WESTWOOD Medical Communications
Medical Illustration for the Health Sciences & Legal Communities

July 20, 2015

Maria Pallante
Register of Copyrights
U.S. Copyright Office
101Independence Ave. S.E.
Washington, DC 20559-6000

RE: Notice of Inquiry, Copyright Office, Library of Congress

To whom it may concern:

My name is William B. Westwood. I live in Albany, New York and am an internationally published, self-employed Medical Illustrator, Board Certified through the Association of Medical Illustrators. I am an elected Fellow and Past President of the Association of Medical Illustrators (AMI) and in 2010, I was awarded the Lifetime Achievement Award from the AMI, its highest honor.

I hold a three-year Master's degree in Medical Illustration from the Medical College of Georgia (now Georgia Regents University) in Augusta, Georgia. My training there encompassed (what used to be) the first two basic science years of medical school over a three year course of study. Medical coursework included human gross anatomy with dissection, histology, neuroanatomy, embryology, pathology, genetics and surgery. All anatomy and surgery courses were taken with medical students. The program also included advanced training in artistic techniques specific to medical/surgical illustration, visual storytelling and graphic communication. This program is one of only three such accredited graduate programs in the US.

Upon graduation in 1972, I was invited to join the Section of Medical Graphics at the Mayo Clinic in Rochester, MN, where I spent the next 10 years creating anatomical and surgical illustrations, models and exhibits for some of the world's foremost surgeons, clinicians, educators and researchers. These artworks were used for teaching, medical presentations, journal articles, medical textbooks and patient education.

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During the mid 1970s, I became interested in copyright and began to follow the information circulating on the evolution of the first update to the US Copyright law since 1909. While I was disappointed that the publishing and movie industries were able to persuade Congress to broaden the definition of work made for hire and weaken the effectiveness of clear cut copyright ownership by creators, I was excited that illustrators such as myself would have copyright protection upon creation "in a tangible form" of a piece of artwork.

In part, because I recognized the enormous advantages this would give to self-employed illustrators in establishing and maintaining an income stream from their work, I left Mayo in 1982 to go into business for myself. (Please note that I do not call myself a "freelancer" – I am a self-employed medical illustrator.) Leaving a great job at a prestigious institution for the world of self-employment required no small leap of faith. At the time only about a half dozen or so trained medical illustrators were self-employed –nationwide. All others worked for hospitals and large medical centers as full time employees. There were virtually no commercial markets (advertising/ pharmaceutical/editorial) for medical illustrators to exploit. Medical textbooks comprised the major viable market for the medical illustrator's skills outside of full time employment. However, most medical textbooks were illustrated for medical publishers (free of charge) by staff illustrators at the medical centers. This was because the authors were always high ranking physicians or surgeons at any given institution and authorship enhanced both the author's reputation and the institution's.

Prior to the implementation of the 1976 copyright law, illustrating a textbook on a freelance basis, require one to give up their copyright, yielded very little money and offered no possibility for an ongoing income stream even in circumstances where the medical artwork was the obvious element which made the book highly successful for the publishing houses. One classic example of this is the Atlas of Surgical Operations by Robert Zollinger, M.D. This atlas, with hundreds of beautiful and highly accurate surgical illustrations and only a small amount of text, was first published in 1961 to high acclaim – because of the exceptional artwork. In 2011, the 9th Edition was published. The book sells for $238.00 and since it was first published as an all rights project, the several fantastic medical illustrators, who are really the ones responsible for the book's success, have been totally cut out of the income stream that has flowed to the authors and the publisher for the last 54 years. There are many more examples like this.

And yet, the US Copyright Office continues to work against creators by not promoting policies that reduce the abuses of all rights and work made for hire

contracts – not to even mention the Court's expansion of what constitutes fair use far beyond what was intended when the concept was formally codified in the 1976 law, with apparent applause from the Copyright Office.) Now proposals are being made to further undermine the concept of "exclusive" copyright ownership by creators through notions that "potential users" have "rights" to make use of copyrighted images on par with those of actual creators and copyright owners. This is utter nonsense and an affront to those who wrote copyright protections into the Constitution in 1790.

Many of us saw the 1976 copyright law as a path to changing the abuses surrounding creative ownership through the enhanced leverage provided by copyright ownership upon creation. It could not only bring illustrators appropriate recognition for their medical and surgical contributions to the advancement of science, it could potentially bring sustained income streams from shared royalties with authors and publishers in successful projects. However, this was not to be because of the deceit and greed of many in the medical publishing industry, but the revamped copyright law did open doors in new commercial healthcare markets for medical illustrators.

I along with a handful of other medical illustrators were heavily involved in opening up these commercial markets for our profession. Shortly after leaving Mayo, I conceived of and created the internationally recognized *Medical Illustration Source Book*, which has become the leading national visual advertising resource used by medical illustrators to promote their artwork and businesses to the healthcare marketplace. Today, almost half of the several thousand medical illustrators in this country are self employed and many of those pioneering illustrators went on to build businesses now employing several dozen or more medical illustrators supporting and helping to advance medical education and medical and scientific research.

The proposals being made to allow medical nonprofits to take and use the private work of self-employed medical illustrators through an expanded fair use doctrine will truly damage hundreds of illustrators' businesses and in the long run undermine this profession and the advancement of science it supports.

Over the ensuing 33 years since starting my own successful business, I have personally created between 5,000 and 6,000 illustrations for pharmaceutical companies, medical advertising agencies, medical magazine publishers, anatomical and surgical textbooks, medical product manufacturers and trial attorney clients, nationwide. I have also created medical exhibits, 3D models and animations. My artwork has been published in over 300 medical journals and in

over 50 surgical textbooks. My illustrations have won 38 national awards, including nine First Place awards for surgical illustration from the Association of Medical Illustrators, the Billings Gold Medal from the American Medical Association and a Silver Medal from LA Society of Illustrators. I am a co-inventor of two medical devices and holder a patent on one of them. I continue to work full time, creating new, original illustrations everyday and licensing them for additional usage at later dates. (www.billwestwood.com and www.westwoodmedicl.com)

What are the most significant challenges related to monetizing and/or licensing my medical illustrations?

Understanding the various markets for medical illustration (pharmaceutical advertising, editorial, medical products, textbook publishing, patient education, teaching, medical legal, etc.) and knowing how to attract potential clients in those markets and successfully promote one's artistic services to them is a significant, ongoing challenge for every self-employed creative person. However, once you get someone interested in your work, the greatest challenge creators face is the ever present struggle to negotiate a fair price with appropriate terms and a grant of rights commensurate with the creative complexity of the project and the usage desired by the client.

Ever since the first days after the institution of the 1976 copyright law, medical illustrators and other creators have had to deal with the prevalence of "take it or leave it", all rights contracts and work for hire contracts (pushed aggressively by the Boards and their attorneys representing the companies in all markets). Medical publishers are among the worst (but are not unique) for using such coercive techniques and often, the illustrator finds himself in a "David and Goliath" situation where he cannot win and where he must walk away or capitulate to the demands to give up his/her rights. Many simply capitulate. Not because they don't value their copyrights, but because they have bills to pay and families to support. Under work for hire, the illustrator who capitulates, becomes the de facto employee of the client. He usually receives a pittance of a payment but none of the benefits of employment such as health insurance, retirement contributions, paid vacation, payment of half of his FICA taxes, etc.

There is almost never a level playing field when an individual illustrator is trying to negotiate a fee/usage contract with a large corporation. Many medical publishers (Elsevier is a notable example) have used these strategies to develop large libraries of medical artwork that they are now licensing nationally with the result that illustrators often wind up competing against their own past work for

new work with different clients. This is not right and the weakness US Copyright law relative to work for hire doesn't help the situation. The nine work for hire categories are, in my experience, regularly abused by clients in the healthcare marketplace. To exacerbate this, illustrators cannot even band together to fight these abuses, because the Federal Trade Commission calls that "collusion and restraint of trade", even while the publishers give seminars on how to force "freelancers" to give up their copyrights. (Here's one of many examples of lawyers advising publishers on how to produce an iron clad work for hire or all rights contract: http://copylaw.com/new_articles/wfh.html.)

While I and many of my medical illustrator colleagues have fought successfully to maintain our copyrights, many others have not been able to do so. Younger, less experienced illustrators, in particular, are often taken advantage of and coerced into take it or leave it situations through which they frequently wind up giving up all the rights to their work while receiving ever spiraling downward fees and no benefits and no ability to share in the proceeds of a successful project. It is equally sad to see older illustrators, who due to lack of a forceful personality or business acumen, head towards the ends of their careers not owning or controlling the artworks that make up the creative essence of their souls.

Lawyers, business people, bureaucrats and the like, look at artistic products and see only valuable commodities that they want to monetize and exploit. Their goal is to cut the creator out of the equation. Their moral compasses are not attuned to what "makes creative people tick" (i.e., the part of their souls that go into every creative work).

That is why we are at this place in copyright history today. Creative individuals are on the precipice of having their artwork (their writings, their illustrations, their photographs, their music) stolen from them by commercial elements of society, which want to rob them of the products of their souls! It's not enough that we've been contractually run roughshod over for decades, now "they" want everything. My artworks are like my children and the Copyright Office and Google and the publishers and the giant stock houses and their ilk, along with the rest of the greedy business world now want to get at my work because they see how valuable it is, and in the process, they want to financially cut me out of the equation. This is what the orphan rights act and the requirement that creators put their work into registries, among other provisions, will yield.

Well my artwork is valuable to me too. When I create an illustration, I sell the client the limited reproduction/usage rights that they need and only that.

Afterwards, and depending on the negotiated usage terms, every illustration I create is available to be licensed through my own website, through ongoing networking and marketing efforts and through an artist controlled stock medical illustration database. The relicensing of my artwork represents a sizable income stream alongside the creative fees I receive for producing the original works. I must compete with huge stock houses and publisher's collections which often will license artwork for as little as a few dollars. These huge corporations have gutted the photography market and done much damage to the illustration market. Medical illustration has managed to maintain slightly better equilibrium.

I have worked throughout my career to maintain my copyrights and negotiate appropriate fees for my artwork and the knowledge and skill it takes to create it. I have never signed a Work for Hire Contract and have only sold the copyright to my work on a handful occasions. I have fought hard to retain the copyrights to my work and have lost many projects and tens of thousands of dollars because of my steadfast refusal to give in to coercion and relinquish up my creative rights.

I have only registered approximately 20% of the approximately five to six thousand medical illustrations I have created over the years. Registration is a time consuming, expensive and burdensome process. It takes almost an hour to register a single illustration and longer if you are registering multiple pieces, even for unpublished works. If I had registered all 5,000 to 6,000 of my illustrations over the years, it would have cost me roughly $175,000 at $35.00 per registration. The hourly charge that I base my fees on is $125. So a minimum of an hour of my time per registration would add another $625,000 to $750,000 to my costs of registration. (Not to mention that I already work 55-60 hours a week just meeting my deadlines.)

Small, independent sole proprietors like myself, cannot sustain these types of costs and there is no way that I can pass those costs on to my clients. And now you are talking

about instituting Registeries that will force me to pay commercial agencies to register my
artwork just to maintain the copyright protection that the Constitution supposedly guarantees me? I absolutely fail to understand why registration should be a necessary part of my being able to protect my creative works to begin with.

What are the most significant enforcement challenges for medical illustrators?

Enforcing and protecting my copyrights is an exercise akin to spitting into the wind. I have identified over 700 clear cut infringements (which I can show to anyone reading this who might want to see proof) of my medical illustrations. My illustrations have been infringed by medical textbook publishers, medical journal publishers, medical product manufacturers, trial attorneys, individual physicians and the lay public, literally worldwide. The costs, in terms of time and out of pocket dollars is enormous. Every single infringement in this country that I have been able to pursue has clearly been willful (my copyright notice has been on every illustration), and when confronted, each infringer's first claim was "fair use". Some even unilaterally declared the artwork in question to be "orphaned". Some of these infringements have been statutory, some have not. No matter how "nicely" I might approach someone who is illegally using one of my illustrations, I have never gotten an offer to pay me a license fee. More frequently, I get a response like the one my attorney received just last week from a urologist in Boston who had taken one of my registered illustrations off the internet to use in a medical presentation (and at the end to promote one of his books). According to my attorney, the doctor was "smug in his response" and "even suggested that I (as the medical illustrator) should be happy for the exposure and that it would enhance my reputation to have my artwork in his presentation because he is affiliated with Harvard".

This is not at all unusual. Another surgeon wrote me the following when I insisted that he had to pay me a license fee for his unauthorized use of one of my illustrations: "I am a physician and surgeon who works in the trenches daily saving lives and I find your response to my educational and selfless use of the illustration on behalf of my patients and the public to be astonishing, selfish and inhumane." In both of these cases, I had to find and hire attorneys to seek redress for these infringements. In each case my illustrations had been copied from one of my legitimate client's websites along with my copyright notices.

And yet, one other infringers did offer to pay me a license fee for their unauthorized usage of another two of my illustrations. He wrote to me: "When I have been able to locate the copyright holder, I have paid the appropriate fee. To wit, enclosed is a receipt for an image that I bought to use on the project that I am now working on. I paid $27 for the image. On another occasion, I paid $224 to Shutterstock for many images--I can't remember if it was 50 or 100 images. I figure that your two images are worth $50 and in good faith, will be happy to pay you this amount."

And so this on steroids, is what to expect if small claims courts and the concept of license fees along the lines of "what a reasonable licensee or licensor would have agreed to before the infringement" with no teeth is instituted as has been discussed. If anyone reading this thinks that infringers would be falling over themselves to be "fair", then they have zero experience in dealing with individuals who are caught infringing artwork.

Out of the 700+ infringements of my work that I have identifiedI have filed complaints against eight of them (one of those is currently pending). It has been a time consuming process, but it is superior to the small claims concept that has been proposed and which will only benefit the infringer by letting him "off the hook" for a small fee. . The low end of my licensing scale is $500 for a onetime educational use. Using that number, these 700 infringements have cost me over $3,500,000 in lost revenue. Aside from the fact that no such small claims courts currently exist, in my experience dealing with Federal Judges, I've found many of them are clueless when it comes to copyright, and even those who aren't often have no understanding of the value of visual art or how the "when, where, how long, etc" questions of licensing affect the value of usage.

From 1997 through 2007, I, and sixteen medical illustrator colleagues, were plaintiffs in a lawsuit against a major medical publisher who had infringed our illustrations over 900 times. None were statutorily registered. *(See McDermott et al v. Advanstar Communications, United States district Court, N.D. Ohio, Eastern Division.)* One hundred twenty four of these infringements involved my illustrations. In spite of the fact that we all had worked with this publisher for many years and for every project we each had the same contractual terms in writing: "Illustrator retains the copyright and grants the client one-time North American reproduction rights only". It was also plainly stated that any additional uses would require the payment of additional license fees. In spite of this, the publisher made millions of dollars licensing their journal names and all content – including our artwork - to other publishers around the world. Because our works weren't statutorily registered we had to spend thousands of dollars each out of our own pockets and go through three copyright attorneys (two actually died while working on our case). It took countless hours for us to provide answers on avalanches of interrogatories dumped on us by defense counsel. The effort almost put several of our group into bankruptcy, not to mention the travel costs for each of us to fly from all parts for the country for depositions and meetings. In the end we settled for 2 million dollars. But by the time our attorney's fees came out and we'd paid our out of pocket expenses back, we made a relatively small amount each. For us, it was a moral victory because this was such an obvious, egregious

theft of intellectual property. It still amazes me today that there is no effective system for righting such wrongs.

However, as hard as our fight was, I am solidly convinced that had there been the kind of small claims court that's been proposed, we would have fared even worse. The bottom line is that there are people out there who do not understand intellectual property and firmly believe that if it's on the internet, it's free to take and use.

Medical illustration is a challenging field in which practitioners must possess exceptional creative skills as well as in depth knowledge of human anatomy and neuroanatomy, pathology, cell biology, embryology and surgery. The function of the medical artist in serving science is embodied by his/her ability to know and understand the language of science and to be able to use his/her accumulated medical knowledge and artistic skill to conceive of and create artwork that elucidates complex scientific ideas and facilitates the educational process for specific audiences. It has often been said that "medical illustrators draw can't be seen, watch what's never been done, and tell thousands about it without saying a word".

The changes being called for under the guise of 'reforming" the current copyright law will, if implemented, destroy the medical illustrators' already limited ability to protect, control and exploit their works.

These proposed changes would:

Render null and void one of the basic rights given by the Constitution to copyright owners: the right to exclusive control of one's creative work.

Allow many of the clients ("non-profit" hospitals and medical centers) to whom medical illustrators relicense their anatomical/surgical artwork to take their work and use it for little or no reasonable compensation.

Allow others to create derivatives from my work and re-register those as"new" works, which in many cases would undermine my markets and completely stop part of my income stream by potentially having me compete against work that was created directly from my own, but for which I have received no fee.

It would expose the thousands of registered and unregistered artworks that I've created over 33 years to being declared "orphans" if I don't or can't afford to

place them in some – AS YET UN-NAMED, UNDECLARED AND UNDEVELOPED – and potentially expensive commercial registry.

Allow anyone who wanted to take my work and use it without significant penalty, taking away my right to sue for damages, which is the only weapon I have to fight the rampant infringement of my artwork. If anyone pushing the proposed changes doesn't understand that the suggestions about "reasonable license fees that a 'willing buyer and seller' would have agreed to before an infringement" will be totally unworkable, then I can guarantee that they have never had to hire an attorney to go after and infringer. As the law stands today, defense lawyers are practiced and skilled at obstruction, obfuscation and the development of clever stories about why their client's theft of someone else's artwork wasn't an infringement. If the proposed changes are implemented these attorneys will have a loophole large enough to drive semis through.

I want to express one last concern relative to collecting societies in the US, or rather the lack of them – reprographic rights markets. There are apparently hundreds of millions of dollars in royalties that should be being distributed to creators for the licensing of their works. This massive secondary licensing of reprographic rights is a huge revenue stream going apparently to many other corporations even though the money belongs to creators. Why Congress cannot or will not address this unjust situation is mind-boggling. I support Congressman Jerrold Nadler's American Royalties Too (ART) Act of 2015. My understanding is that it contains a provision that would create a visual arts collecting society, which if passed, would begin returning lost royalties to artists.

In conclusion, I would argue that the Copyright Office and Congress should realize that it is the true creators of valued works contributing to the progress of art and science that are going to be most deleteriously affected by the changes that are being proposed to the copyright laws. These individuals (whether they be illustrators, photographers, writers or musicians) are the "geese who lay the golden eggs" in our society and if the proposed changes take away or severely compromise their livelihoods, they will not continue to "produce those golden eggs". And society would suffer.

Corporations are not creative. Lawyers are not creative. Bureaucrats are not creative. The likes of Richard Prince or Shepherd Fairey are not creative – they are mere pretenders. They, the "remixers"and the "repackagers" are like jackels always circling, looking for an opportunity to steal something that isn't theirs.

They take someone else's creative work and make small changes and the Copyright Office and the Courts call this "transformative". Transformative? Really???!!! This is the world that the suggested proposals for "new" copyright law expect real artists, photographers, musicians and authors to work in in the future?

I urge the Copyright Office and Maria Pallante to stand strong against undermining the rights of true creators and to remember the words on the Copyright.gov website about copyright:

It is a principle of American law that an author of a work may reap the fruits of his or her intellectual creativity for a limited period of time. Copyright is a form of protection provided by the laws of the United States for original works of authorship, including literary, dramatic, musical, architectural, cartographic, choreographic, pantomimic, pictorial, graphic, sculptural, and audiovisual creations. "Copyright" literally means the right to copy. The term has come to mean that body of exclusive rights granted by law to authors for protection of their work. The owner of copyright has the exclusive right to reproduce, distribute, and, in the case of certain works, publicly perform or display the work; to prepare derivative works; in the case of sound recordings, to perform the work publicly by means of a digital audio transmission; or to license others to engage in the same acts under specific terms and conditions. Copyright protection does not extend to any idea, procedure, process, slogan, principle, or discovery.

Sincerely,

William B. Westwood, MS, CMI, FAMI