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July 15, 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
Copyright Protection for Certain Visual Works (80fr23054)

Dear Ms. Pallante,

I am writing to ask that you create policy to protect visual authors and their exclusive rights, and support a sustainable environment for professional authorship.

Licensing my rights is how I derive my business income and my copyrights are my economic assets. Copyright is also of the utmost importance to me for creative control of my work to protect its accuracy, integrity and authenticity. The 1976 Copyright Act has enabled me to sustain a professional career. However, I have experienced a substantial and *growing* loss of rights. I am also facing threats to the integrity and preservation of my lifetime body of work, which is my business inventory and also my legacy. My concerns and experiences are shared by my colleagues and by fellow visual artists throughout this country.

The digitization of the world's creative works, along with the dramatically rising arc of unauthorized secondary licensing by ever-expanding techno-publisher behemoths, are increasingly harming visual authors. For over 25 years a passive U.S. Copyright Office has not implemented policy or recommended legislation to restore balance to the author/publisher relationship. Additionally, there are other overdue actions the Copyright Office can implement to restore equity to the American artist.

I am grateful to this new Copyright Office administration for the opportunity to participate in the first inquiry into visual art during my 30-year career.

1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?

- the acknowledged **lack of negotiating power** of independent contractors
- the confiscatory scourge of **work-for-hire** and **all-rights publishing contracts**
- the loss of secondary royalty income from the diversion of artists' **domestically-earned reprographic royalties** by the Copyright Clearance Center, content aggregators and commercial databases to publishers
- the loss of secondary royalty income from the diversion of **repatriated foreign-earned reprographic royalties** from overseas collecting societies to self-appointed U.S. visual art charity and trade organization recipients
- the need for **regulatory oversight** of collective rights administration by the Copyright Office *to assure royalties are paid to the artists who earned them*, and *not* to publishers, content aggregators, commercial databases, visual art "charity" and trade organizations
- the length of time before the exercise of **termination rights**

Copyright supports a property right that establishes a functioning market for the creation and dissemination of my expressive works. For professional authors like me, that property right is created through the pursuit of my craft, a lifetime of study, and my sustained expenditure of great effort, time and money in the production of my artistic creations.

As a medical illustrator I have earned advanced degrees necessary to enter the field as a qualified visual artist. I also maintain my Board certification as a requirement of demonstrating professional competency by successfully completing a measure of continuing medical education every 5 years. In the beginning of my career I was a traditional board artist. Like everyone else, I also now invest in expensive digital technology to serve the needs of my clients.

My work has been published throughout the world in biomedical and scientific trade journals, at medical exhibitions and conferences, as well as consumer journals, textbooks and children's books. It appears in such diverse places as an iPad app demonstrating a mode-of-action of a drug where the target audience is Physicians, on The Discovery Channel® where the target audience is the general public, and throughout print and digital media to the biomedical research and development trade where the target audience is post-docs.

I have been forced to leave the textbook and publishing world largely behind due to loss of rights and non-negotiable contracts. It is not possible to earn a living under these fees and contracts. Moreover, it is a downward death spiral as you begin competing against your own work. The majority of my work now focuses on pathophysiology and drug mechanisms of action for pharmaceutical and biotech research and device companies for their investor and advertising markets. Copyright, trademark and patent are still highly respected in these markets, and copyright protection is treated with the vital respect it commands. My work in these markets is *always* conducted under non-disclosure agreements and under an exclusive license. The nature of the use, the market, the media and collateral use, the worldwide geographic territories, and the length of duration are all carefully enumerated and defined in my client licenses. It is not uncommon for a client to extend or renew a license for another 2 years or 5 years.

No matter the audience, whether it be consumer or trade, technical visual art like mine is held to a rigorous standard of accuracy and integrity. It cannot imply a concept, causal effect or outcome that is not true and it cannot be anatomically or scientifically inaccurate. My work requires dual skills in science and visual communication, and a high-degree of unique visual problem-solving. My visualization of scientific information is subjected to scientific rigor, and travels through many content-expert approval processes during sketch development and the execution of the final painting. In the case of any pharmaceutical advertising work, it must also successfully pass through the Food and Drug Administration (FDA) government agency before publication is permitted.

My work is often embargoed from any public exposure until my clients publish. Because of the FDA process this can be a number of weeks or even months after I have completed the work, delivered it to the Client and registered it with the Copyright Office. After the Client has published I am then able to publicly display the work in my portfolios and promotions and exhibit the work in art exhibitions.

There is an amount that a client invests in me to commission the production of original art. But, there is also a larger, wider investment they make in their support of the intellectual property that I am creating for their use because my visualizations enhance the value of *their intellectual property*. It is an intertwined American intellectual property ecosystem. My copyright adds value and helps protect their investments in their biomedical research intellectual properties. *This ecosystem should be sacrosanct from any diminution of protection.*

<u>If not for the protections of copyright – none of my work – or the vital American research and development it supports would be possible.</u>

As a self-employed artist I have no safety net but the one I provide for myself. Health and business insurance, retirement, continuing education, overhead, and capital investment are all my sole responsibility. And, it all must be covered by the licensing fees I earn from my creation of original works *that serve the market that seeks them*.

European publishers legitimately seek licenses from me for republication of my images they find in scientific literature. PhD candidates throughout the world frequently request permission to use my work on their theses covers and at their dissertations, and I am always pleased to support them with permission and no license fees.

Other users seek free use that I cannot or do not permit. Some seek a license that I must withhold because the work is under a current exclusive license, and sometimes because the use is competitive or incompatible with the nature of the art.

Key is my ability to clear these requests to protect my clients, my work, and my markets according to my discretion and according to my in-force contracts. A violating

license would put me in breach-of-contract with my clients. Worse, it would quickly destroy the trust and goodwill that I have painstakingly earned from long-standing relationships in a very small community of pharmaceutical agency creative directors, art directors, research scientists, inventors, scholars and editors. And, even worse, it would put many significant investments made by my clients in peril.

Infringers routinely attempt to damage my market and the audience it serves. *One of the exclusive rights that is of paramount importance to me is my exclusive right to create and control derivatives, and to stop those who create derivatives of my art.* A derivative by an infringer is often a fast knock-off without any of the development process of intellectual and scientific rigor, and often without any knowledge of what the subject is to begin with.

During the first decade of my career, I was infringed once to my knowledge, and I was able to achieve a successful resolution within one week by hiring a lawyer to make a phone call and send a letter, but not needing to file a lawsuit. I rather think people were more willing to be honest back then, or at least to comply when caught. I was able to work in relative peace.

For the last two decades my work has been more widely disseminated through infringing activity than by legal publication, even though my work is usually being published worldwide in multiple territories on first publication. I find that any image of mine, once published, is likely to be widely infringed. It has already been more than a decade since the courts recognized the damage to authorial secondary rights in *Tasini*. And reprographic royalty income has, in fact, been lost to visual authors like me for more than 30 years.

Yet, it is a secondary royalty stream that continues to expand in both value and marketshare. The Copyright Clearance Center boasts of returning one billion dollars to rightsholders in the last decade, yet it has not returned one dollar to visual artist rightsholders embedded within the published works it licenses. Billion dollar commercial databases, like LexisNexis, ProQuest, EBSCO, Ovid and other content aggregators

engage in the unauthorized licensing of visual art, both within the collective work of the article, and some also *separate out* the individual image for unauthorized licensing.

I have experienced tremendous infringement of my secondary rights in the secondary rights market of publishing commerce. I was a plaintiff in a group of medical illustrators in a decade-long infringement action against a multibillion-dollar worldwide publishing conglomerate who unlawfully extended my first time North American print reproduction rights secured for one of its U.S. journals into a systematic unauthorized licensing of my works to its 45 international affiliates over the course of two decades. It went undetected for many years until the world began to shrink as it became easier to find work on the internet.

The grueling experience of being a plaintiff in an infringement action against a large corporate entity was a terrible education of the vagaries of our judicial system when it comes to defending a copyright. I was naïve enough to think it would be relatively straightforward. We had caught them red-handed and we had iron-clad contracts. But that is not how corporate copyright litigation works.

It is not reasonable, not feasible and not realistic for independent creators to find justice against giant corporations. We cannot sustain the legal battle. For corporations, litigation is part of doing business and they are staffed with entire departments and outside counsel as a matter of course. As far as they are concerned, if they are in the wrong, all they need to do as their defense is keep you in court until you are ruined. Our lawyers were outnumbered and outmatched. Discovery was not "produced," it was a matter for litigation. Irrefutable and undisputed facts were a matter of very expensive procedural litigation. The place, timing and nature of depositions costs thousands of dollars to "negotiate," and when we finally traveled to the appointed place at the agreed time, we found it canceled upon our arrival. The same happened with arbitration. Twice. And with settlement negotiations.

The drain on time, productivity and procedural runarounds designed to drive up costs all took a measurable toll. But, what took a larger toll on all of us, was our first hand

exposure through the discovery process of the breathtaking scope of the unauthorized monetization of our work through the organized, systematic and sophisticated unauthorized secondary licensing market. Discovery revealed additional evidence of the same practices by our other publishers. We found tens of thousands of instances of separate unauthorized uses of our images. We realized how these mega-corporate, now giga-corporate, entities are being built on the backs of American illustrators. It was perhaps the most disheartening experience of my professional life.

Even though we had partial-contingency fee lawyers our expenses were through the roof. The resolution was unsatisfactory, the toll of the litigation was draining, and our legal fees alone (not including expenses) approached two million dollars.

Throughout, as one cause of action after another was dismissed by technicality and legal maneuvering, we were threatened with countersuit and promises of bankruptcy for their recovery of legal fees under §505. We knew their legal fees were probably three times more than ours. Perhaps more, since we were always facing down a full phalanx of the corporation's lawyers.

We were bullied, threatened and faced with very real financial insolvency because we had dared to enforce our copyrights against massive, blatant, willful systematic infringement. It was the very foundation of the explosive-growth "business model" that had catapulted this small company into a worldwide licensing entity.

We stuck it out, for ourselves and our profession. I am most proud of the fact that the plaintiff group hung together. Our youngest plaintiff had two works infringed, but was in the fight for his future career. Our oldest plaintiff was 70 years of age when we started, had hundreds of works infringed, and had been deprived of a lifetime of lost licensing income. 10 years is a very long time to be in litigation. Yet, it is not unusual, (I now know), for corporate copyright litigation to last years, even decades. Children grew up and entered college. Three artists were diagnosed with cancer, endured treatment and recovered. We had three separate attorneys throughout the course of our litigation; the first two passed away from cancer during the course of the case. And still we persevered and fought for our rights. Such is the honor we accorded to our personal work created by

our hands, mind and spirit. Each of us was a quiet, retiring person – as visual artists often are – and each of us were running successful businesses. Yet, their defense attorneys insulted us as “greedy,” “gold-digging,” and “misinformed” about copyright and our contracts.

We didn’t pick the fight – it picked us. We found the inner strength to protect our work, but not without cost. Because of my insight into how my work is infringed, and the inability to effectively enforce my contracts and my copyrights, I have largely abandoned working for publishers after this event. The contract at that publishing company is now work-for-hire, take it or leave it.

We discovered the infringements in the late ‘90s only because of the advent of the growing internet. And that has had a deleterious affect on the world’s creators, both in lost income from rampant infringement and a decline in civility and respect towards creators by the new construct that legal scholars and the Copyright Office refers to as “users.” What happened to “readers,” “listeners” and other devotees of culture and knowledge? Oddly, they seem to love or covet our work, yet hate the creator as some interloper standing between them and their appetites.

It has forced nearly every professional creator I know to assume a war footing in a bid to protect their businesses and their self-created property. And we have not found the support from our society or our government to provide the necessary honor and intellectual support to American creators that the Constitution would intend. Creators who protect their work are heaped with derision from legal scholars, “public interest” nonprofit advocacy groups, and corporate sharks and their lobbyists and cronies. They know nothing of what it takes to devote a lifetime to the arts and to make an uncertain living from them, yet they pride themselves as “experts” on creating one punitive scheme after another to compel the divestment of the work of individual, independent creators to corporations for the betterment of society (and the enrichment of their clients).

I have found my work isolated from its published article and offered for sale for Powerpoint presentations or as stock art by content aggregators who have secured no

authorization from me to license my work. These infringements are hidden behind expensive subscription walls to which I do not have access (academically-based colleagues have recognized my work and alerted me). I am also painfully aware that my work is extensively pirated in India and China for use on commercial medical packaging.

Like all medical illustrators, I can upload an image of mine into Google reverse image search and find dozens of unauthorized uses on the internet. I am not concerned with fair use of my work, or the use of my work on blogs that celebrate or comment on art. But, I vehemently object to the widespread infringing use of my work to promote medical clinics, vitamin companies, doctors offices, alternative health remedies and blogs, and other licensable uses.

However, these widespread infringements on the internet pale in comparison to the sustained, lucrative, systematic unauthorized licensing for secondary reprographic uses marketed by commercial content aggregators, databases and the Copyright Clearance Center.

It is hard to reconcile this tremendous theft of licensing revenue from American visual artists that **remains unexamined and unchecked** with the goals of the Copyright Act.

<u>The sustained authorship of professional authors is not indestructible.</u> In fact, it is becoming rather frail. Our rights urgently need to be secured.

2. What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?

Little can be done to right the current extreme imbalance between author and publisher, *or author and user if you prefer*, but I have three solutions.

1. **The right to authorship in the U.S. should be inalienable.** It is self-evident that work-for-hire for independent contractors *deprives an artist of authorship* in direct contravention of my constitutional right to secure the exclusive rights

to my work for limited times. This loss of authorship is compounded by the loss of all secondary income created by the ongoing licensing and exploitation of that work, including the *exclusive right to create derivative works*. Meaningful copyright reform would prioritize amending the law to ***apply work-for-hire only to true employees.***

2. The length of time to exercise the termination right must be shortened. By the time a creator can exercise a termination right he or she has been impoverished for three and a half decades while those copyrights have built a billion dollar corporation *or four*. The exercise of the termination right has become a grossly unmatched legal fight against a leviathan. No example describes this more tragically than Jack Kirby and his inability to exercise his valuable termination rights during his own lifetime against the four Marvel and Disney Corporations.

3. All statutory remedies should be automatically available to visual artists at the moment an artist fixes a creative expression in a tangible form. Statutory remedies are the only viable method by which an artist can enforce and defend their property right. The substantial deterrent of ***automatic*** statutory remedies will have a significant effect on the rampant piracy and unauthorized use suffered by American visual artists.

3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

It is self-evident that is fundamentally unreasonable to require registration for visual artists as a prerequisite to statutory remedies. Without theses remedies, including attorney fees, costs recovery and injunctive relief, visual artists cannot adequately enforce their rights.

Most visual artists create exponentially more works than any other genre of creator. And although there is a commendable, special group registration solution for photographers,

non-photographer visual artists need to be especially vigilant when using the group registration system. If the illustrator or fine artist registers a group of works labeled as a "collection" or a "compilation" the artist risks a limitation of a single grant of statutory remedies for the group, or a fractional grant of statutory remedies for an infringed image within the group.

Most artists would reasonably assume that they have "perfected" their copyright by timely registration within three months of publication, and have therefore secured statutory protections for the lifetime of the copyright. Few know that the Copyright Office does not retain most visual art deposits after ten years, and has discarded millions of visual art registration deposits.

Even fewer artists know that the already unaffordable $55.00 cost to register a work only secures retention of the visual art image record for 10 years, and if the artist wishes retention of a published copyright deposit in the Copyright Office for the life of the copyright, *the artist must pay an additional $540.00*. This means the real cost of a "perfected" visual art copyright registration is $595.00 per image.

A registration will not keep our work from being "orphaned" under the Copyright Office definition of the inability to trace an unmarked image back to its owner. The Copyright Office has not created a searchable archive of visual images registered with the Office and has asserted that it does not intend to ever do so. Nor is it feasible since the deposits are not intact to digitize, despite the Office's mandate to serve as the recordation and depository for the nation's artistic works. The recommended orphan works legislation will effectively nullify the statutory protections of millions of registrations of visual art because it is predicated on reliance of searchable image registries even though there are none.

Registration for visual artists is too burdensome, unrealistic, costly and fraught with potentially fatal technicalities of which many artists are unaware. The Copyright Office has *long known* that most visual artists are unable to afford the time and expense to register all their works. The 1976 Copyright Act was revised in part to prevent the

loss of rights to American creators by removing burdensome formalities that caused the forfeiture of rights, *especially by the actions of third parties*, like the absence or removal of a copyright notice before publication.

Because of this, the true spirit of the Berne Convention prohibition on formalities should be honored for U.S. visual artists.

I realize this stands in stark contrast to current policies being pushed that would limit or remove artists' remedies while imposing even more formalities. Such policies favor infringers and not artists, and favor the extinguishment of professional authorship in exchange for the protection of infringers.

I no longer know the cost of overdue library fees, but when I was in college the fee for an overdue book (or never returned book) was quite small. It was to encourage you to go ahead and be sure to return the book. The penalty wouldn't become so overwhelming that it might cause you to abandon the idea of returning the book. So, it was a minor penalty, no matter how overdue, ***until*** it was time to register for the next semester when you could not re-enroll unless you returned the book or paid for its replacement if lost. Because it had the dramatic hammer of an effective penalty it worked.

If a thief steals a handful of loose candy from a convenience store the thief is charged with shoplifting, a very serious crime. If a thief steals more than a $1,000 *of anything* it is a felony. Steal $30, $3,000, $30,000 or $300,000 worth of art usage and *the only penalty is on the artist,* unless statutory remedies are automatic.

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

I have never personally experienced a challenge or frustration in making legal use of other visual art. As a professional illustrator I only use other visual art for inspiration, or under the doctrine of fair use, ***or*** I secure a license from a stock house to incorporate

backgrounds or other textures. I shoot my own reference photography. I do not appropriate other creators' works and I do not "remix," "sample" or "mash-up" other creators' protected works.

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

The overdue implementation of the **resale royalty, and the designation of that royalty as inalienable** would certainly make this list. American illustrators wholly support the implementation of the resale royalty and filed a detailed report with the Copyright Office in 2012: http://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/ASIP_Resale.pdf

The legislative implementation of the federal resale royalty has been in abeyance since the U.S. joined Berne in 1983, and that has resulted in a generation of resale royalties lost to artists and their heirs in the U.S. and around the world.

It is hard to reconcile this loss with the goals of the Copyright Act. The sale of American illustration paintings and drawings is an emerging market attracting sophisticated collectors worldwide, and these rights owners deserve to participate in the wealth they have created. I have observed first hand the sale of many illustration works I remember being created and published by my mentors and peers, including this one where the National Geographic Society auctioned part of its 11.5 million image archive at Christie's in New York: http://www.wsj.com/articles/SB10001424127887323330604578145061719900972

In the case of illustrators, painters and photographers, in many instances *the original art was never sold by the artist*, but passed into the hands of publishers, advertisers and others through the production process.

American illustration is evocative of a unique type of American artistry and personal expression. As more publishing archives are mined for illustrators' original works of art, the market for published illustration originals will continue to grow. Contemporary illustrators today are creating the Americana of tomorrow, and some are experiencing the

market exchange of the growing value of their original art occurring during their lifetimes, *and enriching only others.* There can be no doubt that the adoption of a federal resale royalty regime would further incentivize and protect visual authors. The artists of financially productive works would finally share in the equity of the value they have created.

I therefore support the Congressman Jerrold Nadler's **American Royalties Too (ART) Act of 2015** which calls for the institution of the reciprocal resale royalty in the United States, and for the Copyright Office to bring transparency and justice to artists' secondary licensing rights. I thank the Copyright Office for recommending this bill to Congress.

Summary

Each of the exclusive rights conferred by copyright can be subdivided and each divided right has a value. We rely on the divisibility of our exclusive rights to earn our livings. Any rights not specifically transferred in a license belong to the artist, including rights to uses not yet known or invented.

When the use has value, part of that value belongs to the creator; without the creative work the market—and the demand—would not exist. Yet, we experience significant difficulty enforcing our rights because of the dramatic imbalance between the individual creator and giant publishing enterprises and their cronies. In many cases, revenue streams that directly belong to visual artists have been wholly diverted to other parties, and artists are foreclosed from the exercise and enjoyment of their rights.

No meaningful copyright reform is possible without seeking solutions to this state of affairs in the U.S. today.

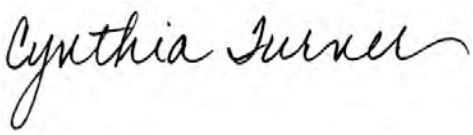
As Justice Ginsburg wrote in *Eldred*,

> "the economic philosophy behind the Copyright Clause . . . is the conviction ***that encouragement of individual effort by personal gain is the best way to advance public welfare*** through the talents of authors and inventors. Accordingly, copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . ."

It is my sincere hope that this Copyright Office will take care to firstly cause no harm to visual artists. Secondly, that the Copyright Office will proactively work with visual artists to craft policy to protect visual authors and their exclusive rights, and support a sustainable environment for professional authorship.

Thank you for issuing the first Notice of Inquiry dedicated to examining copyright and visual artists.

Respectfully submitted,



Cynthia Turner, Certified Medical Illustrator
Alexander & Turner Inc. Medical Illustration Studio

Biography:
I am a certified medical illustrator and a Fellow of the Association of Medical Illustrators. I am an adjunct assistant professor of Biomedical Visualization at University of Illinois at Chicago. I am a founding member and board member of the Illustrators' Partnership of America, and a co-founder of the American Society of Illustrators Partnership where I serve as co-chair with Brad Holland.

I have been successfully self-employed for 30 years. My work has been published throughout the world in biomedical and scientific trade journals, at medical exhibitions

and conferences, as well as consumer journals, textbooks and children's books. My work focuses on pathophysiology and drug mechanisms of action for pharmaceutical and biotech research for their investor and advertising markets.

My work was selected for inclusion in the juried *Art of Medicine* exhibition, New York, NY and the juried *Dream Anatomy* exhibition at the National Library of Medicine, Bethesda, MD. Johnson & Johnson honored me with a one-man show of *The Medical Art of Cynthia Turner*. I exhibited at the University de Andres Bello Art Gallery and the U.S. Embassy in Santiago, Chile and those works were later included in the permanent collection of the Universidad Andres Bello Medical School. I was selected for inclusion in juried exhibition at the 2011 TEDMED Conference, and selected for inclusion at the ASCB Exhibition held at the 2013 American Society for Cell Biology Meeting, New Orleans, LA, December 2013.

I am the recipient of numerous illustration awards including being twice bestowed the prestigious Ralph Sweet Member's Choice Best of Show award from the Association of Medical Illustrators. I was a 2009 and a 2014 Illustration Finalist in the annual International Science & Engineering Visualization Challenge sponsored by the journal *Science* and the National Science Foundation. I won the Gold Award, Editorial Cover for *Geriatrics Journal* from Advanstar Communications; and the Grand Aesculapius Award for the highest-scoring ad by doctors' choice, from *Modern Medicine Journal*. My illustrations have been showcased in *Medical Advertising News* and profiled in *Medical Marketing & Media,* and also *PM360 (Product Management 360) 2012 Greatest Creators*.

Recently, I was the Artist-in-Residence for Varian Surgical Sciences for four years, producing several 3' x 4' limited edition prints for Varian's *Take a Closer Look* campaign, highlighting Varian's role in advancing Stereotactic Body Radiation Therapies (SBRT) for cancer treatment of previously inoperable cancers.

In 2014, I received the *Brödel Award for Excellence in Education,* from the Association of Medical Illustrators, "for outstanding educational contributions to the profession of medical illustration."