

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1153

TITLE MILLS MUSIC, INC., Petitioner v. MARIE SNYDER AND TED SNYDER,
JR., ETC.

PLACE Washington, D. C.

DATE October 9, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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MILLS MUSIC, INC., :
Petitioner : No. 83-1153
v. :
MARIE SNYDER AND TED SNYDER, :
JF., ETC. :

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Washington, D.C.
Tuesday, October 9, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:10 o'clock a.m.

APPEARANCES:

MARVIN E. FRANKEL, ESQ., New York, New York;
on behalf of Petitioner.

HAROLD R. TYLER, JR., ESQ., New York, New York
on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

MARVIN E. FRANKEL, ESQ.

on behalf of the Petitioner

3

HAROLD R. TYLER, JR., ESQ.

on behalf of the Respondent

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MARVIN E. FRANKEL, ESQ.

on behalf of the Petitioner - Rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: Mr. Frankel, I think
3 you may proceed when you're ready.

4 ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.

5 ON BEHALF OF RESPONDENT

6 MR. FRANKEL: Mr. Chief Justice, and may it
7 please the Court, this case has a similar superficial
8 sound to the one preceding it. This, too, is a case of
9 statutory construction. And here again, the petitioner,
10 Mills Music, is arguing among other things, that the
11 Court of Appeals reversing the district court violated
12 the rule that it ought to read the statute and follow
13 the plain meaning of what Congress wrote.

14 The statute here is determination of transfer
15 provisions of the Copyright Act of 1976 and, more
16 specifically, the one sentence exception to the results
17 of termination. The provisions that are in issue are
18 set out at pages 14 and 15 of petitioner's blue brief,
19 and I'll be talking about them and focusing most
20 particularly, as I say, on a single sentence, the
21 Exception that both lower courts describe with a capital
22 E to focus on its centrality in the case, which is
23 subsection A of 304(c)(6) there on page 15 of our brief.

24 Very briefly, let me remind the Court of the
25 relevant statutory background. The Copyright Act of

1 1976, extending copyright terms in general to 75 years
2 for old copyrights, that is, pre-Act copyrights, and to
3 life of the author plus 50 years for new copyrights,
4 also created a termination provision by which authors or
5 their heirs could terminate grants of transfers or
6 licenses of their copyrights.

7 There are two separate sections that embody
8 this termination idea. One, section 203, relates to new
9 copyrights after the effective date of the new Act. The
10 other, section 304, relates to preexisting copyrights.
11 We deal with 304 here, but as the courts below
12 indicated, and I think the parties agree, both sections
13 are identical for our purposes. Both contain the
14 identical exception for derivative works set out at page
15 15 of our brief. And it is that exception that the case
16 is about, and I'll be talking about that sentence, I
17 think, in some little detail.

18 The undisputed facts that led to the summary
19 judgment motions and decision in the district court are
20 relatively simple. In 1923, three authors, including
21 Ted Snyder, wrote a song, a popular song called "Who's
22 Sorry Now?"

23 We're concerned only with Ted Snyder's
24 interest and the interest of his heirs, Marie Snyder and
25 Ted Snyder, Jr., and I'll be referring to him, as we

1 have throughout, as the author.

2 In 1940, Snyder assigned the renewal term of
3 his copyright to the Mills Music Company, the petitioner
4 here, in a form of assignment that, as both courts below
5 said, is typical of the music business and typical of a
6 number of others. And it appears at the beginning of
7 page 41 of the Joint Appendix.

8 The provisions of direct and central interest
9 to us are the provisions for the licensing by Mills of
10 recordings of the song. Snyder, in a sense, did not
11 transfer all his rights under the copyright, and I mean
12 in the sense that he retained under the terms of his
13 grant a 50 percent interest in the net royalties from
14 licenses for recordings that Mills was authorized to
15 issue.

16 Now, that, as both courts below said, is a
17 standard or typical arrangement in the music business.
18 And its standardness and typicality is a point of some
19 consequence, in our view, for the correct construction
20 of the statute. And I might add, as the Court of
21 Appeals indicated, that multi-grant situations of the
22 kind we have here are typical not only in the music
23 business, but in other fields of artistic work and the
24 business relationships that grow up around artistic
25 works, and that is, among other reasons we take it, why

1 this is a case warranting review on certiorari.

2 After the effective date of the new Act, the
3 heirs of Ted Snyder, whose widow and his son, who is a
4 conservator of the widow, exercised the power given
5 under that statute 304(c) to terminate the grant,
6 terminate the grant from Ted Snyder to Mills.

7 They exercised it by giving a notice to Mills
8 referring to that grant and terminated it. And there is
9 no dispute that that's the only grant they purported to
10 terminate and, for our purposes, the only grant they
11 could terminate.

12 Everyone agrees that as a result of the
13 termination, they recapture 100 percent of all rights in
14 the copyright going forward from the effective date of
15 the termination. They can license new recordings. They
16 can reap rewards from sheet music. They can use it in
17 movies and wherever else popular songs are exploited.
18 And this appears to be still a popular song that
19 produces considerable royalties.

20 There is, as I've said, an exception to what
21 reverts to them, and that's what the case is about.
22 That exception, the exception for derivative works,
23 relates to sound recordings, in our case, a form of
24 derivative work licensed by Mills prior to the
25 termination.

1 Prior to the termination, as I've said, the
2 net royalties were shared equally, 50/50, under the
3 standard practice in the industry. Mills's position is
4 that under the plain words of that statute which Mills
5 contends Congress knew what it was doing when it wrote
6 it, under those plain words, Mills contends that
7 Congress, for those old derivative works, issued under
8 the authority of Mills, the old arrangement of equal
9 sharing continues.

10 The position of the Snyders is that that's not
11 so, and that the Snyders now get 100 percent of those
12 royalties. Their position was rejected by Judge
13 Weinfeld in the district court. Judge Weinfeld said the
14 position is one that requires a tortured reading of that
15 exception.

16 But Judge Weinfeld characteristically did not
17 stop with the language. He went ahead and wrote what
18 the Circuit properly called a characteristically
19 comprehensive opinion, traced through the history,
20 traced through the policies and the purposes of Congress
21 in this enactment, and concluded that, if anything, that
22 history buttressed what the plain language said,
23 certainly did not warrant altering it or deviating from
24 it.

25 The Circuit, as I say, reversed and reversed

1 -- and I'll be returning to this -- on the basic
2 premise, as stated by the Circuit -- that Congress did
3 not realize what it was legislating about when it
4 legislated for the exception, was not aware of or did
5 not have in mind the standard or typical or common
6 multiple grant situation.

7 And our position on that, which I will enlarge
8 upon is, that you're dealing with a statute that was 20
9 years in the making, that the Circuit emphasizes
10 correctly was initially produced after long study by the
11 Copyright Office, and you have a decision of the Court
12 of Appeals saying that, throughout the 20 years of that
13 gestation, the Copyright Office which lives with
14 copyrights and the business relationships every day in
15 the week, didn't realize that this exception would be
16 treating that standard or typical arrangement, and that
17 Congress -- which was at this for ten years -- didn't
18 realize it either.

19 We say with respect to the Circuit that that's
20 a drastically wrong way to view the work of Congress and
21 to interpret a statute. We say it is contrary to what
22 the Court would presume if it had no evidence of
23 anything about what Congress knew or didn't know.

24 This Court has said more than once that if you
25 have nothing else to go on, a judge ought to presume

1 that the Congress knows what it's dealing with when it
2 legislates, knows what's out there in the world that
3 will affected by the statute.

4 QUESTION: Mr. Frankel, the language of the
5 statute itself appears to be addressed just to the
6 single grant situation, author to the person who uses
7 the work. It doesn't, on the face of it at least, seem
8 to address the third party situation.

9 MR. FRANKEL: Your Honor, it doesn't say
10 anything about third parties, but it is dealing with a
11 world where grants and subgrants are the order of that
12 universe. It covers that universe --

13 QUESTION: Well, that's our problem, of
14 course, but how to apply this language which may not be
15 all that clear as applied to the third party situation?

16 MR. FRANKEL: Let me come to that directly,
17 Your Honor.

18 If you look at that exception, it says "A
19 derivative work, prepared under authority of the grant
20 before its termination, may continue to be utilized
21 under the terms of the grant after its termination. But
22 this privilege does not extend to new derivative
23 works." And we all agree on that.

24 Now, first, there's a matter of --

25 QUESTION: Is Mills Music a utilizer under

1 that subsection?

2 MR. FRANKEL: Is Mills Music a --

3 QUESTION: A utilizer.

4 MR. FRANKEL: No, it is not.

5 QUESTION: Does Mills Music utilize the work?

6 MR. FRANKEL: It is not, Your Honor. The
7 statute doesn't say anything about utilizers, and it
8 doesn't say anything about preparers.

9 What it is says is, "the derivative work,
10 prepared under authority of the grant before its
11 termination." Let's be clear. The only grant that was
12 terminated is the grant from Snyder to Mills. That's
13 the only grant they could terminate.

14 Now, the only thing that the exception applies
15 to or could apply to is a derivative work prepared under
16 authority of that grant, because obviously the exception
17 is referring to that.

18 If you're dealing with a derivative work that
19 was not prepared under the authority of that grant, but
20 some other grant, it doesn't get into the exception at
21 all. The exception only applies to that situation.

22 Now, our friends say obviously what Congress
23 wanted to protect in this case are the 419 licensees
24 authorized by Mills to make recordings. If the concern
25 is to protect them -- and we agree it is -- the only way

1 they get protected is by virtue of this exception.

2 And while the exception does not say in so
3 many words, this applies to the typical arrangement and
4 the judges are to read it faithfully and understand what
5 it means, and assume Congress knew what it was talking
6 about, and see how it works -- while it doesn't say
7 that, it fits with great comfort and intelligibility, as
8 Judge Weinfeld held, if somebody's looking at it with a
9 purpose to serve the mandate of Congress, which we think
10 is the judicial purpose.

11 One way to illustrate that, Your Honor, is to
12 look at what the Court of Appeals said. It said this
13 exception is ambiguous. "Ambiguous" means having more
14 than one meaning. If you read the exception, it's not
15 ambiguous. It refers to just one grant -- the
16 terminated grant.

17 QUESTION: Except that it appears, when you
18 read it, to be addressed to the purpose of protecting
19 the people who have recorded the works.

20 MR. FRANKEL: Sure. There's no dispute about
21 that.

22 QUESTION: And that it doesn't appear to
23 address the royalty question or who should receive what
24 royalties.

25 MR. FRANKEL: On the latter half, with

1 respect, Justice O'Connor, I think I would say it
2 somewhat differently. It does address that, because it
3 would have been written differently if it didn't.

4 It only had to say derivative works are
5 protected and derivative works owners will not be
6 infringers, period, if it only wanted to protect them.
7 Either way, we are absolutely agreed that they were the
8 object of Congress's concern and solicitude. There's no
9 dispute about that. And you will note that there isn't
10 any derivative work owner here.

11 They pay their royalties and have been paying
12 them under this new statute, and they don't have any
13 question about that.

14 QUESTION: Could I ask you about that? When
15 Mills made their grant or their -- he gave permission to
16 create this derivative work -- what did the user promise
17 to do? Pay royalties -- to whom?

18 MR. FRANKEL: The user promised to pay
19 royalties.

20 QUESTION: To whom.

21 MR. FRANKEL: To Mills.

22 QUESTION: And then Mills passed on half?

23 MR. FRANKEL: Mills passed on half of the net
24 royalties to the Snyders.

25 QUESTION: Well, what excuses the user from

1 paying royalties to Mills?

2 MR. FRANKEL: Well, actually, Your Honor, the
3 mechanics, the user -- I'm not sure this is at the heart
4 of your question, but I want to be technically
5 accurate. As a matter of mechanics, the royalties are
6 paid to this Harry Fox Agency, the licensee of a lot of
7 publishers, that handles the mechanics of these
8 licenses. It deducts its administrative costs, and then
9 the net royalties go 50/50 to Mills and the Snyders.

10 The record owners, if I may now try to reach
11 the question, have not been excused. They have not
12 stopped paying. They continue to pay.

13 QUESTION: The statute says that the
14 derivative users can continue to use, but I suppose in
15 accordance with the terms of their undertaking. And the
16 statute may contemplate that what would be continued for
17 old uses are those very terms, which would include
18 paying the royalty to Mills.

19 MR. FRANKEL: Well, to Mills if --

20 QUESTION: Or Mills's agent.

21 MR. FRANKEL: Your Honor, if you look at the
22 grant that has been terminated, you will see that
23 there's no way to know that RCA, for example, is a
24 record company authorized to make derivative works. You
25 will also find no way to know from the grant what was

1 the specific royalty rate that RCA has to pay under the
2 license from Mills.

3 What the grant from Snyder to Mills says in
4 that many words is, look, follow the typical
5 arrangement, licensed record companies -- RCA, Columbia,
6 whoever -- and, of course, fill in the royalty rate.
7 But the grant is the overarching limiter --

8 QUESTION: What kind of a piece of paper
9 passed between Mills and the user, the derivative -- the
10 record --

11 MR. FRANKEL: Actually, again, I'm being
12 pedantic, but I want to be accurate, the piece of paper
13 passed from Harry Fox to --

14 QUESTION: All right. And where is that? Is
15 that piece of paper --

16 MR. FRANKEL: Yes. A couple of them begin at
17 page 22 of the Joint Appendix. And I mentioned RCA
18 because it is the illustrative company. And there, in
19 this subgrant or sub-license, Mills, through its agent
20 Harry Fox, fills in the blanks.

21 QUESTION: Promises to pay royalties to us.

22 MR. FRANKEL: Yes. Us being Harry Fox.

23 QUESTION: Right.

24 MR. FRANKEL: And Harry Fox being an agent of
25 Mills.

1 QUESTION: Right.

2 MR. FRANKEL: And this being the typical
3 industry arrangemnt. And I emphasize, Your Honor, if --

4 QUESTION: This promise seems to me to be part
5 of the cconditions of the use that the statute says would
6 be continued.

7 MR. FRANKEL: Without a dcubt. Without a
8 doubt, Your Honor. But it will only be allowed to be
9 continued if it was a use permitted by the terms of the
10 terminated grant. And that's why we way what you have
11 to look to to find out how that use is regulated and
12 administered, what you have to look to is the terms of
13 the terminated grant.

14 Now, that, we argue as a matter of English,
15 logic, syntax. Now, it is true, Justice O'Connor, that
16 the words, if you have something less than a will to
17 make them work, can be made not to work. And if you
18 look at the alternatives which were conveniently, from
19 our view, laid out by the Court of Appeals, you can see
20 a ccontrast between these possible approaches.

21 At page 23 of our brief, we have set out what
22 the Circuit acknowledges is the way the words of that
23 exeption, subsection A, would have to be rewritten if
24 Congress had expressly intended to reach the result that
25 the Circuit thought it ought to reach.

1 And what you find there in the text at page 23
2 is a wonderfully, thoroughly, entirely rewritten statute
3 full of italics, twice as much new language added by the
4 Circuit in its drafting effort as the language Congress
5 wrote.

6 If you go to the next page, in Footnote 10,
7 you will see what the Circuit did in its
8 evenhandedness. It said well, the statute is ambiguous,
9 and we would have to rewrite it in order for Mills to
10 win as well. And in that footnote, you'll see the
11 rewriting and you'll see a few italicized words. And I
12 think Your Honors will see, with all respect to the
13 distinguished Circuit, that it's a bad drafting job;
14 that these words are added, most of them, gratuitously.
15 They don't make a better statute. They aren't
16 necessary.

17 A court bent as the district court, we submit,
18 in this case was, on reading faithfully the message
19 Congress tried to convey, in the context of the world
20 with respect to which Congress was legislating, would
21 reach the district court's result, we say, as a matter
22 of the essentially adequately plain meaning of this
23 statute in its setting.

24 We say that on the plain meaning rule, there
25 just isn't any way to reach the Circuit's result. And

1 let me point out --

2 QUESTION: Mr. Frankel, I guess at the time
3 that Snyder made the agreement originally with Mills
4 Music, it was contemplated that, at best, the right
5 would extend for 28 years and a renewal term. Is that
6 right?

7 MR. FRANKEL: Yes, Your --

8 QUESTION: And we're now in that extended 19
9 -- we're talking about the extension of an additional 19
10 years within which the copyright can be put into effect
11 beyond that contemplated by Snyder and Mills when it was
12 originally made.

13 MR. FRANKEL: That's correct.

14 QUESTION: And so I'm wondering whether, under
15 those circumstances, the mechanical licenses issued by
16 Mills would be expected to continue to require payment
17 of royalties beyond the original expiration time.

18 MR. FRANKEL: Your Honor, the extension
19 affected everybody. Now, if it were not for the
20 extension, the Snyder copyright would by now have
21 expired. And the record companies for whom our friends
22 are solicitors and we are, too, would be able to sell
23 their records without paying royalties to anyone.

24 It's agreed that by virtue of the extension,
25 they do have to continue paying royalties.

1 When the deal was made between Snyder and
2 Mills, both of them expected a maximum of 56 years,
3 Snyder as well as Mills. Congress came along and
4 extended the copyright, and then the question was what
5 does Snyder or his heirs get, and what does everyone
6 else get?

7 Now, Congress said we're going to give the
8 author, because we have special concern for authors, 100
9 percent of everything, with an exception. Now, what's
10 the exception? The exception says whatever were the
11 terms on which old derivative works were launched into
12 the world, we're going to continue that.

13 QUESTION: Well, if then Snyder had entered
14 into the agreement with Mills for a fixed lump sum fee,
15 not a continuing royalty of 50 percent, but just you pay
16 me \$5,000 now and you may have the right to license
17 during the term of the copyright, would Snyder's heirs
18 now be in a position to share in any of the money?

19 MR. FRANKEL: Your Honor, with respect to old
20 derivative works, the short answer is no. And it was
21 intended to be no. They used the example of movies, for
22 instance. In many movie deals, an author sells the
23 movie rights to his or her book outright, and people
24 make movies based upon it.

25 Under this statute, those movies could

1 continue to be exhibited, and the original author would
2 get nothing. There was a time when there was an effort
3 to make a different result. It failed. Whatever the
4 old deal was, having in mind that Congress didn't know
5 who did what to whom with respect to old derivative
6 works, Congress knew -- and it's in the legislative
7 record, as the courts below knew -- that publishers are
8 not mere middle men, that authors don't just give their
9 copyrights to publishers out of a feckless love for
10 these companies so that they can collect money.

11 But they give those rights to publishers
12 because publishers promote, plug, sell the work. And
13 Congress knew that, the Copyright Office knew that, and
14 they legislated accordingly. And Congress said the
15 author gets everything, going forward. But for what was
16 done in the past, we're going to leave the parties as
17 they agreed to be. If it was a lump sum, it's
18 finished. If it's shared, you go under those terms.

19 Now, look at what the Circuit said. And then
20 I'll stop, if I may. The Circuit said you have to read
21 that subsection A to mean that the word "grant" there
22 refers to the 419 grants from Mills to the record
23 companies, not the terminated grant. So that, as a
24 result of the Circuit's reading, you somehow don't get
25 into this exception at all, and what that is is a way of

1 -- as we put in our brief, and I think correctly -- I
2 think it's a legitimate lawyer's argument. What that's
3 saying is that in the same section of the same statute,
4 when it used the word "grant," Congress used it to have
5 two different meanings.

6 It doesn't work as a matter of grammar. It
7 doesn't work as a matter of law. And it is completely
8 wrong as a matter of history and policy in our
9 submission.

10 If I may, I'd like to reserve --

11 QUESTION: Can I just ask one question, Mr
12 Frankel?

13 MR. FRANKEL: Yes, Your Honor.

14 QUESTION: What is the source, as you
15 understand the statute, of the obligation of the 419
16 licensess to continue to pay anything to Mills or Fox?

17 MR. FRANKEL: They are obliged by the license
18 that they accepted from Mills --

19 QUESTION: Which, at the time they accepted
20 it, as Justice O'Connor has pointed out, anticipated
21 there would be no payments after the 56th year.

22 MR. FRANKEL: It did. But all have thus far
23 agreed -- and it may be in part -- it may be in part,
24 Your Honor, because there's no record company here.

25 QUESTION: That's what's running through my

1 mind.

2 MR. FRANKEL: I know you're aware of that. We
3 are agreed that the record companies, having construed
4 all the pertinent documents, statutory and contractual,
5 are right in their decision that they have to keep
6 paying royalties.

7 QUESTION: And what is your understanding of
8 the source of their obligation to continue to pay?

9 MR. FRANKEL: I think the source of their
10 obligation is their acceptance of the license which
11 would subsist as long as there was a valid copyright
12 under Gerde.

13 QUESTION: But under your theory, there is no
14 valid copyright insofar as it covers the exclusive right
15 to use the derivative works.

16 MR. FRANKEL: Your Honor, the copyright, the
17 grant which is the main document, has remained effective
18 because Congress said it would remain effective, and
19 that you look to the terms of that terminated grant,
20 continued in force, as the conditions on which these
21 record companies could continue to utilize.

22 It didn't ask who is the utilizer. It said
23 whoever is utilizing does it under the terms of the
24 terminated grant.

25 QUESTION: Well, Mr. Frankel, has any court

1 had occasion yet to decide whether, under one of these
2 Fox-type agreements, the licensees are required to
3 continue to pay any royalty at all?

4 MR. FRANKEL: Not so far as I know, Your
5 Honor. And I think --

6 QUESTION: And so that is really an open
7 question. And if they are not required to pay any
8 royalties at all, I guess both you and the respondent
9 are losers in that sense.

10 MR. FRANKEL: It may be, Your Honor, and I'm
11 sure that both Mr. Tyler and I would be grievously
12 unhappy if the Court found a way to reach that question
13 on this record.

14 QUESTION: Then you're both sorry now.

15 MR. FRANKEL: But I don't think there is any
16 way to reach that question, Your Honor, because
17 everybody has assumed, including the people who care --
18 the record companies -- that they have to pay.

19 QUESTION: If they want to use the work.

20 MR. FRANKEL: If they want to continue to sell
21 records.

22 QUESTION: I mean, it may be they are not
23 obligated to pay. They could say, well, I don't want to
24 use it at all.

25 MR. FRANKEL: The terms of payment are only a

1 royalty.

2 QUESTION: But the copyright is extended and
3 gives the right to exclusive use, doesn't it?

4 MR. FRANKEL: Well, that's right, Your Honor.
5 But it's only a royalty arrangement anyhow. If they
6 don't sell any records, they don't pay anything. But
7 it's a royalty-based arrangement, and I think, though
8 frankly I'm not prepared to argue all the details of
9 this, knowing something about the copyright bar and
10 entertainment lawyers, if that were wrong, Justice
11 O'Connor, for the record companies to have decided they
12 don't have to pay, we'd have heard from them before
13 now.

14 But so far, so far as I know, subject to what
15 my friend knows, that contention has not been raised,
16 certainly not in court.

17 Thank you.

18 CHIEF JUSTICE BURGER: Mr. Tyler.

19 ORAL ARGUMENT OF HAROLD R. TYLER, JR., ESQ.

20 ON BEHALF OF THE RESPONDENT

21 MR. TYLER: Mr. Chief Justice, may it please
22 the Court, the Snyders contend that this argument, both
23 in the brief as well as orally, on behalf of Mills,
24 really avoids and evades the principal issue in this
25 case. And that is the contention that the Snyders made

1 successfully in the court below, that there is
2 absolutely nothing in the statutory language, whether
3 it's in the basic reversion section or the exception
4 thereto, or any of the purposes of Congress in passing
5 this language, which can indicate that Mills, as a
6 publisher, is a benefitted class under this
7 legislation.

8 There is just no language in this statutory
9 set of provisions which deals with anyone in the nature
10 of Mills.

11 It is argued that the language is plain. We
12 agree with that. We are accused, of course, of saying,
13 as is the Second Circuit accused of saying, that the
14 language is ambiguous. As far as it goes, the language
15 is very clear.

16 First of all, section 304(c)(6) says that all
17 of a particular author's rights that were covered by the
18 termination, terminated grant, revert to the author or
19 as, in this case where the author is deceased, to his
20 heirs.

21 Second of all, the derivative works exception
22 is very plain on its face. It says a derivative work
23 prepared under authority of the grant before its
24 termination may continue to be utilized under the terms
25 of the grant after its termination.

1 Now, contrary to Mill's argument, the Second
2 Circuit did not miss the point here at all. It flatly
3 observed that the real problem with the exception
4 language is that it was designed to apply to a one-step
5 grant only. That is to say, a grant by the holder of
6 the underlying copyright to someone who was a creator of
7 what is known as a derivative work.

8 I recognize that Mill dances evasively on what
9 is meant by a utilizer and, of course, points out
10 correctly that there is not the exact word "utilizer" in
11 the exception, but it's perfectly clear that what we're
12 talking about here is preserving the right, which is a
13 copyrightable right, to someone such as a record company
14 who takes an assignment from someone in the position of
15 either the original copyright owner or, as in this case,
16 Mills and uses the idea of the underlying song to create
17 what is clearly a separately copyrightable work.

18 That is what Congress wanted to protect, and
19 all that is asked of this Court is to do what courts
20 from time-honored beginnings have always done: to apply
21 the clear intent of Congress to the facts of this
22 particular case.

23 Now, it is to be noticed also that Mills does
24 not like to talk about the precise grants which are
25 shown in the Joint Appendix in this case. First of all,

1 what happened was, as the Court's questions illustrated
2 now, originally Snyder sold to Mills the rights to the
3 second 28 years in the original old statutory setup of
4 56 years.

5 Mills has gotten its full 56 years, and it
6 certainly was not the intention of Congress, we say,
7 when they added 19 years in the new statute to benefit
8 authors, that there is anything in the statutory
9 language here that gives one scintilla of a suggestion,
10 let alone evidence, that Mills in its position, having
11 bargained for the 56 years -- and believe me, members of
12 this Court, they knew how to bargain to get their value
13 -- when way back in the 1940s they agreed to a price
14 with Snyder.

15 QUESTION: Judge Tyler, why do you think Judge
16 Weinfeld didn't buy that argument?

17 MR. TYLER: I think the short answer, Justice
18 Blackmun, is this. If you will notice, in his 70-plus
19 page opinion, nowhere did the district court start out
20 or indeed anywhere along the line, focus on the
21 principal objectives which Congress obviously intended
22 here; first, to extend for authors a period of copyright
23 protection, especially for those authors such as Snyder
24 who, way back in the early 20s, long before this 50/50
25 split which my opponent says is the norm of the trade,

1 was ever the norm of the trade, assigned away their
2 copyright --

3 QUESTION: Mr. Tyler -- go ahead.

4 MR. TYLER: Second, if you'll bear with me,
5 Justice Rehnquist, the clear purpose of the exception is
6 not to benefit a publisher like Mills, but to benefit
7 the public, to give the public access to clearly
8 copyrightable derivative works.

9 Now, if you will notice in the opinion of
10 Judge Weinfeld, he really never talks about those two
11 purposes, and I maintain that what happened was, if you
12 turn to the core of his holding, he misconstrued really
13 what the interplay between these parts of the statutory
14 language were all about.

15 QUESTION: But surely, if an author had
16 assigned away his rights, the statute intended to
17 benefit the assignee as well as the author.

18 MR. TYLER: Well, no, not in this sense,
19 Justice Rehnquist. The whole purpose of this section
20 304(c)(6) initially was to enable some author such as
21 Snyder, who long ago had bargained away the underlying
22 copyright, to get it back.

23 QUESTION: Yes. But then subsection A is the
24 exception to when they can get it back.

25 MR. TYLER: Well, that is correct. In other

1 words, the Snyders are well aware, as they have been in
2 the court below and here, that subsection 304(c)(6) is
3 subject to this privilege to derivative works
4 utilizers.

5 To that extent, the reversion is somewhat
6 undercut, if you will, or made subject to a privilege.
7 But that privilege doesn't go to somebody like Mills.

8 QUESTION: But, Mr. Tylcer --

9 MR. TYLER: Mills hasn't created anything.

10 QUESTION: Mr Tyler, isn't it correct that
11 it's subject to an exception for the derivative works?
12 That the people who make the derivative works may
13 continue to make them.

14 MR. TYLER: That is correct.

15 QUESTION: So that the copyright owner has no
16 exclusive right to prevent them from --

17 MR. TYLER: That is correct.

18 QUESTION: So I don't understand your --
19 supposing the derivative works people had paid a lump
20 sum for their rights, anticipating that they would run
21 out in 56 years. They wouldn't have to pay anymore.

22 MR. TYLER: You've got to be a little careful
23 here. If your question means, instead of the facts in
24 this case, if our client Snyder has assigned directly to
25 a derivative works --

1 QUESTION: No. My question is, your client
2 did exactly what he did with Mills, and then Mills said
3 well, I'll give RCA the right to use this particular
4 song for \$5,000, and they paid it in cash on the table.
5 Then they could continue to use it after the
6 expiration.

7 MR. TYLER: Oh, there's no doubt of that, but
8 that's not going to make it --

9 QUESTION: And the reason they could do it is
10 because your client has no exclusive privilege with
11 respect to the derivative work.

12 MR. TYLER: We have to accept that, Justice
13 Stevens.

14 QUESTION: Then what is the source of your
15 right to royalties with respect to derivative works?

16 MR. TYLER: No, no, no. That's a little
17 different. What we're saying is, we have to concede
18 that to be consistent here under the exception, as you
19 point out. What we are arguing is quite a different
20 case.

21 Mills is trying to position itself as a
22 beneficiary of the privilege, that is, the privilege
23 conferred in the exception, which language has nothing
24 to do with Mills at all.

25 QUESTION: Well, my question is, what is the

1 source of your right to get any money at all from RCA?

2 MR. TYLER: Let me go back to the two grants
3 here. First of all, you will notice in the record that
4 the first grant by Snyder to Mills provided that Mills
5 got the copyright and for the future of that 28-year
6 second term, there was an obligation specifically set
7 forth in that grant that Mills would have to remit to
8 Snyder 50 percent of all income collected by Mills.

9 Now, once 304(c)(6) was enacted, Mills goes
10 out of the picture. It's perfectly clear. The
11 reversion takes place.

12 Snyder steps in -- excuse me -- Snyder or his
13 heirs steps into the shoes of Mills. That leaves us to
14 the second grant. In that second grant, there is no way
15 my opponents can get around it. They have to rely,
16 which they don't like to do, obviously, on this second
17 grant. And what did the second grant provide?

18 And this, I'm looking to page 22 of the Joint
19 Appendix. My opponent sort of suggests that this is --

20 QUESTION: What page, please? What page
21 again?

22 MR. TYLER: JA-22, Justice O'Connor.

23 QUESTION: Thank you.

24 MR. TYLER: Our opponents like to sort of
25 slither around and say this isn't very clear and it

1 doesn't really indicate an awful lot, but it indicates
2 one thing. Mills Music, under this second grant, that
3 is, the grant to the derivative works utilizer or the
4 record company, pays 100 percent to Mills. So that the
5 obligation flowing from the derivative works utilizer or
6 the record companies should come now to pay Snyder,
7 because Snyder stands in the shoes of Mills.

8 QUESTION: But your answer to my question,
9 then -- I asked you what is the source of Snyder's right
10 to receive royalties from RCA. And as I understand your
11 answer, it is the document on JA-22 which says in words,
12 RCA must pay royalties to Mills. That's your argument.

13 MR. TYLER: Yes; because Snyder, under the
14 reversion

15 QUESTION: In other words, it's a written
16 undertaking by RCA to pay money to Mills, which is what
17 you claim to be the source of Snyder's right to receive
18 money from RCA.

19 MR. TYLER: So long as you understand -- and I
20 am sure you do -- that this wouldn't have ever come up
21 if it weren't for the statute change.

22 QUESTION: Well, of course not.

23 MR. TYLER: But otherwise, yes.

24 Now --

25 QUESTION: Judge Tyler, I think I should

1 object that you and Judge Frankel speak of how long ago
2 this took place, in 1923 I think. That is long ago for
3 both of you, but there are a lot of us up here who
4 remember when Who's Sorry Now came out, and thought it
5 was a pretty good song.

6 (Laughter.)

7 MR. TYLER: Well, I agree, both counts. It's
8 a long time for me. Judge Frankel claims to be a little
9 bit younger than I am, but I deny it.

10 Now, one of the points here which becomes very
11 important in understanding what happened is to
12 recognize, contrary to what we understand Mills, being
13 prepared to argue not only here but in the court below,
14 is the legislative history.

15 And as you know, there's a great deal devoted
16 in the Mills brief here and some significant part by us,
17 the point being, as I understand Mills, that the
18 legislative history, as they claim Judge Weinfeld found,
19 is inconclusive.

20 We dispute that, simply because if you analyze
21 clearly what happened here, that beginning in the late
22 '50s, the Copyright Office began to analyze the existing
23 law and prepared first an initial report which came
24 about in 1961, indicating that one of the problems under
25 existing case law, under the old Act was a continuing

1 and indeed growing doubt as to the ability to protect
2 the rights of derivative works utilizers, particularly
3 where there was a possibility of a reversion of the
4 underlying copyright on a novel, for example, to the
5 author or his heirs.

6 It is true that right from that beginning,
7 there was this concern. But the concern didn't really
8 come to a point of issue until the 1963 draft was
9 prepared in the Copyright Office, and there for the
10 first time, Barbara Ringer, one of the principal -- if
11 not the principal -- draftsmen of the statute, as a
12 practical matter, did make it clear that the exception,
13 pretty much as it's now in the law, would be a suggested
14 way of taking care of this problem, of seeing to it that
15 derivative works utilizers were protected.

16 And this was not an insignificant point,
17 because under the old law, there were periods of time
18 where very famous movies, for example, such as Gone With
19 the Wind, Rear Window, and such were put on the shelves
20 simply because it was commonly then thought by copyright
21 lawyers that in the event of a reversion, these movies,
22 for example, in other words would lose their copyright
23 protection as derivative works.

24 Now, it was this kind of thing that Congress
25 certainly was aware of. And it's also, of course, true

1 though that what happened was that most of the work,
2 seriously in this whole area, was done in the Copyright
3 Office, which not only is an arm of the Congress, but
4 which was embodied in six booklets transferred to the
5 Congress.

6 Mills argues that since there is no dialogue,
7 no colloquy on the floor of the House or in any of the
8 committee sessions dealing with the reversion section
9 and the exception, this means that Congress never
10 understood this, never did anything about it.

11 Well, the fact is that they didn't do anything
12 about it because the register of copyrights, when he
13 submitted the volumes of the hearings which went on
14 principally from '61 through '65, underscored the point
15 that there was a compromise in respect to this business
16 of the reversion and the exception thereto.

17 So we argue, in short, that if you think what
18 the state of the law was, how the people who were
19 professionals understood the state of the law -- and, by
20 the way, two very articulate lawyers representing the
21 publisher, Messrs. Abililes and Wattenberg, were the
22 first to understand and consistently understood just
23 exactly that this exception did not benefit or help
24 publishers or middle men at all.

25 Therefore, we believe that what happened here

1 was that, contrary to the suggestion of the district
2 court, was that such legislative history as there is
3 firmly supports the reading of the statutes which the
4 Snyders have consistently taken here and in the court
5 below; and furthermore, that it is a consistent position
6 as a matter of plain language in the statute.

7 Let me emphasize that the Snyders do not agree
8 with Mills that this is an ambiguous statute. First of
9 all, it seems perfectly clear just exactly what Congress
10 is attempting to achieve. The only thing that is at
11 issue is to take the exception, apply its clear intent
12 -- and there is no doubt, as we argue it, that if you
13 take the exception language, it applies very easily to a
14 one transaction or one-step transaction, so long as the
15 grantee is a derivative works utilizer.

16 We also point out that this has nothing to do
17 with the position that Mills finds itself in as an
18 absolute free rider in terms of the objectives of the
19 statutory language.

20 QUESTION: You say then that Mills is not
21 someone who may -- who would continue to utilize a
22 derivative work.

23 MR. TYLER: Mills certainly would not. No,
24 sir. And it never did. Mills cannot bring itself
25 within the exception. They try to avoid that. They

1 simply put all their heavy baggage on the phrase "under
2 the terms of the grant." They say that has to mean the
3 first grant, and the statute makes it very clear that
4 grant has been terminated, at least so far as everybody
5 is concerned, except those persons who, under the
6 exception -- that is, creators or derivative works
7 utilizers.

8 QUESTION: So then it would be a grant from
9 Mills to the record company that would be --

10 MR. TYLER: Well, no. Well, in a sense. What
11 we say, Justice Rehnquist, is that is, once you read
12 304(c)(6), you understand that Mills stands out. Snyder
13 stands in its shoes vis a vis the record company.

14 CHIEF JUSTICE BURGER: You may resume there at
15 one o'clock, Mr. Tyler.

16 (Whereupon, at 12:00 o'clock noon the hearing
17 in the above-entitled matter was recessed, to reconvene
18 at 1:00 o'clock p.m., this same day.

1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Tyler, you have
4 eleven minutes remaining.

5 MR. TYLER: Mr. Chief Justice, may it please
6 the Court, the luxury of the lunch hour recess and the
7 reflection it afforded me makes me wish to readdress the
8 point which in part was made at least by Justice
9 Stevens.

10 You, sir, asked what was the source of our
11 claim. And I said, among other things, that the Snyders
12 stand now in the shoes of Mills. Permit me to elucidate
13 a bit and point out that is simply because of the
14 reversion provision which we're talking about.

15 The Snyders now own the copyright; Mills does
16 not. That's why in our brief, we go into the analogies
17 to real estate transactions, patent law transactions,
18 and other commercial transactions. As I put it this
19 morning, the history of this thing is that the Snyders
20 start out -- when Snyder wrote the song in '23, he
21 assigned the copyright to an old line firm in New York
22 which went bankrupt.

23 That meant that Mills picked up the rights to
24 the copyright first term in 1940. As Mr. Frankel
25 pointed out this morning, that meant thereafter that

1 Mills owned the copyright.

2 Here, we're talking about the underlying
3 copyright. We're not talking about a derivative use
4 copyright, as I'm sure you understand. So it came to
5 pass that when Congress passed the '76 Act and provided
6 that there would be an extension of 19 years, bringing
7 the total copyright period more in line with European
8 countries and so on, and would give authors more
9 protection that 75 years, the reversion provision
10 necessarily followed, and hence it is that Snyder is
11 once again the owner of the contract -- of the copyright
12 -- excuse me.

13 Now, that means that if you look at that
14 source and then you look to the terms of the second
15 grant, that is, the grants made by Mills to the music
16 company, that is why we say those are still important
17 because we do not agree with Mr. Frankel that there is
18 some sort of dichotomy in the law. There isn't.

19 Under the new copyright reversion section, all
20 that has happened is that now Snyder is back, owning the
21 underlying copyright, in the place of Mills, and should
22 receive the 100 percent royalties provided for in the
23 second grants to the derivative works utilizers.

24 QUESTION: May I just ask, does that mean you
25 still rely on the grants from Mills to RCA as the source

1 of RCA's obligation to pay money to --

2 MR. TYLER: Well, those grants, whether it's
3 RCA, which is only an exempt --

4 QUESTION: I understand.

5 MR. TYLER: Those grant terms are important.
6 And they still have to be given effect. That's why, as
7 I repeat again, we say that what has happened here, not
8 by agreement as sometimes in commercial transactions --

9 QUESTION: Well, let me just kind of
10 simplify. It seems to me you can rely on either the
11 statute or the written grant or a combination of the
12 two.

13 MR. TYLER: We're relying on both. They
14 obviously can't be there if there wasn't the reversion.

15 QUESTION: But is it correct that having
16 terminated, that the statute does not give your client
17 any right to exclude RCA from further making the
18 derivative work that was --

19 MR. TYLER: That is correct.

20 QUESTION: What is the source of your right to
21 get money from RCA?

22 MR. TYLER: The source is the fact that we now
23 stand in Mills's shoes, plus the fact that --

24 QUESTION: With respect to everything except
25 that derivative grant.

1 MR. TYLER: No. Under the facts in this case,
2 we should get the 100 percent royalties which those
3 grants from Mills to the derivative use people, that is,
4 the record companies, provide.

5 The issue here is that Mills says that even
6 though they have been removed as owner of the underlying
7 copyright, by some mysterious incantation, using the
8 language under the terms of the grant, they should
9 continue to get part of these royalties.

10 That isn't what Congress intended by any
11 stretch of the imagination because under the reversion,
12 Snyder now owns the underlying copyright which is the
13 source of Mills's authority in the first instance to
14 make grants to record companies.

15 QUESTION: The statute itself says that the
16 derivative work can only continue to be utilized under
17 the terms of the grant.

18 MR. TYLER: That is correct.

19 QUESTION: Now, what grant is that?

20 MR. TYLER: That is a grant, assumed by
21 Congress to mean the straight one-step grant which we
22 didn't have in this case.

23 Tyler grants to Tyler -- the copyright owner
24 grants to White, a well-known record company, a
25 derivative works grant.

1 QUESTION: And the terms of the grant are that
2 the grantee can license, and he does license.

3 MR. TYLER: No. In the one-step transaction,
4 under the hypothetical, White has the right to produce a
5 record. He does. Under the exception, plainly, that
6 grant -- Tyler to White -- has to continue.

7 QUESTION: It has to continue, but only on the
8 terms of the grant.

9 MR. TYLER: That grant. Exactly.

10 QUESTION: That's right. And that means that
11 the user has to pay.

12 MR. TYLER: That is correct. But we don't
13 have that case. That's why we're arguing, contrary to
14 Mills, that the only problem with this case is that
15 Congress didn't write out the language which would cover
16 exactly this transaction.

17 Mills says this is an argument of ambiguity.
18 We say no; all this is is a classic situation where an
19 appellate court is asked to construe a statute, the
20 clear intent of which is there for all to see.

21 QUESTION: I suppose you could argue that the
22 terms of the license are, by implication, made part of
23 the terms of the original grant, because Mills was
24 authorized to issue these licenses.

25 MR. TYLER: That's the error that the district

1 court fell into.

2 QUESTION: Well, I know, but I would think it
3 would be -- I don't know why it would hurt you.

4 MR. TYLER: It hurts us in this way. It
5 misconstrues the statute, both in terms of the reversion
6 and in terms of the exception.

7 What we're saying is that the reversion puts
8 Snyder back as the underlying copyright owner. Mills
9 gets knocked out.

10 But I quite agree with Your Honor's thrust of
11 your question that we are relying, of course, on that
12 second grant, if you will --

13 QUESTION: In order to get any money.

14 MR. TYLER: That's right. We say that's fine,
15 but it isn't fine for Mills.

16 So to sum up, what we're really contending
17 here is, once again, that if you look at -- well, take
18 the reply brief of Mills. They frankly exposed this to
19 all who will read or listen. They still continue to
20 argue that there's only one grant, the terminated grant,
21 which is the subject not only of the termination or
22 reversion provision, but as well of the exception.

23 And that language in the exception just can't
24 bury that low. So, ironically, what we come down to is
25 this: Mills accuses the Snyders of obfuscating,

1 distorting, in particular, distorting the language. We
2 argue that, as the Court of Appeals below held, the only
3 way you're going to distort the language of the
4 exception in particular is to follow the theory of
5 Snyder.

6 QUESTION: You'd demur to the accusation.

7 MR. TYLER: Exactly.

8 So, to conclude, it's perfectly clear, if you
9 look at the language and you look at the legislative
10 history, that the real question in this case is answered
11 by simply saying that Mills doesn't fit in the class
12 designed to be a part of the exception.

13 Thank you very much.

14 QUESTION: Mr. Tyler, may I inquire, before
15 you sit down, the Snyders in any event, even if your
16 opponent's view is the correct one, could issue new
17 licenses after the termination and derive income from
18 new licenses.

19 MR. TYLER: Yes. I think, as Mr. Frankel said
20 this morning, we would agree on that.

21 QUESTION: At least that I guess you are in
22 agreement on.

23 Now, what percent of the income that you would
24 expect someone like the Snyders to get over the 19-year
25 period of extension would you reasonably expect to come

1 from the 400-and-some preexisting derivative works, as
2 opposed to new licenses that the Snyders would issue?

3 MR. TYLER: Well, are you --

4 QUESTION: How great is the problem? I mean,
5 do the Snyders really think that all the income is going
6 to come from these preexisting derivative works for
7 which Mills issued the mechanical licenses?

8 MR. TYLER: Yes. We argue that --

9 QUESTION: You don't anticipate, then, that
10 you'll be issuing -- the Snyders would be issuing any
11 new licenses as a practical matter?

12 MR. TYLER: Well, I think, theoretically, the
13 Snyders could very well issue new grants to derivative
14 works users. But --

15 QUESTION: But your realistic expectation is
16 what? That most of the income would probably be from
17 the preexisting --

18 MR. TYLER: No. I don't think there's any --
19 as I understand it, the old song, Who's Sorry Now, still
20 has a fair amount of popularity. But we don't know
21 exactly what might happen. But the argument, of course,
22 really -- as I think both sides agree again -- focuses
23 only on the old derivative works grants.

24 QUESTION: Well, I know that, but I think that
25 the practical expectations might shed some light on what

1 Congress had in mind.

2 MR. TYLER: Well, I think it's clear that
3 Congress had in mind that the Snyders, by getting back
4 in the shoes of a copyright owner, should have the right
5 in the 19-year term, as you put it, to realize as much
6 income as the author or his heirs could.

7 I think there's no doubt of that. My only
8 problem is, I don't know how to be precise in
9 anticipating exactly what might happen. But Congress
10 surely hoped, as your question implies, that they would
11 -- that is, the author or his heirs would be in a
12 position to get that type of income negotiated, of
13 course, with new users.

14 Thank you very much.

15 CHIEF JUSTICE BURGER: Mr. Frankel.

16 ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.

17 ON BEHALF OF THE PETITIONER - REBUTTAL

18 MR. FRANKEL: If the Court please, starting at
19 the end of Mr. Tyler's presentation, of course we argue
20 that the termination provision and the exception in the
21 statute refers to only one grant, the terminated grant.

22 Of course, we recognize that there is a
23 subgrant or license contemplated in the world that these
24 people lived in by the grant from Snyder to Mills. In
25 addition, we not only acknowledge but insist that in the

1 world Congress addressed in this statute, multiple
2 grants are the typical standard arrangement; not just
3 two, but three, four, five, six, to financiers from
4 creative people to financiers, to distributors, to
5 exhibitors, et cetera.

6 And when Congress wrote this exception to
7 provide that the derivative works may be utilized under
8 the terms of the grant, the terminated grant, what it
9 was saying is, we can't visualize all the arrangements
10 out there. What we are doing for former derivative
11 works is simply maintaining the status quo. That's the
12 fairest arrangement we can make.

13 If the artist gave up the derivative work
14 right for a lump sum in the past, the artist gets
15 nothing. The status quo holds. If the artist gave it
16 up on the basis of 50/50 or 90/10, that holds under the
17 terms of the terminated grant.

18 I think that's what we mean. Now, I want to
19 answer a question that I think came from both Justice
20 O'Connor and Justice Stevens. Are we fighting about an
21 academic subject?

22 If we weren't here, and if the copyright had
23 been extended as it had, derivative work owners would be
24 infringing that copyright by purveying their derivative
25 works unless they had authorization.

1 So I'm quite sure that although my answer was
2 inadequate before lunch, the reason they're happy to go
3 along is that they need the license in order to be
4 selling their records.

5 QUESTION: And if they had to renegotiate it,
6 the price might be higher.

7 MR. FRANKEL: It might indeed. I understand
8 the song was on television this morning.

9 (Laughter.)

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.
11 The case is submitted.

12 We'll hear arguments next in Trans World
13 Airlines v. Thurston.

14 (Whereupon, at 1:14 o'clock p.m., the case in
15 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#83-1153 - MILLS MUSIC, INC., Petitioner v. MARIE SNYDER AND TED SNYDER, JR., ETC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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