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Comments of the Association of Medical Illustrators (AMI)

Library of Congress
U.S. Copyright Office
[Docket No. 2012-12]

Orphan Works and Mass Digitization (79 FR 7706)

THE ASSOCIATION OF MEDICAL ILLUSTRATORS

Medical Illustrators are highly specialized visual artists. They apply their creativity, scientific expertise and interdisciplinary skills to further medical and scientific understanding. They have graduate level training or higher and possess dual skills in science and visual communication with advanced courses in human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

“The profession was defined over 100 years ago and a professional association was established in 1945. Since then, the AMI has codified the profession: by setting the academic standards and guidelines through the accreditation of the graduate programs; by establishing a scholarly journal to disseminate our knowledge and skills; and by launching a program to recognize the continued competencies of a professional through board certification of medical illustrators.”¹

Scientific and medical concepts are taught visually, and the expertise of medical illustrators is core to teaching and research in science and medicine. Medical illustration makes it possible to convey complex aspects of anatomy, biology and related scientific disciplines. Without quality medical illustrations it would be more difficult to train doctors and scientists and for research scientists to convey to their peers and the public the details of their discoveries. Medical illustrators are problem-solvers, storytellers and innovators. They are artists in the service of science.

The visual artistry of medical illustrators utilizes diverse techniques and media, from the ancient to the cutting edge. Illustrators are expert in classical painting and drawing as well as 21st Century techniques for conveying visually extremely complex technical information. They create animation, 3D modeling and augmented reality, medical models and surgical simulations, prosthetics and anaplastology. Their work extends to the creation of medical-legal demonstrative evidence for use in the courtroom. Their markets include academic research and training, physician education, medical and consumer publishing, the pharmaceutical, biotechnology and medical device industries as well as advertising, product identity and branding, broadcast media, software development including apps for smart phones, tablets and wearable technology, gaming, web development and interactive design.

¹ 2011 Presidential Address, Dr. Linda Wilson-Pauwels, Association of Medical Illustrators Annual Meeting, Baltimore, Maryland.

The Association has 835 members: 698 US, 114 Canadian and 32 international illustrators. 35% are salaried, 29% salaried and freelance and 36% are business owners. 65% of AMI members own their own business.

Medical illustrators are highly motivated, highly focused creative individuals who have invested extraordinary time, skill and financial commitment to become qualified to work and to keep their professional standing. There are only four universities in North America that offer graduate-level degrees in biomedical illustration and visualization.

Medical illustrators rely entirely on copyright as the basis for compensation for their work.² They understand that copyright functions as a silent patron of the arts by allowing creators to reap where they have sown. They believe that, by honoring and protecting the property of the mind, copyright may be the greatest creativity engine in the world. In fact, considering the importance of the work of medical illustrators, the benefit medical illustrators bring to the public by the creation and dissemination of artistic works of high **educational** value – and considering the concomitant economic loss medical illustrators have suffered in recent years as a result of widespread, unlicensed use of their work **the continuing struggle of medical illustrators for effective copyright protection represents the challenges all visual artists face in the 21st Century. The universal contemporary experience of medical illustrators is that of substantial economic loss through unauthorized use of their works despite the most proactive efforts to protect their rights.**

These comments are submitted in response to a specific inquiry regarding the advisability of creating *limitations* on long established principles of copyright exclusivity in favor of users desiring to reproduce copyrighted works without the prior permission of the rights holder. However, as will be seen in the comments below, the Association of Medical Illustrators strongly believes that policy makers are pursuing misplaced priorities. It indeed may be advisable and possible to create more efficient rights clearance mechanisms for limited categories of users where an important public interest, such as the need for preservation of cultural heritage, is served. However, AMI believes a higher priority should be review of the Copyright law to examine ways in which the creators of visual arts might benefit from the Copyright law to at least the same extent as other classes of creators in the music, literary and cinematographic disciplines.

THE NEED FOR LEGISLATION

The Copyright Office began its study of so-called “orphan works” nearly a decade ago in response to letters from Orrin Hatch and Patrick Leahy, then Chairman and Ranking Member,

² Many medical illustrators are sole proprietors / independent freelance authors, or small studios, and retain the rights to their work. When medical illustrators are employed at hospitals and medical institutions, the rights to their visual art are retained by the institutions as valuable intellectual property. [Johns Hopkins](#), Mayo Clinic, Barrow Neurological Institute and the [Mayfield Clinic](#) are just a few examples.

respectively of the Senate Judiciary Committee, and Lamar Smith, then Chairman of the Subcommittee on Courts, the Internet and Intellectual Property of the House of Representatives.³

Both letters cited concern that the Copyright Term Extension Act of 1998, which extended the term of copyright in the United States by 20 years, might have given copyright protection to works long out of print whose authors could not be located for the purpose of securing permission for purposes of contemporary use, adaptation or reproduction. Congressman Smith's letter limited these concerns to situations where the initial reproduction was by "libraries and archives."

It has now been 16 years since the enactment of the 1998 term extension legislation, and there is little solid evidence that it has created significant hardships for libraries and archives. To the extent that such concerns continue to be expressed they are limited for the most part to two categories of works: cinematographic works in danger of being lost due to deterioration of the media in which existing copies were fixed and very old photographs originally created for noncommercial use that were never published and, therefore, retain perpetual copyright in the United States under common law.⁴

That the concerns of librarians and archivists maintaining collections of works other than films and sound recordings have fundamentally diminished since the orphan works issue first came to the attention of Congress could not have been made more explicit than in the testimony of Columbia University librarian, James Neal, representing the Library Copyright Alliance in recent testimony before the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property. On behalf of the American Library Association, the Association of College and Research Libraries and the Association of Research Libraries, he stated, "changes in the copyright landscape over the past eight years convince us that libraries no longer need legislative reform in order to make *appropriate* uses of orphan works." (Italics supplied).⁵

Clearly, the concerns that gave rise to the 2005 Congressional letters requesting review by the Copyright Office and the resulting report and legislative recommendations no longer exist. Therefore, to the extent that there remains any justification for changes in the existing statutory law they are limited primarily to either old audiovisual works or photographs and writings that remain protected by common law copyright. Neither of these two situations applies to visual art illustrations, generally, or to medical illustrations specifically. The record contains no evidence

³ Letter to Marybeth Peters from Senators Hatch and Leahy, January 5, 2005 and letter to Marybeth Peters from Congressman Lamar Smith, January 7, 2005.

⁴ See testimony of Michael Donaldson on behalf of the Film Independent and International Documentary Association and Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress.

<http://judiciary.house.gov/index.cfm/hearings?ID=ED90F495-04B3-4972-ABCB-01837D6ADEBA>

⁵ James G. Neal, Statement before the House Committee on the Judiciary Committee Subcommittee on Courts, Intellectual Property and the Internet. Page 10 (April 2, 2014) <http://judiciary.house.gov/index.cfm/hearings?ID=ED90F495-04B3-4972-ABCB-01837D6ADEBA>

that clearance of reproduction rights in medical illustrations is a problem requiring legislation, and the Association of Medical Illustrators strongly urges the Copyright Office to advise Congress accordingly.

DEFINING A GOOD FAITH “REASONABLY DILIGENT SEARCH” STANDARD

In view of the fact that the concerns that gave rise to Congressional concern over so-called orphan works no longer exist, there is no need for a statutory “reasonably diligent search” standard that would operate as a defense to an action for copyright infringement. However, medical illustrators and other authors rely on the exercise of their rights to give advance authorization for use of their works as the cornerstone of their ability to earn a living. Therefore, they have a strong interest in maximizing the return on their creative efforts through *licensed* re-use or secondary use of their published works. They are benefited by business models that make it easier for users to obtain such licenses. Best practices developed by professional associations, collecting societies and author and user groups that promote *authorized* access to their works should be encouraged.

THE ROLE OF PUBLIC AND PRIVATE REGISTRIES

At the present time no functioning registry of digital images exists. The only significant registry of copyright information in the world is the database of works that have been registered at the United States Copyright Office. This registry is the legacy of America’s unique system established long before the United States adhered to the Berne Convention on Literary and Artistic Works and enacted implementing legislation in 1987. Registration is considered a “formality” under the Berne Convention and, therefore, can no longer be a requirement for copyright protection. Works published by U.S. authors prior to the effective date of the 1976 Copyright Act have fallen into the public domain unless they were registered prior to publication. Subsequent to the 1976 Act registration was required as a prerequisite to enforcement for infringement. However, the Berne Convention Implementation Act of 1987 took out of the public domain works of foreign authors that had never been registered but remained within the statutory term of copyright. Therefore, tens of thousands of foreign works of visual art created before 1988 are protected by enforceable copyrights in the United States and no record of them or their authors is contained in the registration database at the Copyright Office. The United States stands alone among all member states of the Berne Convention on Literary and Artistic Works having a requirement to register authorship as a condition that must be met prior to bringing an action for infringement.

Deposit of a copy of a work must accompany the application for registration of a work. This has been required for many years as a means of providing the Library of Congress with access to all published works. However, the physical copies deposited are not retained unless the Library wishes to keep them in its archive. Furthermore, there is not and never has been an accessible archive of images of visual works. Therefore, no comprehensive, searchable archive of copyrighted visual works exists at the present time. To the extent that a search can be made, even

of works where the deposited image has been retained by the Library, the name of the author or title of the work is a necessary prerequisite.

Furthermore, electronic searches of registration information prior to 1978 are not possible and can only be made in the Copyright Records Public Reading Room at the Library of Congress in Washington. The Copyright Office has made it clear that it is unable to provide meaningful mechanisms to search its database where only the image is known and name of the author and title are unknown.

In her testimony before Congress in 2008, Register of Copyrights Mary Beth Peters, stated

On a practical level, it is difficult to imagine how the Copyright Office or any government office could ever keep pace with the image technology world that exists outside our doors and beyond our budget. In reality the Copyright Office does not have and is likely not to obtain the resources that would be necessary to build a database of works that are searchable by image, even if there are some copyright owners who would be amenable to such an undertaking.⁶

The Copyright Office has a budget of several hundred million dollars and the largest amount of data available anywhere in the world to make a practical attempt at creating a reliable, searchable database of authorship information regarding visual images. Yet, it is unable to do so. It is hard to imagine, then, how any private entity could finance the creation of such a database.

Much has been made of emerging technologies that could enable the creation of a searchable archive of images. Register Peters referred to companies with workable image recognition, fingerprinting, watermarking and other technologies that would be required to create such a database. The nonprofit PLUS Coalition's goal of creating a Picture Licensing Universal System (PLUS) is often cited as evidence that a workable image database can be created. A representative of the PLUS Coalition testified as recently as April 2, 2014 at a House Judiciary Subcommittee hearing on Preservation and Reuse of Copyrighted Works. However, the PLUS system currently is no more than in beta testing, permitting artists to supply names and contact information only, not the image data necessary to locate them when their names and/or the titles of their works are unknown. Although it has been in development for at least 3 years ***there is no registry at all of images and no publicly available information as to whether more than a handful of artists have signed up to participate.*** The PLUS Coalition's website acknowledges that it is no more than a beta system.⁷ Such a registry will take years if not decades to become viable for searching for rights holders. It may never be viable.

Most importantly, there is no indication that the economics of such a system are workable. It would depend on rights holders in visual images bearing the cost of scanning all of the images in their repertory prior to depositing them in the database. Virtually all visual artists are sole

⁶ Marybeth Peters, Testimony before the Subcommittee on Courts, the Internet, and Intellectual Property (March 13, 2008) <http://www.copyright.gov/docs/regstat031308.html>

⁷ See, "PLUS Registry Now Under Development" plus.useplus.org/PLUSnews/2

proprietors unless they are employed by institutions. They usually work in a small studio alone or with a handful of other artists and no assistants. They work full time for modest compensation and lack the financial resources to hire staff or outsource the huge task of creating a database containing images created during a lifetime of effort.

It is even less likely that heirs or legatees of an artist would have the ability to comply with the requirements of a registry. Any requirement to do so would clearly violate obligations to the thousands of non-U.S. artists who are guaranteed freedom from formalities by virtue of U.S. treaty commitments, creating the possibility of international trade sanctions and retaliation that would result in denying Americans the ability to enforce their copyrights in other jurisdictions.

TYPES OF WORKS SUBJECT TO ORPHAN WORKS LEGISLATION, INCLUDING PHOTOGRAPHS

As noted above a record is clearly being developed that demonstrates that the so-called orphan works issue is impacted by the type of work involved. For example, musical works are not an orphan works problem because they are universally available under free market business models. The availability of blanket licenses from music collecting societies that give any user the ability to access and use a work on reasonable terms and conditions means that there is no orphan works issue for this class of work. There also are established rights clearance mechanisms for most other works of authorship for the *first* reproduction or distribution of the work, including visual art.

After sixteen years of study the public record supports the conclusion that reasonable access to works by users is available for all but a relative handful of works where there arguably is a legitimate need for use. The Copyright Office study of the issue, commenced in 2005, was based largely on concerns of librarians and archivists who maintain collections of works that have lost significant commercial value and, therefore, do not support easily useable licensing mechanisms for scholarly use of works. Today, scholars using literary works seem to be content with the collective and bundled-works licensing mechanisms developed by publishers and the latitude afforded them under the evolving case-law of fair use.

Thus, with the exception of very old cinematographic works and old photographs that lack attribution, there no longer seems to be a problem involving categories of works long recognized as copyrightable under U.S. law. Of course, very old unpublished works contained in libraries and archives constitute a problem in that they enjoy perpetual copyright under the common law. Likewise, sound recordings created prior to 1972 and protected under state statutes and unfair competition laws also present problems to keepers of cultural heritage because it is difficult to obtain permission to re-master and preserve historically meaningful recordings.

The Association of Medical Illustrators does not believe that these problems have any effect on the use of works created by their members and does not object to legislation that would address these issues. There has been no evidence in the last 16 years that there is an orphan works problem with regard to medical illustration. However, that is not to say that medical illustrators, other branches of the professional illustration profession and creators of visual works of fine art

do not have concerns about the effectiveness of the existing copyright system in ensuring them the full benefit of their constitutionally mandated rights.

Unlike other creative disciplines such as music, literary authorship and cinema, illustrators receive no compensation for continuing, secondary use of their works in the United States even though U.S. law and international treaties grant them very significant exclusive rights for secondary uses of their creations.

Unlike producers of motion pictures, playwrights, screen writers, composers, lyricists and authors of literary works, visual artists lack effective mechanisms to enforce their rights in secondary uses. This is because, alone among creators of copyrighted works, illustrators and visual artists lack the collective mechanisms necessary to enjoy the benefit of these secondary rights. By contrast, screenwriters have professional guilds that can bargain for continuing residuals from re-runs of their works. Composers and lyricists have collecting societies to enforce their performance rights in continuing uses of their creations.

Very few Americans have been inconvenienced by the asserted problems of clearing rights in so-called orphan works. They enjoy unfettered access to more creative works through more channels of distribution than would have been conceivable only a few years ago. Artists, on the other hand, have not enjoyed the benefits of the new technologies, largely because Copyright law and the institutions to license copyrights in works of visual art have lagged far behind advances in technology to the point where instead of benefiting from advancements through expanded markets and opportunities to provide content for new media, they find themselves falling behind.

Commissions for works of professional illustration today are smaller in real dollars (not adjusted for inflation) than they were in the mid-century heyday of professional illustration represented by artists such as Norman Rockwell, Rockwell Kent and Maxfield Parrish.

The same level of attention that has been given to the concerns of a very small group of users of so-called orphan works, few of whom have lost a penny of the income necessary to support their families, has not been given to the actual visual artists who were most certainly in the conscious minds of Thomas Jefferson and James Madison when recognition of the rights of creators of advancements in “science and the useful arts” was written into our nation’s foundational law.

Medical illustration is an old profession, but one as needed today as ever, especially in a society in which medicine has become one of the most important pillars of national well-being and economic competitiveness. The ancient cliché “a picture is worth a thousand words” is as true in the era of modern science as it was when Leonardo da Vinci revolutionized the visual representation of human anatomy.

Clearly professional illustrators deserve better from policy makers who should be giving greater attention to rewarding creative genius and skill than to loopholes benefiting those who profit from the labors of those who create original works while contributing nothing that will become worthy of the very scholarship and preservation that has been the focus of the orphan works debate.

TYPES OF USERS AND USES SUBJECT TO ORPHAN WORKS LEGISLATION

As discussed above, the only use of works of unattributed provenance for which a case has been made for special consideration are purely archival and scholarly uses of works. Therefore, a threshold for any legislation granting a safe harbor for the use of such works is that the use must not interfere with the full exercise of exclusive copyright by authors of works for whom *nonprofit* users and uses are a significant market. The primary markets for medical illustration are either scientific and medical publications or advertising and promotional materials created for pharmaceutical and medical device or equipment manufacturers. Therefore, any exceptions to the ability to fully enforce copyrights in medical illustrations would rarely, if ever, be justified.

In addition, medical illustration is unlikely to be orphan work. For over a half century, the Association of Medical Illustrators has promoted professional standards that are expected to be met by publishers who commission their works. The technique and style of individual medical illustrators is well known to those who commission their work. There is no evidence in the record of the copyright office proceedings or in legislative hearings that works of medical illustration have been found to have been orphaned. Therefore, at a minimum, medical illustration should be excluded from any legislated exemption or limitation to full copyright protection.

The market for medical illustration is highly specialized with a very small group of users. Subscriptions to medical journals using illustration are very expensive and publishers exert tight copyright control over their distribution and use. In the digital era, site licenses for institutional copying and online use and distribution are increasingly common. Because of the ease with which images in digital format can be copied and re-used, the need for strong copyright control has become especially critical if the profession is to be kept economically secure. Educators and lecturers also are making increasing use of medical illustration in video and slide show formats. This should constitute a new market for a growing illustration profession rather than an opportunity for piracy. A growing area of use for medical illustration is marketing materials and advertisements used by pharmaceutical and medical device manufacturers. These users also need medical illustration for video works and slide shows that constitute part of their marketing programs.

Just as medical illustrators themselves are highly trained and skilled professionals the user groups and individual users making use of their works are highly trained, skilled and knowledgeable. They, and the institutions in which they work, are highly unlikely to be unaware of where to go to obtain permission for reuse of an existing image or to commission a new image for their use.

MASS DIGITIZATION GENERALLY

The exclusive right of reproduction and distribution lies at the heart of copyright law. Without it, the basic rights guaranteed under Article 1, Section 8 of the Constitution have no meaning. Mass digitization now is technologically possible and may ultimately work to the

benefit of authors and users of copyrighted works. However, if copyright is to be preserved as a meaningful mechanism to incent and reward creativity, mass digitization technologies can only be employed with the consent of rights holders.

If rights holders wish to give consent to inclusion of their works in a mass digitization database, they have the right to do so. If they do not choose to permit such use of their works, they should continue to have the right to withhold consent. Any system of mass digitization, therefore, must be an opt-in rather than an opt-out system.

Ultimately, the success of mass digitization systems will depend on the workings of a free market. If business models can be developed that supply copyrighted works to users under reasonable terms and conditions while at the same time providing a fair economic return to rights holders it will flourish and investment in new technologies of digitization and rights management will take place organically. If not it will fail. It is not the government's prerogative to give private property holders' assets away without their permission.

EXTENDED COLLECTIVE LICENSING AND MASS DIGITIZATION

The Association of Medical Illustrators takes the position that, other than where mass digitization is the functional equivalent of transferring collections of print works to microfiche format, there are no circumstances in which mass digitization without consent of rights holders should be permitted.

Mass Digitization and the HathiTrust Case

Much attention has been paid to the ongoing HathiTrust case.⁸ The appellate court has yet to complete its review of the district court decision, and it is important to note that the trial court limited its finding of fair use to the specific factual circumstances presented to it in that case.

The defendants in the case are a consortium of universities who entered into an agreement with Google to create digital copies of the works in their libraries that would then be provided to the defendant universities for purposes of creating "a shared digital library." Where the author of a work was known, the use of this digital library was limited to full text searches, preservation, and access for people with certified print disabilities.

The full text search allowed users to search for a particular term across all of the works in the combined digital library. The use of the digitized archive for reproduction of entire works or even significant portions of a work appears to have been for purposes limited to preservation of the particular work or for very limited use by the visually impaired. The only circumstance in which the full text of digitized works would be made available to users – other than the visually impaired – was where the work was not available for commercial sale and an attempt to locate the copyright holder for purposes of licensing was unsuccessful.

⁸ *The Authors Guild, Ind., et al., v. HathiTrust, et al.* 902 F. Supp.2d 445 (2012) S.D. New York

The Association of Medical Illustrators disagrees with the trial court holding in this case, sharing the views of the plaintiffs that the objectives of the HathiTrust project could have been achieved through commercial licensing. However, we wish to emphasize that, even if upheld on appeal, the HathiTrust case is an extremely limited holding and does not in any sense justify large scale, unlicensed mass digitization of libraries.

The trial court in HathiTrust applied the four factor analysis set forth in section 107 of the Copyright Act and concluded that the defendant's actions fell under the fair use doctrine. The court's decision did not condone mass digitization and distribution of unlicensed digital copies to users – whether they were profit making companies or nonprofit organizations – who would otherwise be able to obtain a license from the rights holder.

The Association of Medical Illustrators does not oppose mass digitization of works with the prior consent of the author. Such activity requires no change in existing law.

Extended Collective Licensing

The Association of Medical Illustrators supports the principle of extended collective licensing under two circumstances: (1) where the repertory of works licensed collectively consists only of works authorized for licensing by each rights holder or (2) pursuant to a statutory license such as that for sound recordings provided under Sections 112 and 114 of the Copyright Act.

Collective licensing of repertories containing only works authorized for licensing voluntarily by the author requires no change in existing law. Leading examples of such collective licensing regimes are the music collecting societies, ASCAP, BMI and SESAC, which offer blanket performance licenses on a non title specific basis and the Copyright Clearance Center (CCC), which offers blanket licenses on a non title specific basis for the secondary reproduction of literary works initially published in print format.

As we understand it, a true extended collective license binds authors who have not specifically given prior consent to the license or affiliated with a collecting society. Therefore, such a license would, of necessity, have to be a statutory license created by Congress as an amendment to existing copyright law.

The leading example of a collecting society administering royalty collections and distributions under a statutory, extended collective license is Sound Exchange, which licenses performance rights to non-interactive, audio streaming websites. Royalties are divided between sound recording producers and performers under a statutory formula. A very important feature of the Sound Exchange scheme is that, unlike the traditional music societies, it collects royalties owed for works of rights holders who have not identified themselves or affiliated with Sound Exchange. These royalties are held by Sound Exchange in a segregated fund for a period of years until a rights holder identifies himself or herself to the collecting society as the author of an eligible work.

An important feature of collecting societies operating under statutory licenses is that that they are regulated by the Copyright Royalty Board in the Library of Congress. A statutory license covering certain secondary uses of visual works such as medical illustration could provide a means for visual artists to make effective use of the exclusive rights already granted them under the existing copyright law but which currently generate no royalty income because users are either unaware of the need to clear the rights to visual components of literary works licensed through the CCC or the two existing visual artists collecting societies cannot assure them of a comprehensive license.

Extended collective licensing could provide a mechanism for making mass digitization for purposes of secondary uses of copyrighted works feasible by providing assurance of compensation to rights holders.

THE STRUCTURE AND MECHANICS OF A POSSIBLE EXTENDED COLLECTIVE LICENSING SYSTEM IN THE UNITED STATES

As discussed above, to the extent that an extended collective license is understood to be a license applying to works without prior authorization of an individual rights holder, it would have to be a statutory license created by Congress as an amendment to the existing Copyright Act. Such extended collective licenses are widely used in European countries to license reprographic and other secondary uses of literary works, including the visual art components, on a non-title-specific basis. In most of these countries royalty payments are collected by an umbrella society that grants blanket licenses to institutional users of the reproduction right. Each category of creators, such as visual artists, has a separate collecting society that distributes the share of royalty payments allotted to that particular category of work. These category-specific collecting societies are accountable to their particular constituency of authors. The United States has no comparable system. The Copyright Clearance Center (CCC) offers non-title-specific licenses to institutions for reprographic and digital secondary uses of the works of publishers of literary works.

The CCC was created more than three decades ago by major commercial print publishers and only began to collect meaningful licensing revenue starting in the mid 1990s after winning a series of infringement actions against corporations and photocopy mills specializing in custom academic course packs. This was a long and extremely expensive process involving litigation that would not have been possible to finance except by the kind of deep pocket corporations that characterize the publishing industry.

Regretfully, the fruits of the publishers' litigation successes have not been shared with subsidiary rights holders in the works they presume to license. Therefore, while the CCC markets to institutional users what appears to be a blanket license for secondary use of published books and periodicals, it neither makes clear to licensees whether these licenses cover the visual art content, nor does it make any attempt to clear its rights to license such content with the illustrators and other visual artists whose contracts have not previously conveyed to the publishers these rights. A statutory license covering secondary uses of works of visual art could correct this problem by

adopting the European approach of setting aside a certain percentage of blanket license revenue for visual artists.

Another problem of visual artists that could be addressed by a statutory, extended collective license encompassing works of visual art would be their inability to receive a share of royalties currently collected by foreign reprographic rights collecting societies.

The exclusive right of reproduction of a copyrighted work is entitled to “national treatment” under the Berne Convention on Literary and Artistic Works. Yet, even though America’s major trading partners, especially in Europe, have systems in place that provide for the payment of non-title-specific blanket licensing revenue to rights holders such as visual artists, only a few have attempted to provide for payments to U.S. artist rights holders. And, the few societies that have attempted to transfer a percentage of collected royalties for use of U.S. works have transferred these payments to U.S.-based organizations that have never been authorized to serve as agents of the rights holders and who have never distributed the non-title-specific distributions they have received to the actual rights holders.

The works of members of the Association of Medical illustrators account for a disproportionately large percentage of licensing royalties collected abroad because most medical and biotechnology publications read in all countries are originally written and published in English and a disproportionately large percentage embody the works of American illustrators. The membership of the Association of Medical Illustrators includes the vast majority of accredited medical illustrators, yet neither the Association collectively or individual members who have attempted to do so have been successful in obtaining their appropriate share of distributions as rights holders from the U.S. recipients of European payments or directly from the European societies themselves. The total amount of foreign royalty payments to U.S. organizations claiming to represent visual artists exceeds millions of dollars, yet the actual rights holders have never received a penny in spite of their continued efforts. And, it must be remembered that these payments have been made to U.S. organizations only by a small minority of European societies, centered in Scandinavia. The large collecting societies of Europe have never made an attempt to meet their national treatment obligations to U.S. copyright owners.

A statutory extended collective license could address this problem by codifying the obligation to distribute licensing revenue and providing a regulatory mechanism that would assure that organizations representing rights holders actually have been authorized to do so.

Because foreign licensing revenue collected for American illustrations has been collected for many years and misdirected to U.S. based organizations with no authorization to represent the rights holders, any new system of extended collective licensing must be designed to return royalties collected to actual rights holders. This suggests careful vetting of authorized collective management organizations and close supervision by a regulatory authority such as the Copyright Royalty Board, which oversees existing statutory licenses in the United States.

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