licenses.” *Id.* at 168 n.36.

⁶² *Id.*

⁶³ Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright sec. 11.02 n.121 (2022).

⁴⁸ U.S. Copyright Office, *General Guide to the Copyright Act of 1976*, ch. 6:1 (1977), <https://www.copyright.gov/reports/guide-to-copyright.pdf> (“It is generally acknowledged that during the early stages of the revision effort, ‘the most explosive and difficult issue’ concerned a provision for protecting authors against unfair copyright transfers.”); U.S. Copyright Office, *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, ch. XI, at 10 (1975) (explaining that “[t]he subject is inherently complex, and the bargaining over individual provisions was very hard indeed,” and that “[t]he result is an extremely intricate and difficult provision”).

⁴⁹ H.R. Rep. No. 94–1476, at 124.

⁵⁰ *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172–73 (1985).

⁵¹ H.R. Rep. No. 94–1476, at 127.

⁵² 469 U.S. 153 (1985).

⁵³ *Id.* at 163–64, 169.

⁵⁴ *Id.* at 166–69.

⁵⁵ *Id.* (“[A]lthough the termination has caused the ownership of the copyright to revert to the [songwriter’s heirs], nothing in the statute gives them any right to acquire any contractual rights that the Exception preserves. The [songwriter’s heirs] 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 [T]he licensees . . . 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.”).

assignment to a publisher becomes the “copyright owner” of the musical work and the publisher’s copyright ownership “would cease” at the point of termination, statutory mechanical license royalties would then “be payable solely to” the terminating songwriter.⁶⁴ Goldstein’s treatise takes a similar view.⁶⁵

In a subsequent appellate case, *Woods v. Bourne Co.*, the Second Circuit stated that “[t]he effect of *Mills Music*, then, 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.”⁶⁶ *Woods* involved a more complicated series of agreements, but as with *Mills Music*, the preparation of the derivative work began with a grant in a musical work from a songwriter to a publisher that was terminated by the songwriter’s heirs. The court ultimately found that the publisher was entitled to continue to receive a share of royalties from post-termination performances of the musical work embodied within pre-termination audiovisual derivative works that were prepared pursuant to synchronization licenses issued by the publisher. The court explained that “[u]nder our reading of *Mills Music*, the ‘terms of the grant’ include the provisions of the grants from [the publisher] to ASCAP and from ASCAP to television stations. This pair of licenses is contemplated in the grant of the synch licenses from [the publisher] to film and television producers,” the terms of which “required the television stations performing the audiovisual works to obtain a second grant from either [the publisher] or ASCAP, licensing the stations to perform the Song contained in the audiovisual works.”⁶⁷

⁶⁴ *Id.* (citing *Mills Music*, 469 U.S. at 168 n.36; *id.* at 185 n.12 (White, J., dissenting)).

⁶⁵ Paul Goldstein, *Goldstein on Copyright* sec. 5.4.1.1.a (3d ed. 2022) (“The requirement that, to be terminable, a grant must have been ‘executed’ implies that compulsory licenses, such as section 115’s compulsory license for making and distributing phonorecords of nondramatic musical works, are not subject to termination.”).

⁶⁶ *Woods v. Bourne Co.*, 60 F.3d 978, 987 (2d Cir. 1995) (“*Mills Music* appears to require 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.”).

⁶⁷ *Id.* at 987–88. Another Second Circuit case emphasized the importance of the actual terms of the grant. *Fred Ahlert Music Corp.*, 155 F.3d at 24–25 (concluding that where the co-authors of a musical work had made a grant to a publisher and the publisher, pursuant to that grant, authorized a record company to prepare a sound recording derivative of the musical work and release it as “Record No. SP 4182,” the inclusion of the

V. Analysis

A. The Exception Does Not Apply in the Context of the Blanket License

1. The Blanket License Cannot Be Terminated Under Section 203 or 304 of the Copyright Act

To be subject to termination, a grant must be executed by the author or the author’s heirs.⁶⁸ The blanket license, however, is not executed by the author or the author’s heirs. As a type of statutory license, the blanket license is “self-executing,” such that it cannot be terminated.⁶⁹ If a blanket license cannot be terminated, then it cannot be subject to an exception to termination; the license simply continues in effect according to its terms.⁷⁰

The plain language of the statute is in accord. The Exception refers to “the grant before its termination,” “the grant after its termination,” and “the terminated grant.”⁷¹ Thus, the “grant” referenced in the statute is a terminated grant. Because the blanket license cannot be terminated, it cannot be the terminated “grant” referenced in the text to which the Exception applies.

2. No Derivative Work Is Generally Prepared Pursuant to the Blanket License

Section 115’s blanket licensing regime is premised on the assumption that DMPs are not preparing derivative works pursuant to their blanket licenses. Instead, the statute envisions that DMPs operating under the blanket license are obtaining and licensing sound recording derivatives⁷² from record companies or other sound recording licensors.⁷³ In

recording in a film soundtrack and soundtrack album were not covered by the Exception because the terms of the grant from the publisher to the record company did not authorize additional releases or inclusion in a film soundtrack, even if the grant from the songwriters to the publisher may have).

⁶⁸ 17 U.S.C. 203(a) (“executed by the author”), 304(c) (“executed . . . by any of the persons designated by subsection (a)(1)(C) of this section”).
⁶⁹ *Mills Music*, 469 U.S. at 168 n.36; see Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright sec. 11.02 n.121 (2022); Paul Goldstein, *Goldstein on Copyright* sec. 5.4.1.1.a (3d ed. 2022).

⁷⁰ Although the blanket license cannot be terminated, as discussed below, that does not mean that entitlement to royalties is fixed. It travels with ownership of the copyright.

⁷¹ 17 U.S.C. 203(b)(1), 304(c)(6)(A).

⁷² Some sound recordings of musical works may not even necessarily be derivative works within the meaning of the Copyright Act. For example, where preparation of the musical work and sound recording are concurrent, the musical work is not a “preexisting work[.]” that the sound recording is “based upon.” See 17 U.S.C. 101.

⁷³ See, e.g., 17 U.S.C. 115(a)(1)(A)(ii)(II) (in describing one of the eligibility criteria, stating that “the sound recording copyright owner, or the authorized distributor of the sound recording copyright owner, has authorized the digital music

this standard situation, DMPs would generally have two distinct sets of licenses: one to use the sound recordings offered through their service and another to use the underlying musical works.

If no derivative work is prepared “under authority of the grant,” then the Exception cannot apply. Proponents of the Exception’s application to the blanket license might argue that the blanket license should be construed as being included within a so-called “panoply” of grants pursuant to which a pre-termination derivative work of the musical work was prepared. However, the only panoply to which the blanket license could theoretically belong would be the grant (or chain of successive grants) emanating from the songwriter and extending to the record company (or other person) who prepared the sound recording derivative licensed to the DMP.

It is the Office’s view that where no sound recording derivative is prepared pursuant to a DMP’s blanket license, that blanket license is not part of any preserved grants that make the Exception applicable. The Exception, as interpreted by *Mills Music*, should not be read as freezing other grants related to, but outside of, the direct chain of successive grants providing authority to utilize the sound recording derivative, such as the musical work licenses obtained by DMPs.

First, any changes in, or even the loss of, a DMP’s musical work licenses post-termination should not have any direct effect on a record company’s authorization to continue utilizing a sound recording derivative under the terms of the preserved chain of pre-termination sound recording-related grants. While such a change or loss could affect a DMP’s ability to utilize the sound recording—because it cannot make use of sound recording derivatives without the relevant musical work licenses—there does not appear to be any indication that the Exception is meant to preserve a DMP’s ability to do so.⁷⁴

provider to make and distribute digital phonorecord deliveries of the sound recording”); *id.* at 115(d)(4)(A)(ii)(I)(bb) (requiring DMPs to report certain information “to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings”); *id.* at 115(d)(4)(B) (requiring DMPs to “engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings” certain information).

⁷⁴ See *Mills Music*, 469 U.S. at 173 (“The purpose of the Exception was to ‘preserve the right of the owner of a derivative work to exploit it, notwithstanding the reversion.’”) (quoting Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised

Second, if the grants authorizing utilization of a sound recording derivative are separately preserved, then the major concern in *Mills Music*, regarding the continuity of contractual royalty obligations, is not present. Under the terms of the preserved chain of sound recording-related grants, a publisher would still be entitled to continue to be compensated by a record company and a songwriter would still be entitled to continue to then be compensated by the publisher for the record company's post-termination uses of a sound recording derivative. A DMP's musical work licenses would not need to be preserved to keep these sound recording-related contractual obligations intact post-termination.

Last, the Exception's language does not support the inclusion of a DMP's musical work licenses within a panoply of preserved sound recording-related grants where the DMP is not the derivative work preparer. As noted above, the word "grant" is used three times in the Exception and, according to the Supreme Court, all three references should be given a "consistent meaning."⁷⁵ While some might contend that the third reference, to "the terminated grant," could refer to at least some types of DMP musical work licenses (e.g., a direct grant from a songwriter to the DMP), the other two references cannot.

The Exception's first use of "grant" is to a "derivative work prepared under authority of the grant." Here, the relevant derivative work triggering the Exception (i.e., the sound recording) was not prepared pursuant to any authority under the DMP's musical work licenses (in contrast to the direct chain of sound recording-related grants that did authorize the sound recording's preparation). Thus, the first use of "grant" cannot be referring to the DMP's musical work licenses pursuant to which no derivative work was prepared. The second use, permitting the continued utilization of the derivative work "under the terms of the grant," also cannot refer to a DMP's musical work licenses for the same reason.⁷⁶

U.S. Copyright Law, 88th Cong., 2d Sess., at 39 (H. Judiciary Comm. Print 1964) (statement of Barbara A. Ringer, U.S. Copyright Office) (emphasis added).

⁷⁵ See *Mills Music*, 469 U.S. at 164–66. For reference, 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. 203(b)(1), 304(c)(6)(A) (emphasis added).

⁷⁶ If a DMP actually did prepare a derivative work pursuant to the authority of a blanket license, so

3. Applying the Exception to the Blanket License Would Lead to an Extreme Result

Finally, the Office has an additional significant concern with the application of the Exception to the blanket license. If it applies, then it is not clear why it would only apply to the payee, as the MLC's prior rulemaking comments seem to suggest. In *Mills Music*, the Court emphasized that the statute "refers to 'the terms of the grant'—not to some of the terms of the grant."⁷⁷ Consequently, the Office believes that if the Exception applies, then it must apply to all of the blanket license's terms. This would be extremely far reaching, as it would freeze in time everything from DMP reporting requirements and MLC royalty statement requirements to the rates and terms of royalty payments for using the license set by the CRJs. Any post-termination changes made by Congress to section 115 (without also abrogating the effect of the Exception) or by the Office or CRJs to related regulations would seem to be a nullity with respect to an applicable work, for DMPs, the MLC, copyright owners, and songwriters alike. It is improbable that Congress intended such an extreme result *sub silentio*. Such a construction of the Exception would also be directly at odds with Congress's clearly expressed intent for the CRJs to be empowered to adjust the rates and terms of the blanket license every five years.⁷⁸ Moreover, as a practical matter, the Office is concerned about how the MLC could effectively administer a license that may need to be treated differently for each one of millions of works across nearly 50 different DMPs.

B. Even if the Exception Applies to the Blanket License, a Terminated Publisher Is Not Entitled to Post-Termination Blanket License Royalties

Mills Music makes clear that what matters most under the Exception are "[t]he 'terms of the grant' as existing at the time of termination."⁷⁹ Here, the terms of the blanket license are the applicable text of section 115 and related regulations, which simply refer

that the above analysis is inapplicable, the Exception still would not apply. As discussed in the previous section, a blanket license cannot be terminated; it simply continues in effect under its terms. Practically, however, the continued effect of a blanket license in this context is that the ability of the DMP to continue utilizing the relevant derivative work that it prepared remains preserved.

⁷⁷ *Mills Music*, 469 U.S. at 167 n.35.

⁷⁸ See 17 U.S.C. 115(c)(1)(E)–(F), 804(b)(4); see also *id.* at 803(c)(4) (providing the CRJs with continuing jurisdiction to "issue an amendment to a written determination" under certain circumstances).

⁷⁹ *Mills Music*, 469 U.S. at 174, 177.

to paying the "copyright owner,"⁸⁰ who can change over time.⁸¹ Thus, whenever a change is effectuated, whether via a contractual assignment or by operation of a statutory termination, the new owner becomes the proper payee entitled to royalties under the blanket license.⁸² It is not clear why the statute or the case law should be read as making one particular copyright owner the permanent recipient because it happened to be the owner immediately before termination occurred. Such a construction of the Exception would read something into the terms of the blanket license that is not present: the identification of a specific named individual or entity to be paid.⁸³

VI. Proposed Rule

The Office believes that the statute is ambiguous, as it does not directly speak to how the Exception operates in connection with the blanket license. It is not always clear from the plain meaning of the text which grants fall into the Exception, as demonstrated by divisions on the Supreme Court in *Mills Music*.⁸⁴ Additionally, the significantly different nature of DMP blanket licenses, as compared to the record company voluntary licenses at issue in *Mills Music*, raises questions about how both the Exception and *Mills Music*'s interpretation should apply.

Based on the foregoing analysis of the statute, Congress's intent, and the above-discussed authorities, the Office concludes that the MLC's termination dispute policy is inconsistent with the law. Whether or not the Exception applies to a DMP's blanket license (and the Office concludes that the Exception does not), the statute entitles the current copyright owner to the royalties under the blanket license, whether pre- or post-termination. In other words, the post-termination copyright owner (i.e., the author, the author's heirs, or their successors, such as a subsequent publisher grantee) is due the post-termination royalties paid by the DMP to the MLC. Consequently, the Office is proposing a rule to clarify the

⁸⁰ See, e.g., 17 U.S.C. 115(d)(3)(G)(i)(I)–(III), (d)(3)(I).

⁸¹ *Id.* at 201(d)(1) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law.")

⁸² See *Mills Music*, 469 U.S. at 185 n.12 (White, J., dissenting); Melville B. Nimmer & David Nimmer, 3 Nimmer on Copyright sec. 11.02 n.121 (2022).

⁸³ See *Mills Music*, 469 U.S. at 169 ("The contractual obligation to pay royalties survives the termination and identifies the parties to whom the payment must be made.")

⁸⁴ *Id.* at 180–85 (White, J., dissenting) (stating that Congress "phrased the statutory language . . . ambiguously").

appropriate payee under the blanket license to whom the MLC must distribute royalties following a statutory termination.

The Office proposes a rule with two parts. The first part would make clear that the copyright owner of the musical work as of the end of the monthly reporting period is the one who is entitled to the royalties and any other related amounts (e.g., interest), including any subsequent adjustments, for the uses of the work during that period. The proposal provides that by “uses,” the Office means the covered activities engaged in by DMPs under blanket licenses as reported to the MLC. The proposed rule would also caveat that entitlement to royalties is subject to section 115(d)(3)(J), which requires the MLC, under certain circumstances, to make market-share-based distributions of unclaimed royalties for which the copyright owners are unknown.

The Office believes that the appropriate moment in time when a copyright owner becomes entitled to royalties is when the use of the relevant musical work by a DMP under a blanket license occurs.⁸⁵ In line with the monthly reporting scheme set up by the MMA and the Office’s regulations, and in an effort to make the rule reasonably administrable for the MLC, the Office proposes using the last day of the relevant monthly reporting period instead of requiring the MLC to manage day-to-day ownership changes occurring mid-month. The Office seeks comments on this proposed approach, including whether some other point in time might be appropriate.

To avoid any doubt, the proposed rule would also explicitly provide that the Exception does not apply to blanket licenses. It would also provide that no one may claim that by virtue of the Exception they are the copyright owner of a musical work used pursuant to a blanket license.

The second part of the proposed rule would require the MLC to distribute royalties in accordance with the Office’s legal conclusions under the first part. The proposal includes an exception when the MLC is directed in writing to distribute the royalties in some other manner by the copyright owner identified under the first part or by the mutual written agreement of the parties to an ownership dispute. Letters of

⁸⁵ See 17 U.S.C. 115(c)(1)(C) (providing that payable royalties are for “every digital phonorecord delivery of a musical work made”). Cf. *id.* at 501(b) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”) (emphasis added).

direction are commonly used in the music industry and the Office believes the proposed rule should accommodate such arrangements. More specifically, the Office appreciates and understands the MLC’s interest in avoiding circumstances where the existence of a dispute causes songwriters’ income streams to be interrupted. Under the proposed rule, the Office believes that it would be appropriate for the MLC to implement a policy that allows blanket license royalties to continue to be paid to an existing claimant (including a pre-termination copyright owner), despite the presence of an ownership dispute, if the parties to the dispute jointly submit a mutually agreed-to letter of direction requesting the continued payment subject to subsequent adjustment upon resolution of the dispute.

Because the MLC’s termination dispute policy is contrary to the Office’s interpretation of current law, the proposed rule would require the MLC to immediately repeal its policy in full. If the issue surrounding the Exception is resolved, it is not clear to the Office at this time why the MLC would need a separate dispute policy specifically for handling terminations that is different from its policy for other ownership disputes. The proposed rule would then also require the MLC to adjust any royalties distributed under the policy, or distributed in a similar manner if not technically distributed pursuant to the policy, within 90 days. The Office proposes this adjustment to make copyright owners whole for any distributions the MLC made based on an erroneous understanding and application of current law.

List of Subjects in 37 CFR Part 210

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the U.S. Copyright Office proposes amending 37 CFR part 210 as follows:

PART 210—COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHYSICAL AND DIGITAL PHONORECORDS OF NONDRAMATIC MUSICAL WORKS

- 1. The authority citation for part 210 continues to read as follows:

Authority: 17 U.S.C. 115, 702.

- 2. Amend § 210.29 by adding paragraph (b)(4) to read as follows:

§ 210.29 Reporting and distribution of royalties to copyright owners by the mechanical licensing collective.

* * * * *

(b) * * *

(4)(i) Subject to 17 U.S.C. 115(d)(3)(J), the copyright owner of a musical work (or share thereof) as of the last day of a monthly reporting period in which such musical work is used pursuant to a blanket license is entitled to all royalty payments and other distributable amounts (e.g., accrued interest), including any subsequent adjustments, for the uses of that musical work occurring during that monthly reporting period. As used in the previous sentence, the term *uses* means all covered activities engaged in under blanket licenses as reported by blanket licensees to the mechanical licensing collective. 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 and no individual or entity may be construed as the copyright owner of a musical work (or share thereof) used pursuant to a blanket license based on such exception.

(ii) The mechanical licensing collective shall not distribute royalties in a manner inconsistent with paragraph (b)(4)(i) of this section, unless directed to do so in writing by the copyright owner identified in paragraph (b)(4)(i) of this section or by the mutual written agreement of the parties to an ownership dispute. The mechanical licensing collective shall immediately repeal its “Notice and Dispute Policy: Statutory Terminations.” No later than [90 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], the mechanical licensing collective shall adjust all royalties and other amounts distributed pursuant to that policy or in a similar manner so as to be consistent with paragraph (b)(4)(i) of this section.

* * * * *
Dated: October 19, 2022.

Suzanne V. Wilson,
General Counsel and Associate Register of Copyrights.
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2021–0841; EPA–HQ–OAR–2021–0663; FRL–10291–01–R4]

Air Plan Disapproval; AL; Interstate Transport Requirements for the 2015 8-Hour Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).