

10-9-4215**Comments of the Association of Medical Illustrators**Library of Congress
U.S. Copyright Office
[Docket No. 2015-3]Mass Digitization Pilot Program Request for Comments
Federal Register Vo. 80, No. 110 June 9, 2015

The Association of Medical Illustrators (AMI) is the sole professional organization for the profession. Without exception every member is an author of copyrighted works that are subject to mass digitization.

All medical illustrators rely on the protections of copyright to protect the authenticity and integrity of their work. All rely on the divisibility of exclusive rights to earn their living. All have experienced substantial economic loss from unlicensed use of their works despite their utmost proactive actions to protect their rights.

RESPONSE TO THE FEDERAL REGISTER NOTICE

AMI's response to the Copyright Office Notice of Inquiry on Copyright Protection for Certain Visual Works [Docket No. 2013-01] is directly relevant to this inquiry on mass digitization. That prior response sets forth the legal and business context for any possible mass digitization pilot program. Any program of mass digitization must address the concerns of medical illustrators set forth in that response,¹ and also AMI's prior response to the Copyright Office Notice of Inquiry on Orphan Works and Mass Digitization (79FR 7706).²

Medical Illustrations always accompany written text contained in journals, books, advertisements and other literary works. For medical illustrators mass digitization is not a future possibility. It is a present reality. Their works already have been subject to mass digitization. Examples were provided in AMI's earlier comments.

Medical illustration differs from other works of commercial visual art in that it is **high value, low volume**. Medical and other scientific journals have a small readership in comparison with mass-market publications. The cost of subscriptions to these journals is extraordinarily high with the market for medical publishers estimated at \$7 billion per year. The authors of the literary text

¹ Copyright Protection for Certain Visual Works Comments of the Association of Medical Illustrators, "Initial Comments," July 23, 2015, <http://copyright.gov/policy/visualworks/comments/Direct-Initial-Comments.pdf>

² Orphan Works and Mass Digitization Comments of the Association of Medical Illustrators, "Additional Comments," May 20, 2014, [http://copyright.gov/orphan/comments/Docket2012_12/Association-of-Medical-Illustrators\(AMI\).pdf](http://copyright.gov/orphan/comments/Docket2012_12/Association-of-Medical-Illustrators(AMI).pdf)

contained in medical journals write to fulfill their duty as scientists to share advances in science with their peers. Their reward is professional reputation and academic standing. They rely on salaries or grants, not writers' royalties, to make a living. Remuneration for publication of their works inures almost exclusively to publishers. By contrast, medical illustrators derive their entire income from the right to authorize reproduction of their work in copies and the exclusive right to create derivative works. And, unlike photographers whose images are instantaneously fixed with the click of a camera button, works of medical illustration – regardless of the medium in which they are fixed – require painstaking research, drawing and painting taking hours, days or weeks for the creation of a single image.

AMI believes that establishment of an extended collective license (ECL) pilot program for mass digitization is premature until existing mechanisms for collective licensing are reformed. At the present time visual artists in the United States are unable – through no fault of their own – to receive any benefit or remuneration from collective licensing of works containing their copyrighted images. There are two methods of collective licensing of literary works currently in use in the United States: Annual (non-title specific) licenses for reprographic use of works issued by the Copyright Clearance Center (CCC) and site licenses that provide digital access to aggregated content and are marketed either directly by publishers or with their permission and cooperation. While these existing licenses are marketed to users as including all content, publishers actively resist any request by illustrators to receive a share of the income generated.

While American visual artists have a right to national treatment under the Berne Convention and the TRIPS Agreement, foreign visual art collecting societies refuse to pay to them the share of royalty collections attributable to use of their works. The reason given by these foreign CMOs is that the United States has no system of reciprocity because the CCC does not exchange licensing revenue with them. This is in direct violation of these countries' treaty obligations and AMI strongly urges the Copyright Office to bring this violation to the attention of the Office of the United States Trade Representative (USTR).³

AMI asks that the Copyright Office revisit its analysis of the Nordic ECL model contained in its June 2015 Orphan Works and Mass Digitization Report. That report mischaracterized the system currently in use in Nordic countries in failing to acknowledge that their ECLs are foundationally built on **existing and trusted collective rights organizations**. Henry Olsson, recognized for many years as the leading authority on Nordic copyright law, describes the basic features of an extended collective license as follows:

³ While none of the large-market foreign CMO's recognize any obligation to remunerate American artists, a handful of CMOs in small markets have been transferring non-title-specific royalty income to the Authors Coalition of America and the Graphic Artists Guild (GAG), even though these two organizations have never been authorized by rights holders to receive these payments. Neither the Authors Coalition nor the Graphic Artists Guild has shared any of this non-title-specific copyright royalty income with rights holders for at least 20 years. As explained in AMI's earlier submission to the Office's visual works inquiry, this revenue likely constitutes the bulk of GAG's income. This income enables GAG to pay expenses and consulting fees associated with advocacy before the Copyright Office thereby giving the false impression that GAG legitimately represents the large majority of graphic artists. For at least the last 8 years two other organizations have joined GAG in receiving payments without authorization: The Society of Children's Book Writers and Illustrators (SCBWI) and the Society of Illustrators in New York (SI). AMI requests that the Copyright Office investigate this practice and forward its findings to the appropriate law enforcement agencies.

“The system presupposes that the right-owners in particular fields are grouped together in organisations [*Sic.*] that are representative in the field concerned **and that are mandated to conclude contracts on their behalf.**”

“A condition for the extended license is of course that there is an agreement. That agreement must concern the use of works or other subject matter in a certain manner. The agreement must, in other words, be specific and relate to, for instance, reproduction, public performance etc. and **should not be general** and concern all types of exploitation of the works. That would go too far, in particular in relation to foreign or other outside right-owners who might be subjected to the terms of the agreement.”

“The system of giving extended effect to collective agreements in certain areas is a typical Nordic way of finding copyright solutions to otherwise difficult situations of mass use of protected works and other contributions. That system **presupposes of course that there is a well-developed system of organisations** [*Sic.*] in the field concerned and that such organisations [*Sic.*] represent a substantial number of right-owners in the field concerned. **It presupposes in other words that the “copyright market” is well organised** [*Sic.*] **and disciplined.**” (Emphasis added.)⁴

AMI implores the Copyright Office address first the inequities in the current state of reprographic licensing for visual artists prior to recommending establishment of an ECL in the United States. Establishment of an ECL governing graphic art content should not be considered until unauthorized infringing activity is stopped and visual artists receive equitable remuneration for the reprographic licensing of their works by the Copyright Clearance Center, content aggregators and publishers. Unless these problems are addressed first, an ECL scheme for mass digitization would lack the trust necessary for AMI members and other visual rightsholders to participate.

Question 1: Examples of Projects.

More than other works of visual art contained in books and periodicals sitting on library shelves, nearly all medical journals and publications – even though originally published in print format – have been digitized and are already available from publishers or content aggregators in digital format. For the most part the only works that have not been digitized are those that are in the public domain or no longer have research value. Such works are digitized mainly for archival or preservation purposes. Projects involving mass digitization would be of little relevance to this inquiry.

Further, the distinction of out-of-commerce has little relevance to the visual components in a collective work. Medical books are small print run, have a short shelf life, and go out of print by design as the pace of scientific knowledge changes. The licensing of illustrations can occur across multiple titles and their future editions. Every illustrator maintains an archive of

⁴ **The Extended Collective License as Applied in the Nordic Countries**, Henry Olsson, The Ministry for Justice, Stockholm, Sweden, May 20, 2005, <http://www.kopinor.no/en/copyright/extended-collective-license/documents/the-extended-collective-license-as-applied-in-the-nordic-countries>

previously-published work that is available for licensing and also serves as the foundation for new, derivative works. So, while a given book may be out-of-commerce, the illustrations published within that work (and the target of the Copyright Office mass digitization ECL) are still being exploited by the artist as an ongoing revenue stream and repurposed in derivative works.

The eBook market in academia is rapidly growing and providing a robust licensing environment for older illustrations still in copyright. An ECL pilot program focused on out-of-print books would harm a working market. Moreover, the copyright status of a book or any other publication is *irrelevant* to the copyright status of the separately owned illustrations that are contained within that book. An ECL that does not take this into account would violate the author's exclusive rights and most certainly fail the Three Step Test under both Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works and Article 13 of TRIPS:

“Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.”

A pilot program should be just that – a small-scale, narrowly focused feasibility study to test logistics, prove value, and reveal adverse consequences in order to predict performance of a full-scale project. More importantly, any pilot study must be designed to reveal design flaws in a reasonably safe sample size so as not to affect harm on existing markets and services.

AMI also restates its strongly held view that the only use of works for which a case could be made for special consideration are purely archival and scholarly uses of works. Therefore, a threshold for any legislation establishing an ECL for mass digitization must be that it 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.

To safely test an ECL, the Copyright Office should limit this pilot to **cultural heritage** holdings with clear public benefit and no competitive harm to visual artists and their working markets.

Question 2: Dispute Resolution Process.

As described above, publishers and aggregators already provide users with online access to databases containing copyrighted medical publications that have been subject to mass digitization. Therefore, there is no need for a statutory license to enable users to access these databases. All of these databases include published illustrations created by AMI members. However, even though journal publishers have mass digitized books and journals originally published in traditional print formats, they lack the right to convey the copyrights in the images included in such books and journals.

Journal publishers and database aggregators rarely seek permission to include visual art content prior to mass digitization, steadfastly refuse to acknowledge that illustrators have any rights in such mass digitization and do not share subscription or other royalty revenue from secondary licensing. AMI's response to the Office's earlier visual works inquiry describes this phenomenon in more detail. Until recently, medical illustrators granted to publishers only the rights for a one-time use of an image in the initial distribution of a literary work containing that image. Yet, publishers routinely ignore this fact and behave as if they alone own all rights to further reproductions. They give the impression to purchasers and users of their databases that the licenses they issue are complete, and include all permissions necessary for their use.

In recent years medical publishers have begun to utilize their market power to force illustrators – as a precondition of getting a commission – to agree to work-made-for-hire contracts contrary to the wishes of the artist and contrary to policy underlying the work-made-for-hire definition in §102 of the Copyright Act. However, this is a relatively recent phenomenon. This means that copyrights in the majority of illustrations in mass digitized databases made available by medical publishers are licensed to users without the permission of copyright holders in the illustrations. Yet, because they lack the resources necessary to enforce their rights there is very little illustrators can do about it.

AMI believes that the use of overwhelming market power to force artists into work-for-hire contracts should be the subject of anti-trust enforcement by the United States Justice Department and the Federal Trade Commission and urges the Copyright Office to advise these agencies accordingly.

To the extent that site licenses issued by publishers and aggregators of medical books and journals fail to cover all elements of a mass digitized library, publishers promote the purchase of blanket annual reprographic licenses from the Copyright Clearance Center (CCC). The CCC license is a voluntary collective license and *should* be a solution to the problem at the heart of this inquiry. However, the CCC willfully excludes illustrators and other authors who retain secondary reproduction rights in their works from sharing in its royalty distributions. CCC seems unconcerned that its licenses are incomplete and highly misleading to licensees.

AMI believes that this problem could be resolved without resort to a statutory ECL if the CCC would follow the example of its European counterparts and obtain permission from artist/authors to include their rights in the CCC license. AMI members already have granted to the Artists Rights Society (ARS) permission to convey rights in their works to the CCC. This would mirror the successful European system where users are granted a blanket license to published works by a single CMO representing all publishers and authors which then makes royalty revenue available for distribution to individual rights holders through subsidiary CMO's representing categories of authors such as ARS.

AMI members technically hold the necessary copyrights to force publishers, aggregators and the CCC to share royalties with them. However, as noted above, the litigation costs necessary to bring enforcement actions are far too great for individual illustrators to bear. Indeed, if all AMI members banded together to enforce their rights their combined resources would not be enough to take on the giant, multinational conglomerates that now dominate medical publishing and

control the market. Because of this, AMI would welcome a statutory role for the Copyright Office to function as a regulator that could supervise the operation of publisher CMOs. This would be similar to the regulatory role of the “rate court” that currently supervises the workings of the two large American music CMOs, ASCAP and BMI. However, while the rate court primarily focuses on the CMOs’ relationship with music licensees, the Copyright Office regulatory role also should encompass the relationship of the CMO with the individual holders the rights the CMO purports to license, such as medical illustrators.

The qualifications necessary to grant licensing authority to a CMO should be very strict. AMI cannot emphasize this too much. Currently, there are only two visual arts CMOs with a track record of successful representation of visual artists: ARS and VAGA (the Visual Artists and Galleries Association.) Given CCC’s history of willfully ignoring illustrators’ rights, it would be a travesty to adopt any criteria that would permit it to qualify as an artists’ CMO. Similarly, AMI’s comments in the visual works inquiry describe the problem of self-appointed trade organizations and unions pocketing artists’ foreign-based royalty payments with no attempt to make meaningful distributions to rights holders. It would be a travesty to grant such groups any fiduciary authority over illustrators’ rights and royalty income to permit them to profit from any ECL. The Office should also be very careful about start-up shell enterprises claiming a right to perform this role. The American Royalties Too (ART) Act contains criteria, which would assure that only legitimate CMOs could represent rights holders, and this is the model that should be adopted.

As noted above AMI believes that a foundation is in place for *market-based* CMO mechanisms in the field of medical illustration and medical publishing that should obviate the need for an ECL. However, an alternative would be an ECL covering reprographic uses of medical illustrations that would recognize the role of a CMO, such as ARS, in administering the license. Again, it would be absolutely imperative that such a CMO meet very high standards to demonstrate that it had the previous experience in licensing of artists’ works. The criteria in the American Royalties Too (ART) Act should be the model. As provided in the ART Act the Copyright Office would perform the regulatory function of certifying qualifying CMOs pursuant to very clear statutory guidance. Like AMI’s suggestion above with regard to a rate-court like regulatory function, the Office also would provide ongoing supervision of a CMO certified to administer the ECL.

Finally, AMI cannot stress too strongly its view that any CMO mechanism, especially a CMO administering an ECL, not convey licenses for the use of mass digitized collections of works that would cannibalize the existing licensing market for medical illustrators.

Unlike many other categories of visual works, medical illustrations are very complex, difficult to create, and can be re-used as illustrations to accompany journal articles and books written subsequent to the publication of the works for which they were originally commissioned. This is a re-use much different than the reprographic reproduction of a journal article or book already containing the illustration. It involves the re-use of the illustration in an entirely new literary work and this currently is a robust market that accounts for a significant portion of many illustrators’ income. Any blanket license issued by a CMO, whether or not pursuant to an ECL, should cover only secondary, or reprographic, copying of the original work. Should the

Copyright Office play a regulatory role, assuring that the blanket license be limited to a reprographic type of use would be absolutely vital.

Finally, the question on the dispute resolution process seeks comment on the potential role of the Copyright Royalty Board and whether such a process should include mandatory arbitration or mediation.

The comments above are predicated on a regulatory role for the Copyright Office. AMI assumes that the Copyright Royalty Board, or some new version of it, would be the means for implementing this regulatory role. The Copyright Royalty Board would be an excellent mechanism for providing a rate-court model in resolving licensing disputes. Also, as noted above the high costs of litigation at present are an insurmountable obstacle for medical illustrators in effectively participating in existing collective licensing regimes for published works. If the Copyright Royalty Board were to serve as an alternative forum for litigation, it may be appropriate to consider that the Board be structured with administrative law judges or hearing examiners that would perform the primary task of conducting hearings and taking evidence with the Copyright Royalty Board functioning as the administrative appellate body. The International Trade Commission (ITC) could provide such a model.

Should the Copyright Office be made an independent agency, the current structure could be replaced by a three member Copyright Commission, with a hearing examiner and rule making system patterned after the ITC or FCC, with the Chair of the Commission supervising the non-regulatory administrative functions currently the responsibility of the Register of Copyrights. However the regulatory function is structured, a paramount concern should be to limit the costs to the administrative litigants. While there is much to commend the ITC as a model, costs to participants in its proceedings – particularly in §337 patent cases – have become comparable to federal district court litigation. A better model might be the post grant opposition system established by the Patent Trial and Appeals Board in the USPTO. This system utilizes limited discovery, use of teleconferencing and prompt disposition of motions and decisions.

Finally, AMI would oppose mandatory arbitration. Appeals from the Copyright Royalty Board (or a successor commission) should be directly to a designated circuit of the United States Court of Appeals.

Question 3: Distribution of Royalties

AMI has no objection to a requirement the royalties from any collective license be distributed within a reasonable period. AMI would strongly oppose diversion of any royalty income after the deduction of administrative costs to anything other than royalty payments directly to visual arts rights holders. Diversion of revenue to activities characterized as artists' "welfare" should be prohibited and any advocacy or public affairs costs should be subsumed in the administrative budget with monitoring by the Copyright Office regulatory mechanism to prevent abuse.

The best approach would be to permit the governing board of the CMO to establish such rules after receiving input from member rights holders. The Copyright Office (or Copyright Royalty Board) could provide appellate supervision. AMI assumes that royalties would be distributed

directly to artist rights holders just as existing music CMOs distribute royalties directly to rights holders (on a semi-annual basis.) The board of the CMO, with the supervision of the Copyright Office or its successor, would establish the methodology for determining how shares of blanket, non-title specific royalty collections would be allocated among rights holders. The music CMOs offer excellent examples of such methodologies that could be applied to this situation. The foundation for the research and fact gathering mechanism necessary to determine relative use of images already exists within ARS, which employs a cadre of specialists who constantly monitor the publications (and sometimes audiovisual productions) where member visual artists' works are reproduced. This could easily be adopted and enlarged to support a more comprehensive collective license, whether voluntary or in the form of an ECL.

Question 4: Diligent Search

AMI has no objection to a requirement, in the case of an ECL binding non-CMO members, that a good faith effort be made to locate all rights holders entitled to royalty payments within the same parameters that are applied to members of the CMO. As noted above the foundation for such a search mechanism already is functioning at ARS which is fully capable of keeping track of use of both members' and non-members' works.

Question 5: Other Issues

AMI is very concerned that the genesis of the current inquiry began with a bias toward users of copyrighted works and that the rights of authors be curtailed so that works can be used without prior authorization more easily and cheaply than is the case currently. Indeed, AMI is concerned that there has been an unfair tilt against authors' rights in the Copyright Office policy inquiries thus far. Nothing could better illustrate this concern than the Office's history on orphan works.

AMI cautions that the rights of authors – including medical illustrators – are statutory rights enacted by Congress to implement the Constitutional mandate to grant “**exclusive**” rights to authors and inventors. Similarly, the prevailing international treaties are predicated on strong respect for authors' rights and our international trading partners – particularly in Europe – take authors' rights very seriously. It is not an accident that Continental copyright is referred to in French as *droit d'auteur*, or authors' rights, not users' rights.

Visual artists – especially professional illustrators such as AMI's members – are almost exclusively private individuals who must negotiate the terms of their livelihood with far larger, often gigantic, organizations: both for profit and nonprofit. AMI respects the public interest in strong educational institutions, libraries, and health research organizations. It respects the dedication and integrity of librarians and teachers.

However, all of the institutions that control the conditions of an individual artist's compensation, whether nonprofit entities, government agencies or profit making enterprises are organizations – usually large organizations – whose salaried employees enjoy a level of job security, benefits and institutional support that would be the envy of any medical illustrator working alone or in a small studio. Artists have no 401 K plan or fixed retirement pension. They have no employer provided insurance or paid leave. They must pay out of pocket the employer portion of their social

security tax and they have no HR department to handle such matters. They have no procurement department to purchase supplies, no accounting department to file tax returns. They are not members of labor unions and do not enjoy the benefits of collective bargaining. Indeed, they must stand at a distance while they watch gigantic publishing and tech companies managed by millionaires and billionaires advocate against their interests in the halls of Congress, the Courts and the media – all to meet the quarterly profit demands of a CFO.

AMI members and all professional visual artists have few places to look to assure that their rights are respected and that they receive justice in our legal and economic system. Great names such as Arthur Fisher, Abraham Kaminstein, and Barbara Ringer have presided over historic changes in the law and business context of copyright. These leaders made sure that the rights of all authors were taken seriously and protected from encroachment, regardless of the wealth or power of those who would diminish such rights. The United States Copyright Office is the sole public or governmental institution authors can count on in securing and protecting their rights and which provides fair advice to legislators and courts on the meaning of exclusive constitutional rights. If the Copyright Office abandons this responsibility, there will be no justice for artists and authors in America.

Submitted on behalf of the Association of Medical Illustrators by:

Bruce Lehman, Counsel
Association of Medical Illustrators
700 7th Street, SW #427
Washington, DC 20024
Telephone: (202) 262-0262
E-mail: blehman@iipi.org