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Comments of the Association of Medical Illustrators

Library of Congress
U.S. Copyright Office
[Docket No. 2015-01]

Copyright Protection for Certain Visual Works

The Association of Medical Illustrators (AMI) is the sole professional organization for the profession. 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 despite their utmost proactive actions to protect their rights.

AMI is grateful that the Copyright Office is undertaking a much needed inquiry into the impact of current copyright law on visual artists.

RESPONSES TO QUESTIONS SET FORTH IN THE FEDERAL REGISTER NOTICE

<u>The Most Significant Challenges Related to Monetizing and/or Licensing Graphic Artwork and Illustrations</u>

The challenges facing AMI members are the same as those for all graphic artists, particularly professional illustrators. However, the market for medical publications is smaller than for mass market publications with the result that purchase prices and subscriptions are especially high in comparison with the publishing industry in general. Further, the business environment for medical illustration has experienced two especially significant changes in recent years that create a much more hostile environment for licensing and monetization than in the past. These are: (1) the consolidation of the Scientific, Technical and Medical (STM) publishing industry with the result that a handful of giant multinational publishing companies control the conditions of licensing for medical illustration, and (2) the disproportionately extensive and rapid migration from print distribution to electronic distribution, often through site licenses offered by publishers and content aggregators to physicians, hospitals, clinics, universities and medical research institutions.

During most of the 20th century STM publishing was characterized by a plethora of journals, many of which were published by nonprofit entities with a primary interest in dissemination of scientific information rather than maximizing shareholder profits. Concentration and consolidation within the industry has meant that relationships with customers and content suppliers have been determined less by the desire to disseminate knowledge than by the need to generate the largest profit possible in order to bolster stock prices for large, multinational corporations. In these circumstances the very purpose of the copyright law is often overlooked: namely, that it is for the purpose of incenting and rewarding authorship.

In the current publishing environment the four most significant challenges to AMI members and other professional illustrators who create works for publication are: (1) the inability to obtain secondary licensing revenue collected by publisher-dominated copyright management organizations, both domestically and internationally; (2) the practice of publishers using their market power to demand that freelance artists sign work-made-for-hire contracts in spite of a long record of Congressional intent to the contrary; (3) the burden of registration and its impact on the ability of artists to initiate infringement actions; and (4) the costs of bringing infringement actions in federal courts.

Inability to access secondary licensing royalties from publisher-dominated collective management organizations (CMOs)

Until recent decades STM publishers received nearly all of their revenue from the sale of printed books and subscriptions to printed medical and other scientific journals. A large percentage of the market for sale of these publications consisted of corporate and institutional libraries. Given the specialized nature of these books and journals, the universe of purchasers was relatively small in comparison with other publishing markets such as popular periodicals and trade books. Therefore, recovery of costs and generation of profits required high prices for individual copies. Typically, the number of copies of medical books and periodicals purchased by libraries depended on the number of users served by each library. The larger the institution served by the library the greater the number of copies purchased, since hard copies had to be lent to users individually. The advent of photocopying machines in the mid-20th century began to change the market by enabling libraries to serve large numbers of users through the ability to photocopy individual articles while leaving the original book or journal on the library shelf.

After many years of litigation over library lending practices, the scope of fair use in photocopying became clearer and publishers established the Copyright Clearance Center (CCC), a CMO that issues non-title specific licenses to institutions and libraries to cover reprography beyond the limits of fair use. Similar to the long-used practices of music collecting societies, the CCC distributes the licensing revenue received to affiliated publishers on the basis of estimated market share. Regretfully, in spite of many years of trying, medical illustrators and other graphic artists have not been able to persuade the CCC to share non-title-specific licensing revenue with artists whose copyrighted images are a significant part of the publications licensed by the CCC, even though illustrators typically have not transferred to publishers the right to keep such revenue. While the CCC's marketing materials give the impression that CCC licenses give users very broad discretion in making secondary copies of published works, the fine print suggests that users have only the right to copy the portions of publications covered by the publishers' copyrights.

The CCC was created for the purposes of issuing copyright licenses in the era of mechanical reprography such as photocopying. However, with stunning speed CCC licenses have become one of the primary mechanisms for users to obtain permission for digital distribution, downloading and copying. These comments primarily are directed at CCC's "Annual Copyright License" which is a blanket license marketed to institutional users that, according to CCC's marketing materials, permits licensees to "share content from millions of journals, blogs,

newspapers, e-books and more." The annual license is a blanket license similar to those offered by music collecting societies for an entire repertory of works without differentiating specific works. This is best described as "non-title-specific licensing." This Annual Copyright license is sold to users as a sort of back-up license to provide assurance that they will be free of liability for copyright infringement for secondary copying that is neither covered under a title-specific license or fair use. To our knowledge revenue from the annual license accounts for the largest share of all licensing revenue collected by the CCC, currently in the neighborhood of $300 million per year.

If users are to obtain the safe harbor that CCC advertises to its customers, it should include all rights in the publications covered by the license. However, that is not in-fact what happens because unless the publisher of a work has acquired the rights to authorize CCC to license separately copyrighted components of a collective work, the user remains liable for infringement when copying the entire work. That is the case with regard to visual components such as medical illustration. CCC attempts to limit its liability for these gaps in its licenses by fine print advising the user that they must seek separate clearance for content not covered in the annual license. Were institutions using a CCC license aware that they must strip out all illustrations from works they wish to copy, such as medical journals, the CCC license undoubtedly would attract far fewer customers.

It would be easy for the CCC to close this gap in its annual license. AMI members would be happy to provide authorization for inclusion of rights to their works if CCC would agree to acknowledge their rights and to share revenue collected from the annual license with them. It also would be easy for CCC to clear use of AMI members' works – as well as the works of over 50,000 other artists – simply by making an agreement to share a percentage of total licensing remittances with the Artists Rights Society (ARS).

ARS is a bonafide CMO but like every other licensing mechanism tried by AMI members, also has been shut out by publishers, the CCC and digital content aggregators (e.g., ProQuest, EBSCO, ScienceDirect, SpringerLink, LexisNexis, and Ovid) and does not receive secondary use licensing revenue. ARS' royalty collections on behalf of artist/authors currently are restricted to primary, title-specific licensing of works licensed for initial publication.

Currently, distributions of annual license revenue go only to publishers. This would mirror the practice of most foreign counterparts to CCC, especially in Europe, which set aside a percentage of blanket license revenue estimated to cover visual components that is transferred to artists' CMOs like ARS who, in turn, are authorized by their affiliated rights holders to disperse each artist's share according to commonly agreed methodologies similar to those currently in use by music CMOs. However, after repeated attempts by AMI leadership and ARS management to discuss this approach, the CCC simply refuses to talk. AMI has concluded that the reason for CCC's refusal to consider inclusion of their members' works in their annual license is most likely that CCC was created by and for publishers, not individual authors. A majority of CCC's board of directors consists either of current or retired executives of publishing companies who have little interest in sharing the pie with individual authors.

For over 15 years illustrators have attempted to create a functioning CMO of their own, but have lacked the financial resources to do so. Because of the CCC's refusal to discuss inclusion of the illustration component in the Annual License, an illustrator CMO would have to repeat the costly process, involving years of infringement litigation, necessary to compel users to recognize their obligation to separately clear rights in visual images. Partly because of the misappropriation of existing royalty income by the Authors' Coalition of America (ACA) and its member organizations the Graphic Artists' Guild (GAG), Society of Illustrators in New York (SINY), and Society of Children's Book Writers and Illustrators (SCBWI), AMI members and other professional illustrators have lacked the financial resources necessary to undertake such an effort. Medical and other illustrators also are hindered by their inability to comply with the registration formality that is a pre-condition for infringement litigation. Publishers' failure to share secondary licensing revenue has an exaggerated impact on medical and scientific illustrators since, as described above; their works are far more likely to be reproduced in institutions comprising the primary market for STM publications.

In recent years publishers have been using content aggregators to license re-use of works in cases where the specific work, portion of a work and visual images contained in the work are known. In some cases the aggregator is an entity independent of the publisher that functions as the publisher's agent. In other cases, publishers have established in-house aggregators (e.g., ScienceDirect, SpringerLink, Ovid) to license content from multiple publications that it owns and markets. Consolidation in the publishing industry has made it easier for a single company to offer re-use rights in large, aggregated collections under the control of the company. An example, of such an in-house aggregator used by one of the largest STM publishers, Netherlands-based Elsevier, is Science Direct / Scopus offering a consolidated database covering a myriad of Elsevier published journals, books and e-books.

A leading independent aggregator currently licensing to a large share of the STM and medical market is ProQuest, which enables subscribers to search and ostensibly obtain permission for over 1000 medical publications. ProQuest's business model is particularly damaging to medical illustrators. ProQuest promotes its use of images as the most accurate and efficient search tool on the market: "Many databases within the field of Health & Medicine are enhanced with the ProQuest Deep Indexing providing access to more than 6.1 million figures and tables. Many Science & Technology* databases are enhanced with the ProQuest Deep Indexing providing access to more than 12.4 million figures and tables." Marketing materials for the ProQuest product, Illustrata™ deep indexing, contain the following representation.

> ProQuest Illustrata ™offers a new approach – by searching for papers that feature images (tables, graphs, figures etc.) that have been indexed by the key terms, the result is that the articles the images appear in are likely to be highly relevant. ***The images within an academic paper represent the core aspects of that paper*** – therefore articles that feature images indexed to match the search terms are likely to be highly relevant to the search. (Italics supplied).

ProQuest's database of thousands of medical journals includes a very large number of images authored by AMI members. While AMI takes the position that use of such an image as a search tool itself requires copyright clearance, ProQuest's use of AMI member images destroys the

illustrator's market for licensing images directly for secondary use such as presentations, online streaming and PowerPoint presentations. Unlike the journal article containing the AMI member illustration, ProQuest provides access and permits unlicensed re-use of the entire illustrated image without payment of a licensing fee. In fact, users are encouraged to download and use without permission. For example, the Illustrata™ marketing brochure boasts – that for purposes of "teaching" – unlicensed images used as a search tool can be "export[ed] directly to MS PowerPoint." The brochure asks the reader "what better tool to prepare for a class on style & format for graphics in science papers?"

Content aggregator's use of medical illustrators' copyrighted images as a search tool and its invitation to invite users to download their images for re-use destroys the artist/author's capacity to separately license his or her work. Even in situations where use of the image might arguably be fair use, the cat has been let out of the bag. Any user of an aggregator's database can obtain tens of thousands of medical illustrations, strip out attribution and any copyright, and use it commercially with a nearly non-existent chance of getting caught. Therefore, medical illustrators are shut out of what should be a vibrant new market that would make up for commissions and royalties lost because of declining print sales. Since aggregators are dependent on large publishing conglomerates for material to include in its database it is careful not to enable unlicensed use of these publishers' copyrights. Sadly, neither the publishers nor aggregators seem to have the slightest interest in seeing that the copyright owner of the illustration is made whole.

It is not surprising that publishing conglomerates should have little interest in respecting the copyrights of providers of visual content in their publications. An egregious example of STM publishers' bold expropriation of an illustrator's copyrighted work was recently documented by one of AMI's members. The highly prominent AMI illustrator investigated Elsevier's infringing use of her copyrighted work by purchasing a license for her own work using Elsevier's online ScienceDirect/Scopus database. She was able to search the Elsevier database by image, find her works and download high resolution jpgs and PowerPoint reproductions with the condition that she obtain a license through CCCs title-specific Rights Link upon payment of a fee of $363. Of course, **CCC never made any attempt to notify the illustrator of this use, to obtain her permission or share the licensing royalty fee.**

Regretfully, Elsevier, like other CCC publishers, makes no attempt to obtain rights for CCC licensing of any portion of a work where Elsevier does not own the copyright. The fine print of the RightsLink Elsevier's "General Terms" accompanying its digital license states:

> "Acknowledgement: If any part of the material to be used (*for example, figures*) has appeared in our publication with credit or acknowledgment to another source, permission must also be sought from that source. If such permission is not obtained that material may not be included in your publication/copies…." (Italics supplied.)

Elsevier is not an unsophisticated user of copyrighted works. It is a large foreign-based conglomerate that routinely employs an army of lawyers to guarantee that its copyrights are protected and that its copyright-based profits are maximized. By contrast, the vast majority of AMI members are either sole proprietors of their business or members of a very small studio

where they share expenses with a handful of others. The median net income of a freelance illustrator in 2013 was $58,384. This is very modest compensation for professionals with a Master's Degree and cross disciplinary training in art, medicine and science. Medical illustrators simply lack the resources to defend themselves against abuse by multi-billion dollar publishing conglomerates.

While the majority of AMI members are self-employed freelance illustrators, a significant percentage are employed by medical research institutions. The works of these artists genuinely are works-made-for-hire in the sense intended by Congress in the copyright statute. Their employers pay their Social Security payroll tax and provide benefits such as paid vacation, sick leave and family leave, and contribute meaningfully to employees' retirement plans. Therefore, AMI does not dispute these employer's rights to be considered the authors of copyrighted works. However, that does not mean that employed illustrators are not harmed by the diversion of secondary licensing revenue entirely to publishers. The research institutions that employ AMI member rely on copyright royalty revenue to offset the costs associated with employing illustrators in-house. Diminishing royalty revenue from the publisher-centric licensing schemes impedes the ability of these institutions to compensate fairly their illustrator employees. That is all the more the case in that these research institutions are overwhelmingly nonprofit organizations lacking profits to support employee benefits.

International Issues and Concerns

Unlike rights that are discretionary such as resale rights, the rights of public performance and reproduction are guaranteed national treatment under Berne Convention on Literary and Artistic Works. Further, implementation of national treatment obligations is required of member states of the World Trade Organization under the TRIPS Agreement. Failure to meet this obligation exposes a member state to a complaint by another member state under the dispute resolution provisions of TRIPS and retaliatory sanctions by the complaining state or states.

The principal of national treatment is widely respected with regard to the exclusive right of public performance and also is widely applied with regard to *primary* licensing of reproduction of literary works.

Overwhelmingly, the right of public performance of musical works is administered by author/composer controlled national collective management organizations (CMOs) commonly referred to as music rights collecting societies. Each national CMO offers a blanket collective license to broadcasters and performance venues where music is publicly performed. Since the system is based on use of blanket licenses, each CMO tracks public performance of individual works and distributes a share of the total revenue received according to the author's approximate share of the market. In the United States there are two major music CMOs, ASCAP and BMI, that each generate licensing revenue of more than $1 billion annually. The Copyright Office has extensive knowledge of the workings of these music CMOs because they are regularly involved in Office rule makings and proceedings of the Copyright Royalty Board.

National music CMOs collect royalties not only for public performance of works of its own nationals and domiciliaries, but also for foreign authors. Periodically, national CMOs exchange revenue which then is distributed to authors domiciled in the territory of the receiving CMO. This system, which in many countries makes use of extended collective licensing, provides fair compensation to individual authors who would find it impossible to administer their rights individually.

The administration of national treatment for authors' exclusive rights covering public performance of *non-musical* works is typically handled by contract between the rights holder and performance entity and does not involve collective licensing. However, collective licensing is used for contributors to sound recordings and audiovisual works, such as singers and actors who are not authors but who in many countries are protected under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. While the United States does not adhere to the Rome Convention, it utilizes a similar system of "neighboring rights" through residual royalties paid by producers of audiovisual works and phonograms pursuant to collective bargaining with labor organizations representing performers.

Mechanisms for granting national treatment for *secondary* uses of authors' literary works, and the visual art included in such works, are largely non-existent. *Primary* licensing of the reproduction right, as in the case of audiovisual works described above, utilizes contracts between authors and publishers and does not involve collective or blanket licenses. (P*rimary* licensing is the term used to describe the contractual agreements between authors and publishers for the initial publication of works and subsequent editions of the work. The term *secondary* licensing is used to describe licenses for reprography and digital copying of already published works by users.) While CMOs currently exist in many countries that offer blanket or collective licenses for reprography and digital copying, the principal of national treatment is not widely observed. National CMOs keep royalties collected at home and, after expenses, distribute the entire amount either directly to domestic authors or to funds, such as health care or pension funds, established for the benefit of domestic authors. With the exception of a small number of countries no attempt is made to distribute royalties collected to foreign nationals even though their works are included in the licenses administered by the CMOs. While an AMI representative has raised the issue over the course of many years with European CMOs during periodic meetings at the International Federation of Reproduction Rights Organizations (IFRRO) — where the AMI rep could engage with the international artists' collecting societies – the Europeans insist that reciprocity is required as a condition of distributing a share of their royalty pool with Americans.

A few small European CMO's distribute a share of licensing revenue to the Authors Coalition of America (ACA) and its member organizations the Graphic Artists' Guild (GAG), The Society of Illustrators in New York (SINY) and the Society of Children's Book Writers and Illustrators (SCBWI). However, these organizations have repeatedly refused to redirect those distributions to AMI members even though these rights holders have organized themselves into a licensing society by joining with other illustrators organizations in an attempt to establish a reciprocal artists' CMO in this country – the American Society of Illustrators' Partnership (ASIP) – and authorized ASIP to seek their share of European licensing revenue. However the European members of IFRRO steadfastly refuse to alter their practices even though the Berne Convention

is clear that authors are entitled to national treatment and that reciprocity is not a condition for withholding royalties for the share of licensing revenue attributable to the use of works of Americans.

It is our understanding that while in the past the CCC has exchanged blanket license royalty revenue with some large foreign counterpart CMOs, it no longer does so. In fact, it has set up operations in Europe to directly license its repertoire in that market. Royalty income collected is shared only with publishers and not with authors who retain copyright ownership of visual or other components included in the licensed publications. Since the leading medical publishers are European companies, they are very familiar with the European system because they receive payments directly from European CMOs for blanket licensing of secondary use of works. However, in contrast to their practice at home, European-based multinational publishers have never cooperated in sharing CCC licensing income with subsidiary visual artists' CMOs.

In at least 29 countries royalty revenue is directed not only to publishers but is shared among categories of rights holders, including visual artists. Typically, a percentage of the money collected is distributed to a national visual artists' CMO that in turn pays artists, either directly or to funds established for their benefit. Only a handful of these countries attempt to meet their national treatment obligations to any other country. Unlike the music societies, these CMOs do not even exchange blanket licensing royalties with countries where there are equivalent organizations that could provide reciprocity.

The failure to receive national treatment is particularly significant for medical illustrators because even though foreign companies dominate the STM publishing industry, American authors account for a disproportionately large percentage of works published and distributed internationally. Not only is the U.S. the world leader in medical research and innovation, the English language is predominately used by authors in all countries. It is not uncommon for a foreign author of a journal article to utilize an AMI illustrator for the visual representations incorporated into the author's work.

Because attempts to create through ASIP a functioning artists' CMO that would actually grant licenses, collect and distribute copyright royalties have been unsuccessful, AMI members have assigned to the Artists' Rights Society (ARS) the right to represent them. However, the failure to receive national treatment from foreign societies eliminates a major income stream that could, in part, be used either to establish their own CMO or to support ARS in attempts to collect royalties for secondary use of works.

Expropriation of Foreign Copyright-Based Distributions from Rights Holders Without Authorization

Unlike fine artists whose market consists of collectors who purchase original paintings, drawings, and sculpture, medical illustrators create works for the primary purpose of publication in multiple copies. While AMI supports the American Royalties Too Act currently pending in Congress, that legislation would have little practical impact on their ability to receive income from their work. Therefore, the exclusive right of reproduction contained in § 106 (1) of the Copyright Act lies at the heart of their ability to earn a living. Unlike fine artists who need new

rights such as the resale right as a mechanism to provide equitable remuneration, visual artists already possess the legal rights that should provide them with the means to earn a living. **The paramount challenge facing medical illustrators today is their inability to enforce their rights when dealing with large organizations.**

As explained above the market for medical illustration has fundamentally shifted from creation of works intended for sale in printed copies to works digitally accessed and reproduced by end users. The only means of authorizing such reproductions are: title-specific licenses granted to end users or non-title specific blanket licenses administered by CMOs that distribute to each author a reasonable royalty based on the amount of use of their works by users – a method successfully used to license public performances of music for over a century. In a fair and efficient market both authors and users should have the ability to use these mechanisms for authorizing reproduction. Both methods of licensing require the cooperation of third parties, the publisher, an aggregator, a CMO or all three. We have explained the problems associated with publishers, the CCC, aggregators and the large foreign CMOs above.

Earlier, we made reference to ARS. It is one of two American CMOs routinely offering *primary* licensing services that already exist. The other is the Visual Artists and Galleries Association (VAGA). The largest of these CMOs, ARS, is authorized by rights holders to license the reproduction of copies of over 50,000 artists. The Visual Artists and Galleries Association (VAGA) is a smaller organization, primarily representing American artists who have not chosen to use ARS. However, these two legitimate CMOs – that have written authorization from a huge percentage of visual artists to represent them in copyright licensing – also could and should be able to administer collective secondary use licenses on behalf of visual artists. However, due to lack of cooperation with the third parties described above, ARS (the CMO currently representing AMI members) is unable to implement a working secondary use licensing system.

Because registration prior to the infringement is a precondition for statutory damages, ARS and AMI members are unable to use past infringements to generate the money needed to support the litigation which appears to be necessary to force cooperation of these third parties.

There is a source of revenue that could be used to boot strap the creation of a self-sustaining CMO capable of enforcing artists' rights, but it is currently unavailable to AMI members. This consists of visual arts reprographic royalties currently being paid out, as discussed above, by several of the smaller foreign CMOs, but willfully withheld from AMI members and other illustrators by four receiving organizations: the Authors' Coalition of America (ACA) and its member organizations the Graphic Artists' Guild (GAG), The Society of Illustrators in New York (SINY) and the Society of Children's Book Writers and Illustrators (SCBWI). GAG officers can afford to travel to international meetings and lobby the Copyright Office and Congress because it has received direct distributions from at least one foreign CMO as well as foreign distributions through the Authors Coalition of America, an *ad hoc* group of disparate organizations that, at best, could be characterized as trade organizations. GAG describes itself as a labor union, is a member of the Authors' Coalition and receives copyright royalty revenue through it, but also receives payouts directly from at least one small foreign CMO. Based on publicly available documents, total collections by GAG over the years can be estimated at several million dollars.

Authors Coalition member organizations were never selected by rights holders. Further, to our knowledge and in contrast to ARS and VAGA, **none of these organizations has been specifically authorized to license their members' copyrights much less to receive and keep foreign licensing revenue.**

When the Authors Coalition was formed, it was to be governed according to an "operating agreement." This published agreement specifically states that the remittances received from foreign subsidiary collecting societies are to be used to "assist in the further development of collective licensing programs" for American rights holders. To date, more than two decades after its creation, not a penny has been used by the Authors Coalition to create a mechanism for distributing non-title-specific licensing revenue, foreign or domestic, to rights holders even though publicly available records reveal that the amounts collected are in the range of $100 to $170 million. AMI's attempt to become a member of the Authors Coalition by joining with other illustrators' societies to form an umbrella organization intended to be a working CMO was rebuffed by the Coalition, undoubtedly because the copyright revenue received would actually be used to enforce artists' copyrights provided to them under current law.

The justification for this diversion, which apparently has been accepted by the foreign CMOs transferring funds, is that these organizations contribute to the welfare of visual artists through activities such as lobbying and advocacy. This creates the ironic situation that these organizations are receiving foreign money specifically to lobby the Copyright Office and Congress contrary to the wishes of the vast majority of working professional illustrators and virtually every member of AMI. It is likely that GAG is using diverted artists' royalties to respond to this Copyright Office inquiry. By contrast, all of AMI's advocacy efforts, including preparation of this paper, are supported by individual member contributions.

The Graphic Artists Guild has used the foreign remittances it has received to attempt to silence all efforts by the actual rights holders to advocate for an end to diversion of foreign revenue and support the creation of a working artists' CMO that, unlike GAG, would function with the specific authorization of rights holders and distribute to them copyright licensing revenue for the use of their works.

As discussed earlier, a number of illustrators' professional associations, including AMI, attempted to create a working illustrators' CMO, the American Society of Illustrators' Partnership (ASIP). However, GAG used its receipts from foreign CMOs to do everything it could to defeat this effort, including initiating a lawsuit against ASIP's leadership in New York State Court (*Graphic Artists Guild, Inc. v. Brad Holland, et al., Case/Index No. 109149/2008*). This suit, alleging defamation and *tortious interference with GAG's business*, was defended *pro bono* by attorneys supplied by New York Lawyers for the Arts. The outcome was a summary judgment for the defendants. The allegations of defamation were dismissed out of hand in the judge's written opinion on the ground that "truth is a defense." Regretfully, while Lawyers for the Arts provided counsel to defend against the GAG lawsuit, this representation did not extend to providing legal counsel for the defendants in preventing GAG's ongoing diversion of copyright royalty income from legitimate rights holders.

AMI urges the Copyright Office to play a constructive role in helping AMI members to receive the foreign reprographic licensing royalty payments guaranteed by the Berne Convention so that, unlike the funds being diverted to GAG, the use of AMI members work in foreign markets can be used to support their families and strengthen their ability to enforce their rights. As the United States Government Agency responsible for administration of the Copyright System, the Office can raise this matter directly with foreign counterparts.

The Most Significant Enforcement Challenges for Illustrators

Disparity Between Legal and Administrative Resources of Illustrator and Client

Significantly, enforcement challenges facing medical and other illustrators are grounded in the fact that, as noted above, the vast majority of AMI members and other illustrators are self-employed, sole proprietors of their businesses, seeking and fulfilling commissions on a free-lance basis with virtually no administrative or legal assistance. According to most recent AMI member compensation survey the median net income for self-employed medical illustrators in 2013 was $58,384. This is for professionals with master's degrees and six years of multi-disciplinary education in fine art, human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

While medical illustrators work directly with physicians and researchers who write medical texts and journal articles, nearly all of these physicians and researchers are affiliated with large institutional entities: hospitals, universities, research laboratories, pharmaceutical and medical device companies, biotech companies and, of course the publishers of books and journals in the field of medicine and biology. Therefore, the published works they create are not expected to be their source of income, but rather to enhance their professional standing, obtain academic tenure and meet their ethical obligations to share advancements in science with their peers throughout the world.

Nearly all of the institutions with whom medical illustrators must negotiate contracts for compensation are multi-million and multi-billion dollar entities that typically employ highly trained in-house legal counsel and retain major law firms to represent them in any controversies or disputes regarding copyrights covering the work commissioned from AMI members.

The STM publishing industry has been especially impacted by mergers, acquisition and consolidations. While during most of the 20th century, publishing was a "gentlemen's" profession characterized by relatively small publishing houses where communication was close and respect for authors was embedded into the culture — that is no longer the case. Policy governing contracting, procurement and personnel policies of large conglomerates is more likely to rest with the Chief Financial Officer than the editorial board. And, the primary concern of CFOs is to show market analysts the highest possible quarterly return on investment. One of the easiest ways to squeeze more profit out of the business is to cut costs by pressuring freelance contractors with ever more onerous compensation agreements and terms of employment. Profit is also enhanced when revenue streams traditionally directed to contractors such as illustrators are redirected to the corporate treasury. This explains why the large publishing companies are hostile

to the individual creator and there is a resistance to sharing non-title-specific licensing revenue with anyone else.

The Especially Onerous Impact of Migration of the Business to Digital Distribution

Visual art is particularly vulnerable to "orphaning" through no fault of the creator. Artist signatures are removed or cropped, credit lines and figure captions are separated from the image, illustrations are scanned and placed online without attribution, and metadata embedded in digital images are routinely stripped upon upload (IPTC Photo Metadata Working Group http://www.embeddedmetadata.org/social-media-test-results.php)

Content distribution systems make infringement of visual art easy. Illustrations can be downloaded with a simple keystroke and a perfect reproduction made without obtaining permission of the rights holder. As an example, when AMI members' works are distributed by aggregators as described above, metadata that could assist in locating the rights holder is routinely stripped out by the aggregator. Without copyright documentation the work becomes an immediate orphan and enforcement becomes nearly impossible. Of particular concern is "orphan works" proposals that would limit damages to no more than a standard licensing fee. If this were to happen, infringement will become ubiquitous and enforcement impossible.

It should be kept in mind that copyright litigation may be initiated only in federal court where the costs are especially great. There is no option to sue in a local state court. Should previous orphan works legislation be revived and enacted, the cost of an hour-long interview with an attorney to discuss bringing an infringement action will be greater than recoverable damages. Infringement litigation will be possible only if the illustrator has independent deep-pocket financial resources enabling him or her to sue simply for the principle of justice. There will be no economic rationale for bringing a lawsuit.

As a practical matter the notice and takedown provisions in §512 of the Copyright Act are meaningless to AMI members. It is virtually impossible for an illustrator working alone or in a small studio to monitor the Internet and prepare and send take-down requests while actually doing the commissioned work for which they have been trained and which is their means of earning a livelihood. As sole proprietorships and small businesses they also have the burden of personally handling all administrative, procurement, marketing and accounting activities required to remain solvent. There simply is not enough time in the day to monitor the thousands of images on the Internet to find infringing uses of their works.

The Inability of Illustrators to Receive Statutory Damages for Most Infringements

Most cases of infringement involve works of illustration that have not been registered. While the illustrator must register a work prior to filing an infringement action, such registrations typically occur after the infringement has taken place, making it impossible to receive statutory damages that serve both as a deterrent to future infringements, but also provide the prospect of damages sufficient to cover legal costs. Since most illustrators are unable to pay attorneys' fees and costs upfront, the only means they have to secure legal representation is to agree to compensate attorneys on a contingent fee basis.

Inability to demand statutory damages reduces financial recovery to a level unlikely to satisfy the requirements of attorneys accepting clients on a contingent fee basis. For this reason AMI would support legislation either eliminating the registration requirement entirely for works of visual art or, in the alternative, continue the registration formality as a pre-condition to infringement litigation, but permitting recovery of statutory damages for infringements taking place prior to registration.

The Most Significant Registration Challenges for Illustrators

Medical and other illustrators must generate a much higher volume of copyrighted works in order to earn a living than is the case for other categories of authors, such as songwriters, playwrights, scriptwriters and writers of most literary works. Since they are typically self-employed illustrators, they must personally handle every task associated with their business. In addition to actual painting and drawing, medical illustrators must engage frequent communication with the authors of the text of works for which they are creating illustrations, handle billing of clients, accounting, record keeping, purchases of supplies, payment of bills, and of course quarterly estimated tax payments and annual income tax filings. Many of these administrative tasks are obligatory if the illustrator is to stay in business and comply with legal obligations. For most the burden of routine registration of Copyrights is simply too much. There are not enough hours in the day. Therefore, all or most of their works are not registered prior to publication. In addition, the collective amount of fees required for registering each work would significantly reduce the net income the artist needs to support him or her and family.

Further, the reality that most illustrators have large inventories of past works which have not been registered makes the possibility of catching up of registrations nearly impossible.

Finally, the Copyright Office and Congress should consider whether the current system of registration and deposit is meaningful to users who are using its database to determine authorship or the public domain status of works they may wish to reproduce. Simple registration of the name of the author and the title of the work is of little value in copyright searches involving works of visual art. Users desiring to reproduce a pre-existing work rarely know the identity of the artist of the work and a meaningful search would require access to actual images embodying the work. In the case of works of visual art the original image is rarely deposited and the deposit often consists of a photograph or scanned image rather than the work itself. Deposits that accompany registration of a work are of no value in a copyright search since the deposit is not accessible to the searcher and the Library of Congress does not even retain most deposits for the entire term of a work's copyright.

Much is said about the need to balance the interests of copyright owners and users. Registration prior to bringing an infringement action has no value to a user other than an infringing user by immunizing him or her from liability for statutory damages. AMI strongly believes that the very limited value to users of the information contained in a copyright registration does not outweigh the hardship registration places on the artist attempting to enforce copyright in a given work.

The Legitimate Concerns of Users of Works of Visual Art

Recent Congressional hearings focusing on the balance between users and authors have revealed that user concerns in the area of visual art are limited primarily to the desire of academics and archivists to have the cloud of liability for infringement lifted from them in performing their teaching, research and archival functions. For the most part these concerns do not reflect reality in the world of visual art.

The difficulty of copyright enforcement described above has meant that visual art accounts for a very small percentage of copyright infringement actions in comparison with actions involving literary, musical and cinematographic works. Therefore, the likelihood that unlicensed academic or archival use will invoke a lawsuit is extremely remote. However, AMI does not object to safe harbors covering nearly all archival, cultural heritage preservation, and documentary filmmaker uses.

Rather, medical illustrators object to copyright limitations and safe harbors which enable unauthorized use as a substitute for a licensed use that would provide meaningful compensation to the illustrator or in which the unauthorized use has the effect of subjecting a work to broader infringement, such as that resulting from uncontrolled access on the Internet where a work may be freely copied by anyone. AMI believes that existing fair use precedents combined with limited safe harbors covering archival use would sufficiently address the needs of users while not harming the economic interests of illustrators in effective copyright protection.

Other Issues of Great Importance to Medical and Other Illustrators

Misuse and Misinterpretation of the Work-Made-for-Hire Provisions of the Copyright Act

These comments have described a change in business environment and culture in which medical and other illustrators work. We have explained that concentration in the STM publishing industry has destroyed the relationship of mutual respect that formerly characterized the relationship between the illustrator and the client. Most medical illustrations are commissioned either by author/scientists or editors of journal articles and books for the purpose of providing readers of with visual representations of the written text. Until recent years, rights in an illustration typically were retained by the illustrator who had the option to later use the work in another context, including another publication as well as secondary uses such as analog or digital reprography. Commissioned works were rarely treated as works-made-for-hire unless the illustrator was an actual employee of the textual author's company or research organization.

However, in the world of consolidated STM publishing medical illustrators are routinely forced to sign work-made-for-hire agreements as a precondition for receiving a commission. Of course, this automatically makes the publisher the legal author of the illustrator's work, giving the publisher all rights in secondary uses of the work. Overwhelmingly, illustrators who work on a commission basis are sole proprietors of their business or partners in a small studio. The clients who dictate the terms of commissions, however, are very large companies: increasingly multi-

billion dollar conglomerates. In these situations the market power of the publisher is so overwhelming that the illustrator has absolutely no capacity to negotiate and must accept contractual agreements on a take-it-or-leave-it basis if he or she is to have any work. AMI members report that this is often the case when an illustration is commissioned for a book.

Most AMI members have catalogues of previous illustrations to which they have retained all rights and may continue to license to new users. However, recent appellate court decisions, particularly in the Second and Ninth Circuits, have so misconstrued the plain letter of the law and legislative history with the result that nearly all commissioned work can be considered made-for-hire, even though the illustrator never gave written consent for works to be considered made-for-hire.

The legislative history of the 1976 Copyright Act and more recent revisions clearly demonstrate the intent of Congress that, in the absence of a written contract to the contrary, an author's work cannot be considered a work-made-for-hire unless the author has created the work as a salaried employee.

AMI joined with other artists' rights organizations last year to file an *amicus* brief supporting the petition of illustrator Jack Kirby's heirs to overrule a decision by the Second Circuit Court of Appeals denying their termination rights on the ground that his works were made-for-hire even though there had never been a written agreement to that effect. Jack Kirby was the illustrator and writer who created some of the most famous Marvel comic book characters, nearly all of which are the subject of recent major television and motion picture productions. The Second Circuit ignored the clear language of the definition set forth in §101 of the Copyright Act that a commissioned work is a work-made-for-hire only "if the parties expressly agree *in a written agreement* signed by them that the work shall be considered a work made for hire." It held that a commissioned work is automatically made for hire if it is created at the "instance and expense" of another. Instance was described as including the mere fact that the work was commissioned by the publisher. Expense, was described simply as being paid.

AMI was hopeful that the Supreme Court would correct this blatant and unfair misreading by re-stating the clear teaching of Justice Marshal in *CCNV v. Reid* that "*the work for hire doctrine codified in §62* [of the 1909 Act] *referred only to works made by employees in the regular course of their employment* (italics added)." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).[1] However, after the Supreme Court took the extremely rare action of requesting reply briefs of the respondent, Marvel and its parent company Disney, sought and obtained a settlement which is now covered under a confidentiality agreement. But, one consequence which cannot be kept confidential is that Jack Kirby's name now appears prominently in the credits of Disney movies based on comics published by Marvel.

The AMI strongly urges the Copyright Office to advise Congress of the abuse by publishers and recommend amending the definition of work-made-for-hire to legislatively overturn the mistaken

[1] While the facts of the *CCNV* case took place under the 1909 Act, the definition of work-made-for-hire remained essentially the same under the 1976 Act and the legislative history clearly supports the application of Justice Marshal's interpretation in the context of that Act.

Second Circuit "instance and expense" test and also to restrict the ability of publishers to use their superior bargaining power to coerce illustrators to give up their authorship rights.

Misuse and Misinterpretation of the Termination Right

Under the 1909 Act copyright expired after an initial term of 28 years unless renewed for an additional 28 years in the year prior expiration. This permitted the original author or heirs, by filing for the renewal, to regain ownership of a copyright that may have been assigned to another during the first term. However, by the time Congress began the work leading to the 1976 revision a common practice of assignees of copyrights was to require transfer rights to the second term by contract, thwarting what had been perceived to be a formality that intended to benefit of the author.

The 1976 Act replaced the dual 28 year term with a single term of life of the author plus 50 years, the standard required by the Berne Convention on Literary and Artistic Works. The transition provisions provided that Copyrights not yet expired as of the effective date of the Act were extended by an additional 19 years to a flat term of 75 years. However, to restore the ability to recapture previously assigned rights, authors and their heirs were permitted to file with the Copyright Office termination notices and reclaim previously transferred rights at any time within a period of five years following the 56th anniversary of the original registration.

That Congress intended the termination right to be inalienable could not have been set forth more clearly. §304 (c) (5) states, "Termination of the grant [previous assignment] may be affected notwithstanding any agreement to the contrary." Congress continued this policy with enactment of the Sonny Bono Copyright Term Extension Act of 1998 which extended copyright term for an additional 20 years so as to mirror the recently adopted standard of the European Union. The 1998 legislation provided another opportunity for authors and heirs to assert termination rights for this additional 20 year term.

Regretfully, large publishers to whom copyrights had been previously transferred resisted the clear Congressional intent in twice enacting termination rights. While on the face of the statute the termination right is inalienable, publishers have successfully used their disproportionate capacity to litigate – as in the case of works-made-for-hire – to create case law effectively thwarting the clear Congressional intent to eliminate, in actual practice, a provision of the Copyright Act intended to provide equity to authors. Clearly, Congress intended that benefits of additional copyright term should be enjoyed by authors and heirs rather than become a windfall for corporations.

One of the most egregious examples of this involved the attempt by Joseph Shuster, the son of the illustrator who created Superman, to assert the termination right established in the 1998 Act. When Shuster's son, Mark Peary as executor of his father's estate, attempted to exercise the statutory termination right, the publisher, DC Comics, initiated a full-scale legal battle to attempt to hang on to their interests in the Superman character even though at the time rights were transferred to them by the illustrator, they had the expectation of a maximum 56 year term rather than the 95 year term that later resulted from two term extensions enacted by Congress. While the statute is crystal clear that termination must be granted regardless of "any agreement to the

contrary" DC Comics, a division of Warner Brothers, was able to persuade the Ninth Circuit Court of Appeals that the clear letter of the law did not apply because a previous agreement providing pension rights to Shuster's siblings foreclosed termination because it was not "an agreement to the contrary."

It challenges the credibility of our judicial system that an appellate court could so twist clearly stated policy so as to render it meaningless. AMI joined with a large number of other artists' rights and illustrators' organizations in filing an *amicus* brief seeking *certiorari* review of this finding by the Supreme Court. That brief accompanies this submission and explains the circumstances and the outcome in much greater detail.

The Court did not grant *cert* in this case. One can only speculate, but it is possible that of the two petitions pending before the court at the same time, the court would have been more interested in Kirby because, unlike the Peary case, it offered the opportunity to correct the case law on both the work-made-for-hire issue *and* the termination right. While AMI is gratified Marvel and Disney were so fearful of Supreme Court intervention that Jack Kirby's heirs received what we assume was a fair settlement, we are very disappointed that the opportunity was lost to correct the misinterpretation of two provisions of the statutory law of vital importance AMI members and all artists' ability to enjoy meaningful copyright protection. The failure to receive Supreme Court review was especially disheartening in that so few freelance illustrators have the wherewithal to finance federal court litigation that it is unlikely a case will arise in the foreseeable future that would give the high court the opportunity to correct the law. That means that legislative correction is the most likely means for artists to obtain relief from the abuse of illustrators by large corporate entities that is described in detail in the facts of these cases. We cannot imagine a situation in which the Copyright Office would not advise the Congress of the judicial misinterpretation of these two vital artists' concerns.

Recommendations for the Copyright Office

AMI appreciates the initiative of the Copyright Office in undertaking a review of how copyright law today impacts the visual arts. Copyright in the 21st Century is in grave danger of becoming meaningless and irrelevant. In part, that is due to the challenges posed by technology. But, far more, the threat to copyright is that it is losing its legitimacy which is based on protecting the work of the human author and permitting him or her to benefit monetarily and morally by the exclusive rights promised by the founders in Article 8, Section 1 of the Constitution. Large corporations and institutions have an important role in facilitating the expression of an author's creativity and in making it possible for those who want access to that expression to easily obtain it. Their role in the dissemination of the creative output of artists and other authors justifies their right to a fair profit. However, the systematic cannibalization of authors by the multinational conglomerates that control the distribution of their works in the interests of a quarterly bump in profits threatens the legitimacy of these giant enterprises themselves. Without a nurturing environment of respect for the rights of the individual artist and his or her intellect as envisioned by the drafters of our Constitution, the dissemination of ideas and expression as art that has enriched our country for over two centuries collapses into a jungle where only savages survive.

We strongly urge the Copyright Office to consider how to meaningfully respond to the assault on visual artists' copyright described in this paper.

AMI suggests the following actions for the Copyright Office as a consequence of this inquiry.

1. The Copyright Office should examine the licensing practices of the Copyright Clearance Center and licensors of aggregated content to determine whether they unfairly discriminate against visual arts authors to the benefit of publishers. On the basis of this examination the Office might recommend legislative correction, which could include a regulatory role for the Office in supervising CMOs and licensing aggregators.

2. The Copyright Office should determine whether existing mechanisms for securing national treatment for both American and foreign visual artists are adequate. The Office should examine whether the United States is complying with its national treatment obligations to foreign artists whose work is subject to analog and digital reprography and whether foreign states are providing appropriate national treatment to U.S. artists.

3. The Copyright Office should examine the operations of the Authors' Coalition of America and its member organizations to determine whether they are collecting and distributing foreign copyright licensing revenue based on the works of American visual artists and, if so, forward its findings to appropriate enforcement agencies, such as the Federal Trade Commission, the Department of Justice, and state law enforcement and consumer protection authorities.

4. The Copyright Office should examine whether the value of a copyright registry to users and copyright searchers outweighs the burden on visual art copyright holders.

5. The Copyright Office should examine whether existing remedies for infringement and the necessity to seek such remedies through federal court litigation prejudice the ability of visual artists to enjoy meaningful copyright protection.

6. The Copyright Office should examine whether the obligation to register prior to infringement unfairly limits the ability of visual artists to damages sufficient to justify federal court litigation and whether the requirement limits the effective deterrent value of statutory copyright protection.

7. As the statutory provisions governing the termination right and application of the work-made-for-hire doctrine were drafted based on extensive study by the Copyright Office leading to the 1976 Act, the Office should recommend to Congress legislation that would restore the intended effect of the Office's recommendations.

BACKGROUND ON THE ASSOCIATION OF MEDICAL ILLUSTRATORS

Medical Illustrators are a diverse profession of 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 the certification of medical illustrators." [2]

Scientific and medical concepts are taught visually, and the expertise of medical illustrators is core to the advancement of science and medicine. They are problem-solvers, storytellers and innovators. They are artists in the service of science.

The visual artistry of medical illustrators includes illustration, animation, 3D modeling and augmented reality, medical models and medical simulation, prosthetics and anaplastology, and medical-legal demonstrative evidence for the courtroom. Their markets are in academic research and training; physician education; medical and consumer publishing; pharmaceutical; biotechnology; medical devices; medical advertising, identity and branding; broadcast media; software development including apps for smart phones, tablets and wearable technology; gaming; web development and interactive design.

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. Medical illustrators rely on copyright and actively safeguard their creative works. They believe 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 value – and considering the concomitant economic loss medical illustrators have suffered – **they believe that medical illustrators may stand in as a focus study of *all* visual artists to reflect the need for a special consideration in copyright law for visual artists.**

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[2] 2011 Presidential Address, Dr. Linda Wilson-Pauwels, Association of Medical Illustrators Annual Meeting, Baltimore, Maryland.

No. 13-1178

In the Supreme Court of the United States

LISA R. KIRBY, NEAL L. KIRBY, SUSAN N. KIRBY, BARBARA J. KIRBY,

Petitioners,

v.

MARVEL CHARACTERS, INCORPORATED, MARVEL WORLDWIDE, INCORPORATED, MVL RIGHTS, LLC, WALT DISNEY COMPANY, MARVEL ENTERTAINMENT, INCORPORATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* BRUCE LEHMAN, FORMER ASST SECRETARY OF COMMERCE AND DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE; RALPH OMAN, FORMER U.S. REGISTER OF COPYRIGHTS; THE ARTISTS RIGHTS SOCIETY, THE INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE, AND VARIOUS PROFESSIONAL ASSOCIATIONS, ILLUSTRATORS AND CARTOONISTS IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Bruce Lehman, as Assistant Secretary of Commerce and Director of the U.S. Patent and Trademark Office from 1993 through 1998, served as the chief advisor to the President for intellectual property matters, including copyright. He supervised and coordinated development of the Administration's position in support of the Copyright Term Extension Act of 1998 ("CTEA"), including the provisions permitting authors to recapture for the extended term copyrights they had transferred to others during the first 75 years of the term of copyright in works created by them. From 1974 through 1983 he served as counsel to the Committee on the Judiciary of the U.S. House of Representatives and during that time was the principal legal counsel to the Committee on copyright matters. In that capacity, he advised the Committee in the 93rd Congress and the 94th Congress during the process of consideration and final passage of the 1976 Copyright Act which extended the 56-year term of protection for works created under the 1909 Act for an additional 19 years, and gave the authors of those works the right to recapture for the extended term their ownership of copyrights previously transferred to others. These experiences afforded Mr. Lehman a thorough understanding of the intent and objective of Congress in defining works-made-for-hire

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici* made such a monetary contribution. The parties have been given at least ten days' notice of *amici's* intention to file this brief and have given *amici* consent to file. Copies of the letters of consent will be filed with the Clerk of the Court.

and in establishing the author's right to terminate previous transfers of copyright ownership.

Ralph Oman served as U.S. Register of Copyrights from 1985 to 1993. As Register, he filed with the Acting Solicitor General an *amicus curiae* brief with the Supreme Court in a case that dealt with the application of the work-made-for-hire doctrine -- *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), and the Court's opinion did not conflict with the brief's conclusions. For the past 22 years, Mr. Oman has taught copyright law at George Washington University Law School, but it is his wealth of first-hand experience that has made him a true expert. He served as Chief Counsel of the Subcommittee on Patents, Trademarks, and Copyrights of the U.S. Senate Committee on the Judiciary and as chief minority counsel of the Senate Subcommittee on Patents, Trademarks, and Copyrights during the final two years of Senate consideration of the landmark 1976 Copyright Act. As the former Register of Copyrights, Mr. Oman recognizes that this case raises issues of national importance and implicates wide-ranging and recurring policy concerns of constitutional dimension. Mr. Oman cautions not to draw conclusions from the Copyright Office's failure to intervene at this point in the proceeding because during his tenure as Register of Copyrights it was the Office's policy not to weigh in at the cert stage, absent an express request from the Court or the Solicitor General that it do so. At this preliminary stage, the Court has yet to make such request.

The International Intellectual Property Institute is a nonprofit think tank and development organization

that promotes the effective use of intellectual property rights throughout the world.

The Artists Rights Society (ARS) is the preeminent copyright, licensing, and monitoring organization for fine artists in the United States. Founded in 1987, ARS represents the intellectual property rights interests of over 60,000 visual artists and the estates of visual artists from around the world (painters, sculptors, architects, photographers and others). Among its American members are Jackson Pollock, Alexander Calder, Georgia O'Keeffe, Frank Lloyd Wright, Willem de Kooning, Mark Rothko, Robert Indiana, Sam Francis, Bruce Nauman, Frank Stella, Arshile Gorky, Richard Serra, Sol LeWitt, Lee Krasner, Barnett Newman, Milton Avery, Susan Rothenberg, and many others. Foreign members include Henri Matisse, Pablo Picasso, Rene Magritte, Marc Chagall, Marcel Duchamp, Joan Miró, Man Ray, Edvard Munch, Joseph Beuys, Pierre Bonnard, Fernand Léger, Alberto Giacometti, Georges Braque, Constantin Brancusi, Jean Dubuffet, Max Ernst, Le Corbusier, Vassily Kandinsky, and many others. A large percentage of the artists represented by ARS created works prior to enactment of the 1976 Copyright Act and have a strong interest in being able to assert the termination rights in such works granted to them under 17 U.S.C. § 304.

Joining as *amici* are 12 professional associations and societies that provide standards, education and advocacy services for illustrators, as set forth in Appendix A at App. 1; and 221 nationally celebrated illustrators and cartoonists, several of whom have received the Pulitzer Prize, and artistic professionals as set forth in Appendix B at App. 10.

All of the *amici* represent self-employed, working freelance artists whose livelihood depends on the ability to retain and exercise effective control of their copyrights in an environment in which the clients served are more often than not publishers or institutional and corporate purchasers who regularly use their greater market power to provide the minimum compensation possible in return for transfer of the greatest possible copyright control in works commissioned by them. The ability to make effective use of the termination rights at issue in this case is essential if these artists are to retain meaningful benefit from the use of their copyrights, as Congress intended, in the face of the disproportionately greater negotiating power of their clients.

SUMMARY OF THE ARGUMENT

Amici urge this Court to grant the petitioners' request to review the decision of the court of appeals, which denied them their statutory rights to recapture the copyright interests of their father, Jack Kirby – a world famous creator and illustrator of comic book characters and stories – in works that were sold for $18-20 per page and have subsequently generated billions for respondents. It is undisputed that Kirby was an independent contractor who assigned to Marvel rights in the works Marvel chose to purchase for publication.

When the petitioners exercised their right to terminate those assignments under 17 U.S.C. 304(c) respondents sought a declaratory judgment; arguing that under a judicial "instance and expense" test all of Kirby's creations published by Marvel in 1958-63 were exempt as "work for hire" under the 1909 Copyright

Act. The district court granted Marvel summary judgment pursuant to this highly presumptive "test," and the Second Circuit affirmed. It essentially held that because Marvel was Kirby's primary client, he created his works at the publisher's "instance" and at its "expense," even though Marvel only paid Kirby for those submissions it wished to publish.

Amici vehemently disagree with the court of appeals's retroactive re-characterization of Kirby's freelance work as "made-for-hire" under the 1909 Act. The Second Circuit's controversial "instance and expense" test unfairly imposes an "almost irrebuttable presumption" that commissioned works were "for hire" under the 1909 Act, effectively gutting the termination rights provided by the curative 1976 Copyright Act.

Kirby's creations in 1958-63 were not works for hire according to the interpretation of the 1909 Act by this Court, Congress, and under the common law. Per Section 26 of that statute only a traditional "employer" is considered an "author … in the case of works made for hire." In drafting that provision, Congress clearly contemplated regular, salaried employment and Congress's exhaustive research leading up to the 1976 Act shows that certainly no one in 1958-63 construed work for hire to include the copyrighted material of freelancers like Kirby. This Court's articulation in *Community for Creative Non-Violence et al v. Reid*, 490 U.S. 730 (1989) of well-established norms of statutory construction; work for hire doctrine under the 1909 Act, and the 20-year legislative history of the 1976 Act – all lead to the natural conclusion that Kirby's creations in 1958-63 were *not* Marvel's works for hire.

Petitioners were thus clearly entitled to exercise the termination rights vested in them by the 1976 Act. Congress intended the termination provisions to give authors and their heirs the opportunity to share in the proven value of their works. Yet, the Second Circuit has gone out of its way to thwart congressional intent, ignore the text and legislative history of the 1909 Act, and disregard this Court's teaching in *CCNV* – all to deny creators, like Kirby, their termination rights and to bestow on publishers an unjustified windfall.

Amici encourage this court to grant the Kirby family's petition for *certiorari*.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY FOUND THAT THE WORKS IN QUESTION WERE MADE FOR HIRE UNDER THE 1909 COPYRIGHT ACT, DIVESTING PETITIONERS OF THEIR STATUTORY TERMINATION RIGHTS

A. The Second Circuit Disregards the Legislative History and Contemporaneous Understanding of the Term "Employer" in the 1909 Act

1. The Legislative History of the 1909 Act Clearly Shows that the Term "Employer" Connotes Traditional Employment

Section 26 of the 1909 Copyright Act provides that "the word 'author' shall include an employer in the case of works made for hire…" 17 U.S.C § 26. This language is echoed in 17 U.S.C. § 24 with no further explanation. There are no other uses of the term "for hire" in the

1909 Act. Section 24 makes clear that, where a work is not created for hire, the renewal term vests in the author or certain heirs. 17 U.S.C. § 24.

Although the word "employer" is undefined, it is clear from its common meaning and legislative history that the drafters of the 1909 Act intended work for hire to only apply to regular hierarchical employment. The drafters discussed that payment of a salary, "entitle[d] an employer to all rights to obtain a copyright in any work performed during the hours for which such salary [was] paid." Stenographic Report of the Proceedings of the Librarian's Conf., 2d Sess. 65 (Nov 1-4, 1905). More strikingly, the drafters discussed that"the artist who is employed for the purpose of making a work of art so many hours a day" and "the independent artist" should have different rights. *Id*.

The 1909 Act codified then existing case law governing employed authors. In 1903, this Court for the first time considered the question of whether an employer could be considered the author of a work created by an employee. *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239 (1903). The Court found that copyrights in advertising lithographs belonged to the employers of the designers of those works because the designers were "persons employed and paid by the plaintiffs in their establishments to make those very things." *Id.* at 248 (citations omitted). These employees fit the traditional model of full time salaried or hourly workers performing their tasks using the equipment and workspaces of the employer and under the direct supervision of the employer. Congress codified this principle in the 1909 Act by defining "author" to

include the "employer in the case of works made for hire." 17 U.S.C. § 26 (1970) (Repealed 1976).

2. *The Law in 1958-63 When Kirby Sold His Work to Marvel Was that Work for Hire Applied Only to Traditional Employees Not Freelancers*

Given that the Second Circuit applies the "instance and expense" test as a means of establishing the presumptive intent of contracting parties, Pet. App. 33-46, it is critical that during the 1958-63 period when Kirby created the works at issue that work for hire applied solely to work created within a traditional employment relationship, not to commissioned works of an independent contractor like Kirby.

When Congress initiated the process of revising the 1909 statute it was commonly understood that work-for-hire encompassed only works by salaried employees. At the time of the copyright revision the courts had not applied Section 26 or the work-made-for-hire doctrine to commissioned works. Instead, the courts applied a common law presumption that a commissioned party effected an implied assignment. The leading case was the Second Circuit's decision in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (1939), cert. denied, 309 U.S. 686 (1940). After the City of New York commissioned an artist to paint a mural on a wall in a public high school, the court of appeals held that the city was assigned the copyright and artwork. *Yardley*, 108 F.2d at 30-31. Not once did *Yardley* cite the work for hire provision in the 1909 Act, and the

court went on to state that the artist's executor, not the city, held the renewal right. *Id*.[2]

In *Mills Music, Inc. v. Snyder* this Court found that the Copyright Office held the primary responsibility to develop the 1976 Act, including "authorizing a series of 34 studies on major issues of copyright law"; "conduct[ing] numerous meetings with representatives of the many parties that the copyright law affected"; "issu[ing] a preliminary draft revision bill"; "submitt[ing] [a] 1965 draft revision bill"; and "prepar[ing] a supplementary report to accompany the 1965 draft revision bill." 469 U.S. 153, 159-160 (1985). *See also* Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (Comm. Print 1961) ("Register's Report"). All of its findings were that "employer" in the 1909 Act meant a formal, salaried employee.

This was acknowledged in an analysis by Borge Varmer, who, at the request of the Register of Copyrights authored one of its thirty-four monographs. Varmer stated "[I]t may be concluded that section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment." B. Varmer, *Works Made For Hire And On Commission,*

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[2] Cases following *Yardley* also used assignment language. *See*, *e.g., Official Aviation Guide Co. v. American Aviation Associates, Inc.*, 150 F.2d 173, 178 (7th Cir.), cert. denied, 326 U.S. 776 (1945); *McKay v. Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963); *Grant v. Kellogg Co.,* 58 F. Supp. 48, 51 (S.D.N.Y. 1944), aff'd, 154 F.2d 59 (2d Cir. 1946). *See also* Varmer *Works for Hire*, at 130. None of these cases equated an "employee" and a commissioned creator under Section 26.

Copyright Office Study No. 13, 86th Cong., 2d Sess. 130 (Comm. Print 1960) ("Varmer *Works for Hire")*.

Varmer posed the question of whether revision of the 1909 Act should alter this presumption and treat commissioned works as works-for-hire. Varmer *Works for Hire,* at 143. The Register's Report concluded that the answer to this question was no. The Report observed that "[t]he courts … have not generally regarded commissioned works as 'made for hire'" and recommended that any revision should make this clear by defining works-for-hire as "works created by an employee within the regular scope of his employment." Register's Report at 87.

The 1961 Register's Report was followed two years later by a Preliminary Draft Bill that embodied the conclusions of the 1961 report, explicitly stating, "[i]n the case of a work made for hire, the employer shall, for purposes of this title, be considered the author and shall have all the rights comprised in the copyright unless the parties have expressly agreed otherwise." Copyright Law Revision, Part 3, Preliminary Draft for the Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess. 15 (Comm. Print 1964) (quoting section 14) ("Preliminary Draft"). A footnote stated that "[a] 'work made for hire' would be defined elsewhere in the statute as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." *Id.* At 15 n. 11.

A contemporaneous statement of the American Book Publishers Council and the American Textbook Publishers Institute acknowledged that "[w]orks for hire – in which copyright is by law owned by the

employer – would be redefined to include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission." William F. Patry, *The Copyright Law*, 120 n.28 (2d ed. 1986), *quoting* Copyright Law Revision, Part 4, Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 250 (Comm. Print 1964) ("Further Discussions on Draft").

B. The Court of Appeals's Decision Violates Supreme Court Precedent

1. The Decision Ignores the Supreme Court's Canon of Statutory Interpretation

In the decision below and the cases preceding it, the Second Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10. In *Community for Creative Non-Violence et Al. v. Reid* 490 U.S. 730 (1989) ("*CCNV*") this court clearly rejected the Second Circuit's "instance and expense" test as applied to works created after January 1, 1978, the effective date of the 1976 Copyright Act. The Court held that the test could not apply to define "employee" under the 1976 Act for the universal reason that undefined terms in statutes must be read in accordance with their common law definition. *Id*. at 741.

The issue in *CCNV* was whether a commissioned work of sculptural art could be a work-made-for-hire "prepared by an employee within the scope of his or her employment …" where the party commissioning the work actually designed part of the final sculpture, developed the concept for the sculpture and closely

supervised its creation. *Id*. at 737. Justice Marshal discussed the prior analyses used by four different circuits, including the "approach formulated by the Court of Appeals for the Second Circuit" in *Aldon Accessories Ltd. v. Spiegel, Inc.* 738 F. 2d 548 (5th Cir. 1984), cert denied, 469 U.S. 982 (1984). *Id*. at 739. He viewed the *Aldon Accessories* approach as "turning on whether the hiring party has actually wielded control with respect to the creation of a particular work." *Id*. This is the basis for the "interest" prong of the "interest and expense" test. However, Justice Marshall *rejected* the Second Circuit's "instance and expense" test and endorsed the D.C. Circuit's approach, concluding that "the term 'employee' should be understood in light of the general common law of agency." *Id.* at 741.

"If the word 'employee' in the 1976 Act provides an adequate basis for the Supreme Court to interpret the statutory provision in light of the general common law of agency, then there seems no good reason why the use of the word 'employer' in the 1909 Act should not do the same." 1 H. Abrams, The Law of Copyright ("Abrams") (2005) § 4:11, at 4-44 to 4-45. Moreover, *CCNV* defined "employer" in addition to "employee." *Id*. at 732. Ignoring this part of *CCNV* to theorize about a putative distinction between "employee" in the 1976 Act and "employer" in the 1909 Act misses the point. There is no reasonable explanation of how "employer" could have a broad scope in the 1909 Act when as *CCNV* held it has a narrow scope in the 1976 Act bound by the common law of agency and traditional employment.

It was not until 1966 that the Second Circuit, in a line of cases beginning with *Brattleboro Publishing Co. v. Winmill Publishing Corp.,* 369 F.2d 565 (2d Cir.

1966), began to read commissioned works of an independent contractor within the term "employer" in the 1909 Act, contrary to the well-settled "principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. v. United States,* 221 U.S. 1, 59 (1911). This principle was well understood when *Brattleboro* ignored it, and it remains a "cardinal rule of statutory construction." *Molzof v. United States,* 502 U.S. 301,307 (1992), *citing Morissette v. United States,* 342 U.S. 246, 263 (1952). Under this canon it is clear "that Congress means an agency law definition for 'employee' unless it clearly indicates otherwise." *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 325 (1992). Thus, "employee" means "the conventional master-servant relationship as understood by common-law agency doctrine." *CCNV,* 490 U.S. at 739-40. The correlative term "employer" has the same obvious meaning. *Id.*, at 740-41 ("When we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms")(citations omitted).

The mandatory practice of examining the common law to interpret undefined statutory terms did not come into existence by accident: "federal statutes are generally intended to have uniform nationwide application," and this is especially true for statutes using the terms "employer" or "employee." *CCNV,* 490 U.S. at 740 (quoting *Mississippi Band of Choctaw Indians v.*

Holyfield, 490 U.S. 30, 43 (1989)). The subject at issue in the statute in *CCNV* was work for hire, but the decision explicated this broader holding. The Court emphasized the importance of giving the same common law meaning to undefined terms in statutes that are commonly understood. *CCNV,* 490 U.S. at 740. This copyright legislation is only one statute amidst many. The Second Circuit's expansive unsupported construction of "employer" in Section 24 to include independent contractors not only contorts copyright law but is contrary to the goal of consistency across federal statutes.

All courts of appeals which have addressed work for hire under the 1909 Act now follow the infirm "instance and expense" test.[3] The circuits' total disregard for this Court's holding and reasoning in *CCNV* is matched only by their lack of concern. Indeed, since the creation of this test, not one circuit interpreting the 1909 Act's work for hire doctrine has even attempted to reconcile its holding with this Court's "well-established rule of [statutory] construction," *Neder v. United States,* 527 U.S. 1, 21 (1999), or to square the "instance and expense" test's expansive construction of "employer" with this Court's narrow one.

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[3] *See Twentieth Century Fox Film Corp. v. Entertainment Distributing*, 429 F.3d 869 (9th Cir. 2005), *Brunswick Beacon, Inc. v. Schock-Hopchas Pub. Co.,* 810 F.2d 410, 412 (4th Cir. 1987); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.,* 903 F.2d 1486, 1490 (11th Cir. 1990); *Community for Creative Non-Violence v. Reid,* 846 F.2d 1485, 1489, 1493 (D.C.Cir. 1988), *aff'd on other grounds*, 490 U.S. at 736; *Forward v. Thorogood,* 985 F.2d 604,606 (1st Cir. 1993); *Easter Seal Soc'y v. Playboy Enters.,* 815 F.2d 323, 327 (5th Cir. 1987); *Real Estate Data, Inc. v. Sidwell,* 907 F.2d 770, 771 (7th Cir. 1990).

2. *The Decision Disregards the Supreme Court's Ruling in CCNV v. Reid*

The Second Circuit apparently felt free to disregard this Court's teaching in *CCNV* because Jack Kirby created the works at issue under the 1909 Act. However, the law as understood in 1958-63 that time does not support the "interest and expense" test it retroactively applied. To understand the contours of that law the court of appeals had to look no further than Justice Marshal's opinion in *CCNV*.

Justice Marshal discussed the evolution of the law under the 1909 Act as follows:

> In 1955, when Congress decided to overhaul the copyright law, the existing work for hire provision was § 62 of the 1909 Copyright Act, 17 U.S.C. § 26 (1976 ed.) (1909 Act). It provided that "the word 'author' shall include an employer in the case of "works made for hire." Because the 1909 Act did not define "employer" or "works made for hire," the task of shaping these terms fell to the courts. They concluded that *the work for hire doctrine codified in § 62 referred only to works made by employees in the regular course of their employment* (emphasis added). As for commissioned works, the courts generally presumed that the commissioned party had impliedly agreed to convey the copyright, along with the work itself, to the hiring party. *See*, *e. g., Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.,* 221 F. 2d 569, 570, rev'd, 223 F. 2d 252 (CA2 1955); *Yardley v. Houghton Mifflin Co.*, 108 F. 2d 28, 31 (CA2 1939), cert. denied, 309 U.S. 686 (1940).

CCNV, 490 U.S. at 743-74.

The court of appeal's analysis conflicts with Justice Marshal's analysis of the work for hire doctrine under the 1909 Act. Jack Kirby's works at issue fell into the category of "commissioned works" which Justice Marshall concluded were "convey[ed]," i.e., assigned. Furthermore, all of the evidence available to the lower courts supported that Kirby "convey[ed] the copyright" to Marvel, not that Marvel owned Kirby's work at creation. That is precisely the circumstance 17 U.S.C. § 304 is intended to address by giving authors or their statutory heirs the opportunity to terminate such copyright transfers.

Justice Marshall gave only a brief description of the pre-1978 law of work-made-for-hire. A closer look provides no support whatsoever for the court of appeals bold assertion that "the law in effect when the works were created .... requires us to apply what is known as the 'instance and expense' test." Pet. App. 33-34.

The court of appeals departs from uniform statutory interpretation and Supreme Court precedent without justification. It applied the "instance and expense" test despite acknowledging that it had erred in using *Yardley's* implied assignment factors to find that an independent contractor's work was "for hire." Pet. App. 34-36; *see also Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 159-160 (2d Cir. 2003). The Second Circuit further admits that the sweeping "instance and expense" test was adopted "without explanation or citation of authority." *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.,* 380 F.3d 624, 635 (2d Cir. 2004). In particular, *Hogarth* could not reconcile its

expansive reading of "employer" in Section 26 of the 1909 Act with this Court's express reasoning in *CCNV*. Leading commenters have noted that the use of the "instance and expense" test transform freelance material into work for hire is "wrong both on principle and under the rule of the early cases." 3 M. & D. Nimmer, *Nimmer on Copyright* ("*Nimmer*")(2005) § 9.03[D], at 9-28.2 to 9-28.3. The court of appeals' view is "untenable" under *CCNV*, which explains that copyright vests in a commissioned author "rather than vesting automatically in the hiring party." 3 *Nimmer*, *id.*, § 9.03[D], at 9-28.4. *See also* 1 Abrams, *supra*, § 4:9, at 4-12 to 4-15 (criticizing the Second Circuit's reasoning in cases, including *Brattleboro Pub. Co.* and *Picture Music, Inc. v. Bourne*, Inc., 457 F.2d 1213 (2d Cir. 1972)).

II. MARVEL'S RELATIONSHIP WITH KIRBY IS SYMPTOMATIC OF THE PREDATORY PRACTICES OF PUBLISHERS, AND THE VERY IMBALANCE CONGRESS SOUGHT TO REMEDY BY THE 1976 ACT'S TERMINATION PROVISIONS

A. The 1976 Act's Termination Provisions Demonstrate Congress's Well-Considered Policy to Protect and Benefit Authors

The termination right first appeared in the 1963 Preliminary Draft bill prepared for Congress by the Copyright Office. Copyright Law Revision, Part 3, Preliminary draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess. 15 (Comm. Print 1964).

Publishers' reactions to the termination provisions in the 1963 Preliminary Draft bill were negative. To

limit their impact they proposed that the definition of work-for-hire be retained insofar as it referred to "employees", but that it be expanded to incorporate commissioned works, without regard to subject matter, "if the parties so agree in writing." Further Discussions on Draft at 274.

Representatives of authors strongly objected to the publishers' proposal. The legendary Irwin Karp, long-time counsel for the Authors' League of America, argued that publishers would use their superior bargaining position to force authors to sign work for hire acknowledgements, thereby relinquishing all of their copyrights if they wanted to get their works published. "[A]n author could easily be induced to sign a form contract stating that his work is 'made for hire,' and that ordinary book publication contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into 'employment agreements' as a matter of course." Copyright Law Revision, Part 6, at 67. He urged that language in the 1963 Preliminary Draft bill be retained – that works made "on special order or commission" be excluded from the definition of work for hire. *Id.* at 239, 245.

Ultimately, after introduction of the termination right in an earlier draft bill, a compromise was reached in 1965 providing authors the termination right as to both pre-1978 and post-1978 grants, 17 U.S.C. §§ 203(a), 304 (c), while publishers gained the right to commission "works for hire" under limited circumstances. 17 U.S.C. § 101. The subsequent judicial decisions that unjustifiably expanded work for hire in the last years the 1909 Act were never examined by the

legislature in enacting the 1976 Act's termination provisions. *See Mills Music*, 469 U.S. at 160-161 ("Although additional hearings were held in subsequent sessions, and revision bills were submitted to Congress in each term for the next 10 years, discussion over the termination provisions … was essentially completed at this time. Congress enacted the termination provisions … in the 1976 Act in virtually the same form as they appeared in the 1965 draft revision bill.") "There is no indication that anyone involved in copyright revision later became aware of the line of cases expanding the work made for hire doctrine." Jessica Litman, *Copyright, Compromise, and Legislative History,* 72 Cornell L. Rev. 857, 901 (1987).

The termination right applies only to the period of copyright protection extended by the 1976 Act, and further extended by the 1998 CTEA. 17 U.S.C. § 304. In enacting this right, Congress honored the fact that the parties to a pre-1978 copyright grant had bargained for a maximum term of 56 years per the 1909 Act. Congress gave authors and their families the opportunity to benefit from its extensions by recovering copyrights for the extended term. *See* H.R. Rep. No. 105-452, 105th Congress, 2d Sess., at 8 (1998) (the intention is for "original authors of works and their beneficiaries to benefit from the extended copyright protection"). If the court of appeals' decision is allowed to stand the benefits Congress expressly intended to bestow on authors and their families will be rendered meaningless.

The *amici* represented in this brief can attest through personal experience that Mr. Karp's concerns, articulated 51 years ago, remain as valid today as then.

Not only because many of them created material before 1978, but because they cannot rely upon the legislative compromises that their representatives reached in Congress. The Second Circuit's misinterpretation of work for hire under the 1909 Act unfairly strips freelance artists of their termination rights and provides an unintended and unwarranted windfall to publishers.

B. The Inequitable Treatment of Artists Like Jack Kirby Is Typical of the *Amici's* Experience and Will Continue Without This Court's Much Needed Review

It is undisputed that Jack Kirby was *not* an employee of Marvel at the time he created the works in question. Kirby was typical of the professional illustrators and cartoonists comprising the *amici*. He was a freelancer who, as sole proprietor of his own business, paid his own income and social security taxes, worked out of his own home, purchased all his own materials and paid all of his expenses. Pet. App 44. Marvel paid none of these costs and bore no responsibility for Kirby's authorship of comic book characters, storylines, text and illustrations. Kirby "pitched" and discussed concepts with Marvel's editor and submitted completed material to Marvel which it thereafter purchased for publication or rejected. Pet. App. 44-46. While Marvel may have been Kirby's biggest client in 1958-63, Kirby had no engagement agreement, was non-exclusive, and retained the right to submit his original work to other publishers, even material originally conceived for a sale to Marvel.

The only contemporaneous agreement between the parties consisted of legends inserted by *Marvel's attorneys* on the back of its checks to Kirby "with

assignment, instead of work-for-hire, language." Pet. App. 47. Those very assignments are subject to the 1976 Act's termination provisions. 17 U.S.C. § 304. However, Kirby's children had no opportunity to present evidence to the trier of fact because they were thrown out of court on summary judgment based on the Second Circuit's "instance and expense" test which ignores the text and legislative history of the 1909 Act, this Court's precedent and Congress's clear objectives in enacting the termination provisions. Pet. App. 2.

Like most freelance commercial artists Jack Kirby had little choice if he wished to continue to sell his work to his biggest client. The working artists among the *amici* are intimately familiar with this kind of pressure. They face it each time they attempt to sell a work to a publisher with vastly greater market power than they possess.

Amici strongly urge this Court to review this important case. The "instance and expense" test for retroactively characterizing independent work as employment "for hire" establishes a game of "gotcha" designed to block freelance artists from exercising their rights under the Copyright Act. If the court of appeals unsupportable decision is allowed to stand, Congress's twice expressed intent to give authors and their families the benefit of its copyright term extensions, will be nullified.

CONCLUSION

The "almost irrebuttable presumption" established by the Second Circuit – which disregards the definition of "employer" as it was universally understood at the time Jack Kirby created the works in question – renders meaningless the termination right established for the benefit of freelance authors and artists under the 1976 Act and should be rejected by this court consistent with its decision in *CCNV*.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

This amicus brief is joined by the following organizations:

The American Society of Illustrators Partnership

The American Society of Illustrators Partnership (ASIP) is a grassroots coalition of twelve visual artists organizations, founded and funded entirely by working artists. ASIP was founded in 2007, as an initiative of the Illustrators' Partnership of America (IPA), although many of its member organizations have distinguished histories dating back more than 50 years. The coalition encompasses a broad spectrum of creative artists, ranging from the nation's editorial cartoonists to medical illustrators, architectural and science illustrators, aviation artists, magazine, book and advertising illustrators. Combined, its members create much of the visual material in American contemporary culture. ASIP's board includes a Pulitzer Prize winner, a muralist for the Smithsonian's Air and Space Museum and two members of the Illustrators Hall of Fame; as well as artists who have received the top awards for achievement in their respective fields. The partnership consists of thousands of freelance creators or small business owners that earn their livelihood by licensing the copyrighted work they create. Therefore, ASIP has a compelling interest in the continued effectiveness of copyright law in the field of visual art, as well as unique insight and unparalleled experience in how art is created, licensed and managed by the people who actually create it.

National Cartoonists Society (NCS)

The National Cartoonists Society is the world's largest and most prestigious organization of professional cartoonists. The NCS was born in 1946 when groups of cartoonists joined forces to entertain the troops and decided to meet on a regular basis. Today, the NCS membership roster includes over 500 of the world's major cartoonists working in many branches of the profession, including newspaper comic strips and panels, comic books, editorial cartoons, animation, gag cartoons, greeting cards, advertising, magazine, book illustration, and more. The primary purposes of the Society are to advance the ideals and standards of professional cartooning in its many forms; to promote and foster a social, cultural and intellectual interchange among professional cartoonists of all types; and to stimulate and encourage interest in and acceptance of the art of cartooning by aspiring cartoonists, students and the general public.

American Society of Architectural Illustrators (ASAI)

The American Society of Architectural Illustrators (ASAI) was founded in 1986 as a professional organization to represent the business and artistic interests of architectural illustrators throughout North America, and now includes over 450 practitioners worldwide among a total of eighteen countries. The Society's principal mandate was and remains the fostering of communication among its members, raising the standards of architectural drawing, and acquainting the broader public with the importance of such drawings as a conceptual and representational tool in architecture. The Society also assists in the advancement of the art

and profession in a number of significant ways: as a referral agency for those seeking the services of a perspectivist, as a network among the world's practitioners and affiliated organizations, as a clearing-house for ideas and discussions about architectural illustration, and a sponsor of regional and local member activities. ASAI members have authored many books on the profession, and contributed to numerous sourcebooks and reference publications during its history. By recognizing and celebrating the highest achievements in the illustration of our built environment, the Society and its dedicated, committed and passionate members continue to further the quality of the work and working conditions, to benefit all who have an interest in architectural illustration and its end, architecture.

Association of American Editorial Cartoonists (AAEC)

The Association of American Editorial Cartoonists is a professional association concerned with promoting the interests of staff, freelance and student editorial cartoonists in the United States. The AAEC sponsors a "Cartoons for the Classroom" program designed to aid educators at all levels in teaching history, economics, social studies and current events. The AAEC's annual convention in June gives member cartoonists an opportunity to meet and consider issues through panel discussions and guest speakers. Between conventions, cartoonists can discuss issues on a daily basis through a members' only email list-serve.

Association of Medical Illustrators (AMI)

The profession was defined over 100 years ago and a professional association was established in 1945. Since then, AMI has codified the profession by setting the academic standards and guidelines through the accreditation of graduate programs; by establishing a scholarly journal to disseminate knowledge and skills; and by launching a program to recognize the continued competencies of a professional through board certification of medical illustrators. Medical Illustrators are highly specialized visual artists that apply their creativity, scientific expertise and interdisciplinary skills to further medical and scientific understanding for purposes of teaching, research, marketing, or demonstrative evidence in the courtroom. 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. Scientific and medical concepts are taught visually, and the expertise of medical illustrators makes it possible to convey complex aspects of anatomy, biology and related scientific disciplines. The visual artistry of medical illustrators utilizes diverse techniques and media, from classical painting and drawing to 21st Century techniques such as animation, 3D modeling and augmented reality, medical models and surgical simulations prosthetics and anaplastology. As creators of original work that they may assign, the members of AMI have a direct interest in the realization of Congress' objectives regarding the termination right.

Guild of Natural Science Illustrators (GNSI)

The Guild of Natural Science Illustrators, Inc. is an international non-profit organization comprised of individuals employed, or genuinely interested in the field of natural science illustration. The Guild encourages increased communication between individuals in the field of natural science illustration, assistance to those with the desire and ability to enter the profession and promotes better understanding of the profession to the general public and those requiring natural science illustration services. From its inception in 1968, the Guild has had the support of the National Museum of Natural History, Smithsonian Institution. Membership has burgeoned to nine hundred fifty-three members representing individuals living in all fifty states, the District of Columbia, Puerto Rico and twenty-three foreign countries. Natural science illustrators work in the service of science. Various membership discipline specialties include but are not limited to: anatomy, anthropology, archaeology, astronomy, biology, botany, cartography, education, entomology, ichthyology, invertebrates, mammals, medical, ornithology, paleontology, vertebrates, veterinary and wildlife. Much of the work created by natural science illustrators is published in books, journals, and magazines but is also utilized in other venues such as museum dioramas and exhibitions, the internet, CD-ROMS and shown as fine art.

San Francisco Society of Illustrators (SFSI)

In 1961, thirteen San Francisco illustrators formed a chartered society for illustrators. In addition to promoting illustration, The San Francisco Society of Illustrators encourages independence, fair practices and

personal artistic excellence as its goals. For several decades, SFSI members have participated in the US Air Force Documentary Art Program and the National Parks Art Program, resulting in50 paintings and 18 drawings now permanently on display at the Department of the Interior in Washington DC, and at the Forest Service Design Center at Harpers Ferry, West Virginia. SFSI members have also been involved with the National Aeronautics and Space Administration in documenting various NASA activities. Today many of the members are known nationally for their illustrations, which appear throughout the country in books, periodicals, postage stamps advertisements, publications, television and film. A large group, both past and present, have been involved in the education of aspiring illustrators at Bay Area professional schools and colleges.

Pittsburgh Society of Illustrators (PSI)

Pittsburgh Society of Illustrators began meeting in late 1996 to serve as a social and business networking outlet for free-lance illustrators. PSI quickly morphed into a sophisticated trade organization with the aim of achieving a closer social and professional contact among illustrators in the Pittsburgh area; cultivating and strengthening the profile of the illustration art form in the Pittsburgh region by exhibiting and promoting members' work of the highest aesthetic caliber; acquanting Pittsburgh art and illustration patrons with members' work; hosting visiting illustrators, lecturers, and teachers; and fundraising and donating (including but not limited to scholarships) to worthy and needful college age art and design students pursuing the illustration craft. For the past 15 years, PSI has

held art shows for its members and operated a scholarship program with local colleges.

Society of Illustrators Los Angeles (SILA)

The Society of Illustrators of Los Angeles was founded in 1953 by a handful of Southern California advertising artists and designers primarily to promote the professional status of illustration as well as foster philanthropic and educational goals. From this small beginning it has grown to a very productive membership whose work is seen nationally by millions each year in all printed media, television, films, the Internet and gallery exhibitions. SILA has close to 200 members and is firmly established as the major professional art entity on the West coast providing significant contribution to the vitality of not only the community itself but the nation as well.

The Society of Illustrators San Diego (SISD)

The Society of Illustrators San Diego was formed in 1989 as a chapter of The Society of Illustrators Los Angeles. The purpose behind the formation of this group of professionals was to promote awareness and abilities, to network among each other and with professionals in related fields, to create programs and activities for educational growth, and to provide social interaction for people who share similar experiences and interests. The primary activity of SISD is to provide a forum for guest speakers to show their work, to talk about their experiences as a professional illustrator, and to demonstrate their style and techniques. Additionally, SISD has hosted non-illustrators to address topics on the business side of illustration, such

as pricing sessions, panel discussions on illustration buying and marketing; and future illustration trends.

American Society of Aviation Artists (ASAA)

The American Society of Aviation Artists is a non-profit organization dedicated to the bringing together of artist and public for the purpose of sharing special aviation knowledge and traditional artistic processes necessary to the creation, improvement and public appreciation of aviation art. Since its incorporation in 1986, the American Society of Aviation Artists has pursued its mission of bringing together aviation and aerospace artists in an effort to encourage excellence in this unique genre of art. Aviation and aerospace art are creative responses to premiere technologies of our time. The need for accurate and artistically creative representation of the machines, events, and people involved in the history of flight has provided the impetus for an association promoting high standards of excellence. ASAA has fulfilled that need through its annual exhibitions and forums, regional meetings, scholarship programs, a quarterly journal, an informative and colorful website, and of course, the member networking that a professional art society provides.

The Illustrators Club of Washington DC, Maryland and Virginia (IC)

The Illustrators Club of Washington DC, Maryland and Virginia (IC) is a non-profit, all-volunteer trade association dedicated to promoting the art and business of illustration since 1986. IC's membership network includes professional illustrators, graphic designers, educators, students, vendors and related businesses. IC provides a broad palette of resources, programs and

opportunities to educate and benefit members, art buyers and the general public. The Illustrators Club strives to protect the rights and interests of all members, while maintaining high standards and encouraging fair business practices throughout the graphic arts community.

APPENDIX B

The following illustrators, cartoonists, and artistic professionals individually joined this amicus brief to show their support:

Clay Bennett
Five-time Recipient of the Pulitzer Prize for editorial cartooning, two-time recipient of the United Nations Political Cartoon Award, and recipient of the RFK Journalism Award, Mr. Bennett has earned almost every honor his profession has to offer. Mr. Bennet is a former president of the Association of American Editorial Cartoonists and his work is syndicated internationally

David Hosey
Two-Time Pulitzer Prize-winning editorial cartoonist, recipient of the Robert F. Kennedy Journalism Award and named National Press Foundation's 1998 Cartoonist of the Year, Mr. Hosey's work is currently featured at the Los Angeles Times

Ann Telnaes
The second woman cartoonist to receive the Pulitzer Prize and a former Disney illustrator, Ms. Telnaes's cartoons are currently featured at the Washington Post and syndicated nationally

Nick Anderson
Pulitzer Prize-winning editorial cartoonist currently at the Houston Chronicle and syndicated in over one hundred newspapers, Mr. Anderson is also the recipient of the Society of Professional Journalists' Sigma Delta Chi Award, the National Press Foundation's Berryman Award, and the Charles M. Schulz Award for best college cartoonist in the United States

Mike Keefe
Pulitzer Prize-winning editorial cartoonist, co-creator of two nationally-syndicated cartoon strips, published author, former president of the Association of American Editorial Cartoonists, and former U.S. Marine. Mr. Keefe has also received the Sigma Delta Chi Award and the Berryman Award

Gary Trudeau
Creator of the *Doonesbury* Cartoon Strip and the first cartoon strip artist to receive a Pulitzer Prize

Matt Davies
Pulitzer Prize-winning editorial cartoonist, author, illustrator, and former president of the Association of American Editorial Cartoonists, Mr. Davies cartoons are syndicated nationally and he has given talks at the UN, The Library of Congress, and The National Press Club to discuss cartooning and politics

Hilary Price
Creator of the nationally-syndicated *Rhymes with Orange* Comic Strip and three-time recipient of the Best Newspaper Panel Cartoon Award from the National Cartoonists Society

David Silverman
Animator and Director for *The Simpsons*, the longest running American scripted primetime television series

Bill Morrison
Editor for all *Simpsons* and *Futurama* comics

Ron Ferdinand
Cartoonist for *Dennis the Menace*, a daily syndicated comic strip in one thousand newspapers in forty eight countries and nineteen languages

Pat Brady
Creator of nationally syndicated comic strip *Rose is Rose* and 2004 recipient of the Reuben award by the National Cartoonists Society

Bunny Hoest
Cartoonist for *The Lockhorns*, a single panel cartoon distributed to five hundred newspapers in 23 countries

Brian Crane
Cartoonist for nationally syndicated comic strip, *Pickles* and recipient of the Reuben Award for Outstanding Cartoonist of the Year by the National Cartoonist Society

Bill Griffith
Creator of and cartoonist for comic strip *Zippy*, currently syndicated in more than 100 newspapers

Greg and Brian Walker
Sons of legendary comic artist Mort Walker, and cartoonists for internationally syndicated comic strips, *Beetle Bailey* and *HI and Lois*

Rick Kirkman
Co-creator of and cartoonist for nationally syndicated comic strip *Baby Blues*

Ernie Colón
Comics Artist for *Casper the friendly Ghost* and *Richie Rich*, and former editor at DC Comics

Jim Keefe
Artist for nationally syndicated comic strips *Sally Forth* and *Flash Gordon*

Jim Meddick
Cartoonist for nationally syndicated comic strip *Monty*

Sergio Aragones
Cartoonist for Mad Magazine, creator of comic book *Groo the Wanderer*, and nine-time recipient of the Harvey Award for Humor

Rick Stromoski
Creator of nationally syndicated comic strip *Soup to Nutz*, and past president of National Cartoonist Society

Mason Mastroianni
Cartoonist for internationally syndicated comic strip *B.C.* and grandson of the comic's creator, Johnny Hart

Brad Holland
Internationally acclaimed and award winning illustrator, whose work has been exhibited in the Library of Congress and museums, and appeared in nearly every major U.S. publication. A Seminal voice in copyright policy for illustrators, Holland participated in the Copyright Office Orphan Works Roundtable

Frank Constantino
Recipient of world's most prestigious award for the architectural illustration, the Hugh Ferriss Memorial Prize, Mr. Constantino's work has been exhibited in museums internationally, including the Art Institute of Chicago, the Octagon Museum in Washington DC, as well as in Tokyo, Berlin, and Lisbon

Keith Ferris
Award-Winning Aviation Artist whose work has been internationally published and showcased, Mr. Ferris also created the 25 foot high by 75 foot wide mural "Fortresses Under Fire" in the World War II Gallery of

the National Air and Space Museum of the Smithsonian Institution in, and the 20 foot by 75 foot Evolution of Jet Aviation Mural in the museum's Jet Aviation Gallery

Lori Mitchell
Children's Book Writer and Illustrator, Mitchell's work includes award-winning children's book, *Different Just Like Me*, as featured on Oprah and the Today show

C.F. Payne
Award-Winning Illustrator whose work has been featured at several art galleries and museums, including the National Portrait Gallery in Washington D.C.

Dolores Santoliquido
Prominent natural science illustrator, whose work has been showcased extensively, including at the Smithsonian Institution in Washington D.C.

Dena Matthews
Medical illustrator, international speaker, author, artist, and teacher, Ms. Matthews is a partner at LifeHouse Productions, LLC, a leading edge biomedical animation and illustration studio, honored with numerous awards including the Medical Marketing Association InAwe Gold award, Telly Awards, and Rx Club awards

Michel Bohbot
Award-winning illustrator of video games, books, and magazines, Mr. Bohbot was named one of the New Masters of Fantasy

Cynthia Turner
Award-winning certified medical illustrator, Fellow of the Association of Medical Illustrators, and a founding member of the Illustrator's Partnership of America

Joe Cepeda
Award-winning illustrator of more than twenty children's books, and a sought-after public speaker at public schools around the country

Ilene Winn-Lederer
Internationally Published and Showcased Illustrator

Terrence C. Brown
Director Emeritus of the Society of Illustrators, Author, and Museum Curator

Guy Dorian, Marvel Comics artist

Cyndy Bohonovsky, Disney character artist

John Glynn, President of Universal Press Syndicate

Amy Lago, Editor of Washington Post Writers Group

Steven G. Artley, Award-winning editorial cartoonist

Rob Rogers, Editorial cartoonist for Pittsburgh Post-Gazette

Joe Azar, Esq, Cartoonist and Representative of the Illustrators Club of Washington DC

Jim Nuttle, Former President of Art Directors Club of Metropolitan Washington

Joe Sutliff, Finalist in Washington Post's Next Great American Cartoonist

Ed Steckly, Illustrator and Chairman of the National Cartoonist Society, NY Chapter

Joe Wos, Executive Director of ToonSeum, Museum of Comic Art

Charles Kichman, Editorial Director at Abrams Comicarts

Michale Jantze, Cartoonist for syndicated comic strip *The Norm*

Stephen Silver, Character designer for animated series *Kim Possible* and *Danny Phantom*

Tom Scioli, Writer/Artist/Colorist for *Transformers vs GI Joe*

Chris Burnham, Artist of *Batman, Inc.*

Graham Nolan, Artist for *Sunshine State*

DJ Coffman, Creator of *Hero by Night*

Dave Coverly, Artist for *Speedbump*

Oliver Simonsen, Film director, and cartoonist for the comic *Cerebus*

J. David Spurlock, Artist for *The Space Cowboy* & *Tales from Edge*

Rich Tennant, Cartoonist for *The 5th Wave* and *For Dummies* Books

Celina Barajas, Animator at Calabash Animation Studios, Inc.

Artie Romero, Producer for ARG! Cartoon Animation, LLC

Tom Heintjes, Editor at Hogan's Alley, the Magazine of the Cartoon Arts

Jim Valentino, Founder of Shadowline, Ink Publishing

Mike Gold, Editor-in-chief of *ComixMix*

Javier Hernandez, Creator of the comic books *El Muerto*,
The Coma, and *Weapon Tex-Mex*

Mark Marderosian, Artist for *Angels from the Attic*

Rafael Navarro, Creator of comics *Sonambulo* & *Guns A' Blazin*

John Kovalic, Artist for *Dork Tower*

Dave Blazek, Artist for *Loose Parts*

David Wachter, Artist for *Guns of Shawdow Valley*, *Breath of Bones*, *Godzilla*

Juan Arevalo, Artist for *OYA*, *Vilkon Chronicles*

Ed Siemienkowicz, Artist for *Chrome and Dust*

Denny Riccelli, Artist for *Cousin Harold*

David Lawrence, Writer/Editor for *Red Giant Comics*

Gerry Mooney, Artist for *Sister Mary Dracula*

Arlen Schumer, Author of *The Silver Age of Comic Books*

Maria Scrivan, Artist for *Half Full*

Mike Edholm, Artist for *Undercover Cockroach*, *Secret Agent 69*

CC Rockenbach, Cartoonist for *Sabine*

Steve Conley, Author of *Bloop*

Corwin Scott Gibson, Author of *Galaxy of the Damned*

Tim Mellish, Cartoonist for *LadderCorp*

Birgit Keil, Cartoonist for *Just Bea*

Ronald AG Grant, Cartoonist for *Benjamin Breadman*

Pab Sungenis, Author of *Sidekick: The Misadventures of the New Scarlet Knight*

George Gant, Cartoonist for *On The Grind*

John Auchter, Creator of *Auchtoon*

Dan Thompson, Cartoonist for *Rip Haywire* and *Brevity*

Charles D. McConnell, Cartoonist for *Then & NOW*

Mark Parisi, Cartoonist for *Off The Mark*

Jan Eliot, Cartoonist for *Stone Soup*

Andrew Pepoy, Creator of *The Adventures of Simone & Ajax*

Jimmy Gownley, Author and Illustrator of *Amelia Rules!*

Robert Rich, Cartoonist for Hedgeye

Kate Beaton, Owner of Kate Beaton Cartoons Inc.

Ruben Gerard, Creator, writer, and artist of *Penny Strikes*

Isabella Bannerman, Cartoonist for *Six Chix*

John Hazard, Artist for *Frankenstein Superstar*

Joe Vissichelli, Owner of Joe's Caricatures

Hilary Barta, Comic Book Artist

Joseph D'esposito, Graphic novel artist

Tim Perkins, Graphic artist and comic book artist

Janine Manheim, Cartoonist and *Berndt Toast Gang* member

Stu Rees, Esquire to cartoonists and law cartoonist

Peaco Todd, Cartoonist and author

Sean Kelly, Illustrator

Danielle Thillet, Illustrator

Randy Elliott, Cartoonist

Bucky Jones, Cartoonist

John Kovaleski, Cartoonist

Erika Moen, Cartoonist

Kristin Cheney, Cartoonist

Jonathan A. La Mantia, Cartoonist

John Klossner, Cartoonist

Janet O'Keefe, Cartoonist

Blue Delliquanti, Cartoonist

Carlos E. Mendez, Cartoonist

Greg Hinkle, Cartoonist

Tom Stemmle, Cartoonist

Bob Englehart, Cartoonist

Mark Nelson, Cartoonist

Mike Joffe, Cartoonist

Chris Collins, Cartoonist

Jessica Fink, Cartoonist

Kelly Aarons, Cartoonist

Tony McMillen, Freelance Writer

Mark Wheatley, Cartoonist

Rusty Gillgan, Comic Book Artist

Gregory Giordano, Cartoonist

Mike Lynch, Cartoonist

Roger Green, Cartoonist

Melanie Gilman, Cartoonist

Arnie Levin, Cartoonist

Michael Pohrer, Cartoonist

Scott Jenson, Cartoonist

Peter Davis, Cartoonist

Wayno Honath, Illustrator

Stephen Bissette, Cartoonist

Dan Carrow, Cartoonist

Brian Denisiuk, Cartoonist

Bill Hernandez, Cartoonist

Nathan Webster, Cartoonist

Steven Brower, Cartoonist

Joseph Krejci, Cartoonist

John Wilcox, Cartoonist

Eddite Pitman, Cartoonist

James Lyle, Cartoonist

Howard Beckerman, Animator

Marcel Walker, Cartoonist

David Pasciuto, Cartoonist

Ron Evry, Comics historian, writer, artist

Sal Amendola, Cartoonist

William Pardue, Cartoonist

Charles Andrew Bates, Cartoonist

Brian Crowley, Cartoonist

Mark Brewer, Illustrator

Adrian Sinnott, Illustrator

Kenn Dancer II, Cartoonist

Thomas Andrea, Cartoonist

David Coulson, Illustrator

Kurt Hoss, Cartoonist

Marc DiPaolo, Cartoonist

Albert Hoch III, Cartoonist

Mark Fakhry, Cartoonist

Bob Domfried, Cartoonist

Dr. Mark Staff Brandl, Phd. Art Historian, Artist

Paul Fell, Cartoonist

Mark Bilokur, Artist

Taylor Jones, Cartoonist

Jessica Kemp, Cartoonist

Alex Wald, Art Director

Bart Mallio, Cartoonist

Aldin Baroza, Cartoonist

Michael McParlane, Cartoonist

Annie Mok, Cartoonist

Jan Elliot, Cartoonist

David Folkman, Cartoonist

James Robert Smith, Cartoonist

Tom Racine, Cartoonist

John Rozum, Cartoon Creator/Writer

Scott C. Hamilton, Cartoonist

Matt Kennedy, Cartoonist

Ann Reinertsen Farrell, Illustrator

John Pierard, Cartoonist

P.s. Mueller, Cartoonist

Anthony Zicari, Freelance Writer/Editor

Jim Brenneman, Children's Book Author, Illustrator

Maria Rabinsky, Illustrator

Joseph Barbaccia, Illustrator

Patricia Palermino, Illustrator

Nicolle R. Fuller, Award-winning illustrator

Barbara Dale, Cartoonist and best-selling author

Annie Lunsford, Free-Lance illustrator

Linda Lunsford, Free-Lance illustrator

Devon Stuart, Medical illustrator

Lili Robins, Illustrator

Bruce Guthrie, Photographer

Susan Harriet Baker, Illustrator

Jim Haines, Cartoonist

Derf Backderf, Cartoonist, Graphic novelist

Dave Kellet, Cartoonist, Filmmaker

Chip O'Brien, Cartoonist

Robin Koontz, Children's Book Illustrator

Johnny Alexander Briedis, Caricature artist

Dan Nott, Cartoonist

John H. Johnson, Cartoonist

David Cohen, Cartoonist

Geoff Hassing, Cartoonist

Flash Rosenberg, Cartoonist

Justin Piccirilli, Cartoonist

Dale Stephanos, Illustrator

David Concepcion, Cartoonist

Harry Bliss, Cartoonist

David Cooney, Cartoonist

Al Bigley, llustrator/cartoonist

Dave Mowder, Illustrator/cartoonist

Phil Fehrenbacher, Illustrator/cartoonist

Chari Pere, Cartoonist

Steve Barr, Illustrator/cartoonist

Kerry G. Johnson, Caricaturist/cartoonist

Buzz Dixon, Cartoonist/story editor

Karen Coplen, Cartoonist

Joel Siegel, Artist

No. 13-1523

In the Supreme Court of the United States

MARK WARREN PEARY, As Personal Representative of the Estate of Joseph Shuster,
Petitioner,

v.

DC COMICS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* BRUCE LEHMAN, FORMER ASST. SECRETARY OF COMMERCE AND DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE; RALPH OMAN, FORMER U.S. REGISTER OF COPYRIGHTS; THE ARTISTS RIGHTS SOCIETY, THE INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE, AND VARIOUS PROFESSIONAL ASSOCIATIONS, ILLUSTRATORS AND CARTOONISTS IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

Bruce Lehman, as Assistant Secretary of Commerce and Director of the U.S. Patent and Trademark Office from 1993 through 1998, served as the chief advisor to the President for intellectual property matters, including copyright. He supervised and coordinated development of the Administration's position in support of the Copyright Term Extension Act of 1998 ("CTEA"), including the provisions permitting authors to recapture for the extended term copyrights they had transferred to others during the first 75 years of the term of copyright in works they created. From 1974 through 1983 he served as Counsel to the Committee on the Judiciary of the U.S. House of Representatives and was the principal legal counsel to the Committee on copyright matters. In that capacity, he advised the Committee in the 93rd Congress and the 94th Congress during the process of consideration and final passage of the 1976 Copyright Act. The Act extended the 56-year term of protection for works created under the 1909 Act for an additional 19 years, and gave the authors of those works the right to recapture for the extended term their ownership of copyrights previously transferred to others. These experiences afforded Mr. Lehman a thorough understanding of the intent and

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici* made such a monetary contribution. The parties have been given at least ten days' notice of *amici's* intention to file this brief and have given *amici* consent to file. Copies of the letters of consent will be filed with the Clerk of the Court.

objective of Congress in establishing the authors' termination rights at issue in the instant case.

Ralph Oman served as U.S. Register of Copyrights from 1985 to 1993. For the past 22 years, Mr. Oman has taught copyright law at George Washington University Law School, but it is his wealth of first-hand experience that has made him a true expert. He served as Chief Counsel of the Subcommittee on Patents, Trademarks, and Copyrights of the U.S. Senate Committee on the Judiciary and as Chief Minority Counsel of the Senate Subcommittee on Patents, Trademarks, and Copyright during the final two years of Senate consideration of the landmark 1976 Copyright Act. As the former Register of Copyrights, Mr. Oman recognizes that this case raises issues of national importance and implicates wide-ranging and recurring policy concerns of constitutional dimension. Mr. Oman cautions not to draw conclusions from the Copyright Office's failure to intervene at this point in the proceeding because during his tenure as Register of Copyrights it was the Office's policy not to weigh in at the cert stage, absent an express request from the Court or the Solicitor General that it do so. At this preliminary stage, the Court has yet to make such request.

The International Intellectual Property Institute (IIPI) is the foremost organization for providing education and guidance about intellectual property rights to leaders and innovators in developing countries. Since 1998, the nonprofit organization has educated government leaders about the economic value and impact of IP regulation, created opportunities for the economically disadvantaged to harness their

creativity and innovation, and helped traditional artisans – primarily women – protect and promote their cultural products. Current members on the board of advisors include Former Commissioner of Trademarks of the United States Patent and Trademark Office, Lynne Beresford; Former Commissioner of the Chinese Patent Office and Commissioner of State Intellectual Property Office, Dr. GAO Lulin; and former Vice President of the European Patent Office, Dr. Jacques Michel.

The Artists Rights Society (ARS) is the preeminent copyright, licensing, and monitoring organization for fine artists in the United States. Founded in 1987, ARS represents the intellectual property rights interests of over 60,000 visual artists and the estates of visual artists from around the world (painters, sculptors, architects, photographers and others). Among its American members are Jackson Pollock, Alexander Calder, Georgia O'Keeffe, Frank Lloyd Wright, Willem de Kooning, Mark Rothko, Robert Indiana, Sam Francis, Bruce Nauman, Frank Stella, Arshile Gorky, Richard Serra, Sol LeWitt, Lee Krasner, Barnett Newman, Milton Avery, Susan Rothenberg, and many others. Foreign members include Henri Matisse, Pablo Picasso, Rene Magritte, Marc Chagall, Marcel Duchamp, Joan Miró, Man Ray, Edvard Munch, Joseph Beuys, Pierre Bonnard, Fernand Léger, Alberto Giacometti, Georges Braque, Constantin Brancusi, Jean Dubuffet, Max Ernst, Le Corbusier, Vassily Kandinsky, and many others. A large percentage of the artists represented by ARS created works prior to enactment of the 1976 Copyright Act and have a strong interest in being able to assert the termination rights in such works granted to them under 17 U.S.C. § 304.

The American Society of Illustrators Partnership (ASIP) is a coalition of visual artist organizations, founded and funded entirely by working artists. ASIP was founded in 2007 , although many of its member organizations have distinguished histories dating back more than 50 years. The coalition encompasses a broad spectrum of creative artists, ranging from the nation's editorial cartoonists to medical illustrators, architectural and science illustrators, aviation artists, magazine, book and advertising illustrators. Combined, its members create much of the visual material in American contemporary culture. ASIP's board includes a Pulitzer Prize winner, a muralist for the Smithsonian's Air and Space Museum and two members of the Illustrators Hall of Fame; as well as artists who have received the top awards for achievement in their respective fields. The thousands of creators among ASIP's membership form the foundation of its interest in the continued effectiveness and fairness of copyright law, as well as its unique insight and unparalleled experience in how art is created, licensed and managed by the people who actually create it.

Joining as *amici* are an additional twelve professional organizations that represent illustrators and artists, as set forth in Appendix A at App. 1; plus fifty nationally celebrated illustrators, cartoonists and artistic professionals, including four editorial cartoonists who have been awarded the Pulitzer Prize, as set forth in Appendix B at App. 8.

All of the *amici* represent working artists that strive to participate in the proven value of their works, despite the greater market power wielded by

institutional and corporate purchasers. The artists' ability to make effective use of the termination rights at issue in this case must be preserved as Congress intended, if they are to retain meaningful benefits from their copyrights.

SUMMARY OF THE ARGUMENT

In 1976, Congress extended the term of existing copyrights for an additional nineteen years and provided authors and designated heirs with the inalienable right to recapture for the extended term previously assigned copyrights. Counsel for the *amici*, Bruce Lehman and Ralph Oman, served as counsel to the Judiciary Committees of the House of Representatives and Senate, respectively, in crafting the legislative reports and official statements accompanying passage of that landmark legislation. As shown below, counsel have personal knowledge of Congress's intent that there be no exception to the inalienability of authors' termination rights. In 1998, Congress further extended the term of then existing copyrights for an additional twenty years; coupled this extension with a second termination right; additionally provided termination rights to the executor of an author's estate, and reiterated unambiguously that termination rights are inalienable.

It is under this specific statutory grant of authority that the petitioner in 2003 served a proper notice of termination regarding its co-authorship interest in Superman. But the decision of the Ninth Circuit eviscerated the petitioner's termination rights based on a contrived interpretation of state contract law and with little regard for the statute or Congress's intent.

The decision follows earlier decisions in the Ninth and Second Circuits, which erroneously substitute a state contract law analysis for the plain language of the pre-emptive Copyright Act. Given the concentration of copyright-based industries in these two circuits, their erroneous interpretation of 17 U.S.C. § 304(c)(5) gravely damages the copyright interests of the tens of thousands of authors, visual artists, illustrators, and cartoonists represented by the *amici.*

The federal legal issue presented has significant practical consequences as termination rights apply to all copyrighted works, except those "for hire," at a time when the value of our copyright industries (*e.g.*, software, entertainment) is at an all-time high. The decisions cause real uncertainty as to the copyright ownership of innumerable works and invite a multiplicity of lawsuits, chilling a key federal right designed to foster the creativity of authors, and in turn, our culture and economy.

Amici urge this Court to grant the petitioner's request for *certiorari* review and to reverse the decision below that strips the estate of Joseph Shuster—co-creator of one of the most iconic works of comic art and fiction in the twentieth century—of its statutory termination rights in spite of Congress's clear mandate to the contrary, and negatively affects thousands of similarly situated authors and artists represented by the *amici*.

ARGUMENT

I. THE DECISION THWARTS CONGRESS' EXPLICIT EFFORT TO ADDRESS AND PREVENT CONTRACTUAL RESTRICTIONS ON AN AUTHOR'S ABILITY TO RECAPUTURE HIS/HER COPYRIGHTS

As this Court has observed, "[t]he principal purpose of the amendments in [17 U.S.C. §] 304 was to provide added benefits to authors ….. The termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product." *Mills Music, Inc. v. Snyder et al.*, 469 U.S. 153, 172-73 (1985).

Section 304' s termination right was the most recent expression of more than a century of congressional intent. The 1909 Copyright Act provided an initial 28 year term with the right to renew for an additional 28 years. The renewal right specifically vested in authors and their families so that they "could not be deprived of this right." H.R. Rep. No. 60-2222, at 14 (1909).

However, as in the instant case, Congress's clear intent was undermined by judicial interpretation that the renewal copyright expectancy could be assigned anticipatorily and irrevocably to a publisher. *Fred Fisher Music Co., Inc. v. M. Witmark & Sons*, 318 U.S. 643 (1943). As a result authors and their heirs seldom had the chance to recapture earlier assigned copyrights because "publishers routinely required authors and their families to assign renewal rights in advance." Peter S. Mennell and David Nimmer, *Judicial*

Resistance to Copyright Law's Inalienable Right to Terminate Transfers, 33 Colum. J.L. & Arts 227, 227 (2009).

The 1909 Copyright Act was revised in 1976 after more than two decades of intensive study, largely conducted at Congress's direction, by the Copyright Office. The inability of authors and their heirs to take effective advantage of the renewal scheme was among the key issues examined by the Office, which submitted a comprehensive report to Congress in 1961 observing that "the reversionary feature of the present renewal system has largely failed to accomplish its primary purpose." Staff of H. Comm. on the Judiciary, 87TH Congr. Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 53 (Comm. Print 1961). The report specified, therefore, that "the renewal interest be made unassignable in advance" in any revision legislation. *Id.* at 53-54.

Amicus Ralph Oman's predecessors as Registers of Copyright – starting with Arthur Fisher, continuing with Abraham Kaminstein, and culminating with the legendary Barbara Ringer – all strongly supported the major reform in U.S. copyright law that would give authors a sacrosanct right of termination. In his 1965 Supplementary Report to Congress, the Register of Copyrights, Abraham Kaminstein, explained the debate: "Throughout the drafting phase of the revision program, the most explosive and difficult issue has been the problem [of]… 'protection of authors against unrenumerative transfers," … known generally as the "reversion problem.' Abraham Kamenstein, Supplementary Report of the Register of Copyrights on

the General Revision of the U.S. Copyright Law: 1965 Revision Bill, part 6 at 71 (1965) ("Kamenstein Report").

Because the termination right was intended to be bullet-proof, the publishers fought it at each stage of the debate, but ultimately lost the battle. They could not convince Congress to weaken the termination right, and its inalienability provision, § 304(c)(5), survived largely as originally drafted.

Still, in enacting its reforms, Congress did not deprive assignees of any rights they bargained for and owned. When Congress decided in 1976 to abolish the dual term system entirely for post-1977 works, it modified that system with respect to pre-existing works by extending copyrights in their renewal term by nineteen years for a total term of seventy-five years. This enabled Congress to remedy the inequity identified by the Copyright Office by enacting termination provisions applicable to the extended renewal period without adverse consequences to terminated copyright assignees that had relied on the Court's holding in *Fred Fisher*. Such assignees had no expectation of copyright exclusivity beyond fifty-six years; thus Congress gave the author and his or her statutory heirs the right to recapture the copyright for the nineteen year extension.

The 1976 Act provided that in the case of a deceased author, the termination right "is owned, and may be exercised by, his widow or her widower and his or her children or grandchildren." Pub. L. No. 94-553, § 304(c)(2), 90 Stat. 2574. Consistent with the Copyright Office's 1961 Report, this new termination right was specifically made inalienable in § 304(c)(5)

which stated that "[t]ermination … may be effected *notwithstanding any agreement to the contrary*, including an agreement to make a will or to make any future grant." 17 U.S.C. § 304(c)(5). 90 Stat. 2575 (Italics added).

The termination right was not an obscure provision that was snuck into the statute. It was the front-and-center subject of heated debate between opposing interests. Despite some changes to make the provision less onerous for publishers and movie studios (e.g., by requiring authors to give timely notice of intent to terminate assignments, instead of an automatic copyright reversion), the core of this authorial recapture right survived the legislative process. This would certainly not have been "the most explosive and difficult issue" in the reform legislation, if it could be so easily circumvented. Kamenstein Report, 1965 revision bill, part 6 at 71.

In 1998, Congress again extended the copyright term to harmonize U.S. law with evolving international law after the member states of the European Union collectively adopted a common copyright term spanning the life of the author plus seventy years. The Sonny Bono Copyright Term Extension Act (the "CTEA") matched the common European standard by extending U.S. copyright term for an additional twenty years, including all copyrights then currently in force.

As to this extended term, the CTEA continued Congress's policy of permitting authors and their statutorily defined heirs to recapture previously assigned copyrights. Furthermore, the CTEA expanded the class of those entitled to exercise the termination right to ensure widespread applicability of this

important remedial measure. For the first time, the CTEA granted the "author's entire termination interest" to an "author's executor, administrator, personal representative, or trustee" where there is no surviving spouse, child or grandchild. Pub. L. No. 105-298 § 103, 112 Stat. 2829.

The termination right was one of the five organizing principles of the 1976 Act: automatic copyright protection from the moment a work is fixed in a tangible medium of expression, broad coverage of subject matter, the unitary term (life of the author plus fifty years), the sweeping exclusive rights, and the inalienable termination right. On this sturdy armature, Congress built a regime of authors' rights that gives them a chance to reap a fair reward from the fruits of their labor and creativity. Over two decades later, Congress, in the 1998 CTEA, not only reaffirmed its dedication to the termination rights scheme and the rights' fundamental inalienabilty, it expanded its operation.

II. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT DEFIES THE COPYRIGHT ACT AND ENABLES EASY CIRCUMVENTION OF THE TERMINATION RIGHT

A. The Decision Defies the Copyright Act

Jerry Siegel and Joe Shuster's "Superman" is one of the most iconic and lucrative characters in the world. It provided, even in 1976, a visible example of a work of authorship, sold for a pittance ($130); and then generating millions for the publisher, while the authors are denied any ability to participate in the success of

their creation. In this light, the Ninth Circuit's decision is even more egregious. It not only blindly disregarded the express purpose of the termination right, but also defeated the provision specifically enacted to protect the termination interest of artists like Joe Shuster.

Joe Shuster co-authored Superman in 1934 and in 1938 assigned his copyrights to respondent's predecessor. It is undisputed that prior to the petitioner's service in 2003 of a notice of termination the respondent owned the copyrights in Shuster's work outright. The instant case concerns the right of the petitioner, as executor of the Shuster estate, to exercise its right to terminate Shuster's 1938 assignment pursuant to 17 U.S.C. § 304(d) and § 304(c)(2)(D). The statue gives such terminations priority over any pre-existing contractual agreements in plain language, unequivocally stating that "[t]ermination … may be effected *notwithstanding any agreement to the contrary* [.]" (Italics supplied.). 17 U.S.C. § 304(c)(5).

The Court of Appeals disregarded the plain text and purpose of the statute by giving precedence to a mere pension agreement made in 1992 between DC Comics and Shuster's two siblings settling "all claims to any payments or other rights …" which the siblings "may have … now or hereafter … in any and all work created by … [their] brother, Joseph Shuster, or any works based thereon." *DC Comics v. Pacific Pictures Corp.*, 2012 WL 4936588 (C.D. Cal. 2012).

Even if the termination right were not inalienable as plainly indicated in the statue, at the time of executing this agreement Shuster's siblings did not have the right to terminate earlier transfers of copyrights in their brother's works. In 1992, the right

to terminate prior copyright assignments of a dead author was limited to the author's surviving spouse, children, and grandchildren. 17 U.S.C. § 304(c)(2). Siblings were not and have never been included. *Id*. Since Shuster never married and had no children, no one held termination rights regarding his works in 1992.

In 1998 the CTEA extended the termination right for the first time to "the author's executor, administrator, personal representative, or trustee" where there is no surviving spouse, children, or grandchildren, in which case such person "shall own the author's entire termination interest." 17 U.S.C. § 304(c)(2)(D). Therefore, it was and has never been within the power of Shuster's siblings to contract away the termination interest directly or indirectly.

The Ninth Circuit's interpretation of the statute defies it. Congress carefully considered the termination regime, but the decision completely ignored its explicit text and policy objectives by permitting unintended third parties to disenfranchise the intended beneficiaries of the statute.

B. The Decision Manipulates State Contract Law To Preempt a Federal Right

The decision below follows a misinterpretation of the Copyright Act that is already entrenched in the Ninth Circuit in *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005) and the Second Circuit in *Penguin Group (USA), Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008).

The Ninth Circuit's refusal to give effect to petitioner's termination rights in the instant case is

based entirely on the theory that such rights can be effectively contracted away irrespective of the explicit statutory prohibition in 17 U.S.C. § 304(c)(5) that "[t]ermination … may be effected notwithstanding any agreement to the contrary[.]" In applying state contract law to eliminate the termination right the court of appeals all but disregarded the direct command of a federally pre-emptive statute enacted to carry out the purposes of Article I, Section 8, of the Constitution.

The Ninth Circuit's disregard of the explicit inalienability of petitioner's termination right follows its holding in an earlier termination rights case, *Milne, supra.* That case involved the attempt by Clare Milne to statutorily terminate the prior copyright transfers by her grandfather A.A. Milne of his *Winnie-The-Pooh* stories. Years earlier, a family trust that owned the copyrights by bequest had entered into a contract with the publisher revoking the author's terminable pre-1978 copyright transfers and reassigning his copyrights in a non-terminable post-1977 grant—all for the express purpose of eliminating the termination rights of the author's statutory heirs. *Milne,* 430 F.3d at 1040. In return for this agreement the Milne Trust received very significant compensation.

The court of appeals reasoned that even though this agreement eliminated the termination right it was not an "agreement to the contrary" prohibited by the statute, but a valid contractual "alternative" because the Trust had used the current termination right of Milne's son, Christopher, as leverage to arrive at the bargain. *Id*. at 1045-1046. Undoubtedly, this holding was an attempt by the court to prevent the perceived injustice of allowing a member of the Milne family who

ostensibly benefitted from the Trust to later rely on the inalienability of the termination right. In reality, however, the parties could have simply adhered to the statute by serving a termination notice followed by a new license to the original licensee. 17 U.S.C. § 304(c)(6)(D). Regrettably, the tens of thousands of authors like *amici* now face the consequences of the Ninth Circuit's attempt to save one publisher from the consequences of an ill-advised deal, rather than enforce a statute intended to resolve much larger problems.

Unfortunately, the Second Circuit, the other jurisdiction primarily responsible for the jurisprudence governing the nation's copyright industries, followed the mistaken *Milne* decision in the *Steinbeck* case.

In 1994, John Steinbeck's second wife and widow, who owned her husband's copyrights by bequest, entered into an agreement which rescinded a 1938 copyright license by Steinbeck to a publisher and re-licensed the same copyrights to the publisher for an increased royalty and guaranteed advance above that in the 1938 contract. Neither of the author's surviving sons from his prior marriage were parties to this agreement. Under § 304(c), however, the sons held termination rights. Subsequently, one son and the surviving daughter of the other son (deceased) served the publisher with notice of termination. The district court correctly held that to the extent the widow's 1994 revocation and re-grant of rights operated to divest the author's son and granddaughter of their statutory termination rights, it was void as "an agreement to the contrary" under § 304(c)(5) of the Copyright Act. *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 402 (S.D.N.Y. 2006).

On appeal, the Second Circuit reversed on similar grounds to those relied on by the Ninth Circuit in *Milne*, holding that the 1994 Agreement expressly superseded the 1938 agreement and as such, there was no pre-1977 copyright grant to terminate. *Steinbeck*, 537 F.3d at 202. Following *Milne*, it held that the purpose of the statute was satisfied because Steinbeck's widow had used her putative termination right as bargaining power to renegotiate the original author-publisher agreement, at the expense of the statutory rights of the author's son and granddaughter. *Id*.

The instant case which relied on *Milne* and *Steinbeck* could not be more dissimilar, and thus demonstrates the grave problems which ensue when the lower courts substitute their own beliefs and policy rationalizations for the balanced judgments of Congress and fail to enforce the unmistakably plain language of a statute. The separation of powers bars courts from undermining legislative decisions as was done here. "[I]n our constitutional system the commitment to the separation of powers is too fundamental for [courts] to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 195 (1978). This deference applies with equal force to copyright law. *Eldred v. Ashcroft*, 537 U.S. 186, 212-13 (2003). In this case, it belies all belief that a modest pension agreement with relatives of the author, who held no rights in Superman, could be construed to block the explicitly inalienable and extremely valuable statutory termination right of the author's lawfully designated

executor, in whom Congress specifically vested that right.

This decision and those it relied upon thwart Congress's objective to safeguard the authorial termination right and invite all kinds of opportunistic conduct by grantees to circumvent it. These decisions undermine Congress's intent to relieve authors from unremunerative transfers so that they and their statutory heirs could finally participate in the proven value of their creations. They provide an easy road map for publishers, that can expend their superior resources to anticipatorily block termination without having to provide adequate benefits to authors and their families, easily defeating Congress's objectives and divesting the Act's intended beneficiaries. They encourage grantees to simply re-do pre-1978 copyright grants with self-interested copyright owners or successors (e.g., a middleman), who stand to lose from the exercise of statutory termination, or, as here, to make after-the-fact contract claims that this was their supposed intention.

This reverses Congress's intent, and provides a windfall to publishers and copyright successors, in the form of the extended renewal term, at the direct expense of the intended beneficiaries of the Copyright Act's termination right. Publishers would need only enter into or find some post-1977 document with general release language, as in this case, or some adjustment to a term(s) of a pre-1978 grant and claim that this non-terminable agreement "supersedes" or "novates" the pre-1978 grant. Authors and their families who dare to exercise the termination right will face ever-more protracted courtroom battles,

perpetuating the very author-publisher imbalance Congress expressly sought to remedy.

It is well known that the concentration of the media and publishing industries within the Ninth and Second Circuits gives them disproportional power in interpreting the Copyright Act. In the instant case two judges of a Ninth Circuit panel (Reinhardt, J., Sedwick, D.J.) enshrine a precedent that eviscerates a policy objective Congress has pursued for over a century.

III. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE BECAUSE AT STAKE ARE THE STATUTORY RIGHTS OF THOUSANDS OF AUTHORS AND ARTISTS

Amici believe that without this Court's intervention these decisions mark the death of the termination right by allowing it to be easily circumvented. In fact, the decisions provide a roadmap and effectively gut any meaningful ability of the tens of thousands of artists and authors represented by *amici* to avail themselves of the statutory benefits Congress bestowed on them. They substitute Congress's clear articulation in the Copyright Act with interpretations of state contract law under which "any agreement to the contrary," apparently means "some agreements to the contrary" depending on the court's particular policy views.

Under *Milne* and *Steinbeck*, courts must not only apply state law to determine whether a pre-1978 copyright grant was impliedly superseded, but also determine whether the re-grantor possessed termination rights that could currently or soon be exercised, and whether such rights had in fact been used as bargaining leverage, and were exchanged for adequate

compensation. In this case, the Ninth Circuit disregarded even that. It hastily disposed of the Shuster estate's statutory termination rights by reading an "implied novation" of Shuster's original copyright grants, under purported New York law, into an irrelevant 1992 pension agreement between DC Comics and Shuster's siblings who lacked the legal authority to do so. Their half-page agreement neither mentioned Superman nor identified the original copyright grants it supposedly extinguished. The court of appeals accomplished all this inferentially, and on DC Comics's motion for summary judgment no less, in a perfunctory opinion which divested the Shuster estate of intellectual property worth hundreds of millions of dollars. In a word, the decision is outrageous.

Almost as troubling was the Ninth Circuit's apparent endorsement of this decision by swift denial of the Shuster estate's petition for rehearing en banc, even though the decision concerned important Ninth Circuit precedents and had been rendered over a dissent by Judge Thomas who unsurprisingly arrived at the opposite conclusion, while still focused on state law rather than the Copyright Act and the federal questions at issue.

None of these state-law inquiries into contractual machinations is a proper substitute for federal copyright law or a reliable method of determining a federal property right. If federal law can be avoided "by ad hoc accommodation" of the contract laws "of every State, then the scope of federal regulatory power would vary in accordance with the kaleidoscopic variations of local contract law." *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 98 (1963).

The need for national uniformity in our copyright laws and certainty as to copyright ownership is particularly acute given the tremendous economic importance of our copyright-driven industries (e.g., computer software, movies, television, music, videogames, publishing).

Furthermore, federal copyright law is designed to enrich our culture and our economy by providing financial incentives for authors to create new works. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [Copyright] clause … is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors [] in '[] useful Arts.'"); *see also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). By allowing the remedial termination right to be easily circumvented, and injecting great confusion and uncertainty into the law, the decisions frustrate this fundamental objective.

Absent faithful interpretation of the Copyright Act, and a clear statement of the law from this Court, litigation in this area will increase significantly, given that the Act's termination rights apply to hundreds of thousands of works, many of which have significant economic value. In light of the flexible contractual dodge endorsed by the Ninth and Second Circuits, which hold a near monopoly on copyright decisions, protracted litigation is almost certain to follow any notice of termination regarding a significant work, chilling the exercise of this important federal right. This not only harms the thousands of authors represented by the *amici* but is to the detriment of the millions who rely on a robust commercial environment

that maximizes the ability of artists and authors to paint, draw and write for the enrichment of all.

IV. CONCLUSION

The termination right is one of the five defining features of the Copyright Act and for copyrighted works created before January 1, 1978, it was designed to cover both the 19-year and 20-year extensions of the copyright renewal term under the 1976 Act, and the CTEA, respectively. *Amici* are astounded that both the Second Circuit and the Ninth Circuit—despite the unambiguous language of the statute, the explicit explanations provided by the House and Senate Reports, and the cumulative weight of it 20-year legislative history—could brush aside this potent statutory trail and divine enough wiggle room to summarily deny the timely exercise of an author's termination right. There is no wiggle room in the statute. Under Section 304, an author, his statutory heirs and estate enjoy an un-waivable right to terminate prior copyright assignments.

The artists and authors represented by the *amici* are irreparably harmed by the erroneous precedents expanded by the decision below. The lower courts disregard for the statute leaves *amici* particularly vulnerable to the unequal bargaining power the termination regime was intended to ameliorate. This Court should exercise its authority to ensure uniform application of the Copyright Act's explicitly inalienable termination right and to prevent its defiant erosion by the lower courts.

Respectfully submitted,

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APPENDIX

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APPENDIX A

This *amicus* brief is joined by the following organizations:

National Cartoonists Society (NCS)

NCS is the world's largest and most prestigious organization of professional cartoonists. The NCS membership roster includes over 500 of the world's major cartoonists working in many branches of the profession, including newspaper comic strips and panels, comic books, editorial cartoons, animation, book illustration, and more. NCS' primary purposes are to elevate the ideals and standards of professional cartooning in its many forms; foster a social , cultural and intellectual interchange among professional cartoonists; and stimulate recognition and appreciation of the art of cartooning by the general public.

Association of American Editorial Cartoonists (AAEC)

AAEC is a professional association formed to promote the interests of staff, freelance and student editorial cartoonists in the United States. AAEC fosters communication and networking year-round and its annual convention allows member cartoonists to consider issues through panel discussions and guest speakers. AAEC also sponsors a "Cartoons for the Classroom" program designed to aid educators at all levels in teaching history, economics, social studies and current events.

Illustrators Partnership of America (IPA)

IPA launched in 1998 to establish a national network of freelance illustrators that could join in promoting long-term professional and economic interests unique to their occupation. IPA's primary purposes are to advise illustrators on the protection and management of their intellectual property rights, including opportunities afforded by emerging technology and secondary markets; define and uphold professional standards among illustrators to protect against unfair business practices; and promote the awareness and exhibition of illustration as an art form. Since its grassroots inception, the IPA has preserved the integrity of the craft and effected positive change to help artists compete in a rapidly changing business and technological environment. In 2007, the IPA expanded their efforts by initiating the American Society of Illustrators Partnership.

American Society of Architectural Illustrators (ASAI)

The American Society of Architectural Illustrators (ASAI) was founded in 1986 as a professional organization to represent the business and artistic interests of architectural illustrators throughout North America, and now includes over 450 practitioners worldwide among a total of eighteen countries. The Society's principal mandate was and remains the fostering a professional community and network, raising standards of architectural drawing, and educating the broader public about the important use of architectural illustration as a conceptual tool. The Society also assists in the advancement of the art and profession in a number of significant ways: as a referral

agency for those seeking the services of a perspectivist, as a clearing-house for ideas and discussions about architectural illustration, and a sponsor of regional and local member activities. ASAI members have authored and contributed to numerous sourcebooks and reference publications during its history. By promoting the highest achievements in the illustration of our built environment, ASAI and its dedicated, passionate members continue to further the quality of the work, to benefit enthusiasts of architectural illustration and its end, architectu

Association of Medical Illustrators (AMI)

Since its establishment in 1945, AMI has codified the medical illustrating profession by accrediting graduate programs using a rigorous set of academic standards and guidelines; establishing a scholarly journal to disseminate knowledge and skills; and launching a board certification program. Medical illustrators are highly specialized visual artists that apply their interdisciplinary skills to further medical and scientific understanding for purposes of teaching, research, marketing, or demonstrative evidence in the courtroom. They have graduate level training or higher and possess dual skills in science and visual communication. Scientific and medical concepts are taught visually, and the diverse expertise of medical illustrators using a wide variety of media makes it possible to convey complex aspects of anatomy, biology and related scientific disciplines. As creators of original work that they may assign, the members of AMI have a direct interest in the realization of Congress' objectives regarding the termination right.

Guild of Natural Science Illustrators (GNSI)

The Guild of Natural Science Illustrators, Inc. is an international non-profit organization comprised of individuals in the field of natural science illustration. The Guild connects individuals in the field, assists those with the desire and ability to enter the profession and promotes better understanding of the profession to the general public and prospective clients. From its inception in 1968, the Guild has had the support of the National Museum of Natural History, Smithsonian Institution. Membership has burgeoned to nine hundred fifty-three members representing individuals living in all fifty states, the District of Columbia, Puerto Rico and twenty-three foreign countries. Much of the work created by natural science illustrators is published in books, journals, and magazines but is also utilized in other venues such as museum exhibitions and the internet.

American Society of Aviation Artists (ASAA)

ASAA is a non-profit organization that allows members to share special aviation knowledge and traditional artistic processes necessary to the creation, improvement and public appreciation of aviation art. Since its incorporation in 1986, ASAA has pursued its mission of connecting aviation and aerospace artists in an effort to accurate and artistically creative representation of the machines, events, and people involved in the history of flight and the premiere technology of our time.. Aviation and aerospace art necessitate high standards of excellence and ASAA has fulfilled that need through its annual exhibitions and forums, regional meetings, scholarship programs, a

quarterly journal, and of course, the member networking that a professional art society provides.

San Francisco Society of Illustrators (SFSI)

Established in 1961, The San Francisco Society of Illustrators promotes illustration, encourages independence, fair practices and personal artistic excellence as its goals. For several decades, SFSI members have participated in the US Air Force Documentary Art Program and the National Parks Art Program, resulting in several works now permanently on display at the Department of the Interior in Washington DC.. SFSI members have also been involved with the National Aeronautics and Space Administration in documenting various NASA activities. Today many of the members are known nationally for their illustrations, which appear throughout the country in books, periodicals, postage stamps, advertisements, publications, television and film.

The Illustrators Club of Washington DC, Maryland and Virginia (IC)

IC is a non-profit, all-volunteer trade association dedicated to promoting the art and business of illustration since 1986. IC's membership network includes professional illustrators, graphic designers, educators, students, vendors and related businesses. IC provides a broad palette of resources, programs and opportunities to educate and benefit members, art buyers and the general public. The club strives to protect the rights and interests of all members, while maintaining high standards and encouraging fair

business practices throughout the graphic arts community.

Pittsburgh Society of Illustrators (PSI)

Formed in 1996 as a social and business networking outlet for free-lance illustrators, PSI quickly morphed into a sophisticated trade organization with the aim of achieving closer social and professional contact among local illustrators; cultivating and strengthening the profile of the illustration art form in the Pittsburgh region by exhibiting and promoting members' work of the highest aesthetic caliber; acquainting Pittsburgh art patrons with members' work; hosting visiting illustrators, lecturers, and teachers; and fundraising and donating (including but not limited to scholarships) to worthy and needful college age art and design students pursuing the illustration craft.

Society of Illustrators Los Angeles (SILA)

The Society of Illustrators of Los Angeles was founded in 1953 to promote the professional status of illustration as well as foster philanthropic and educational goals. From this small beginning it has grown to a very productive membership whose work is seen nationally by millions each year via all printed media, television, films, the Internet and gallery exhibitions. SILA has close to 200 members and is firmly established as the major professional art entity on the West coast, providing significant contribution to the vitality of the community as well as the nation.

The Society of Illustrators San Diego (SISD)

The Society of Illustrators San Diego was formed in 1989 to promote awareness and abilities, to network

among each other and with professionals in related fields, to create programs and activities for educational growth, and to provide social interaction for people who share similar experiences and interests. SISD provides a forum for guest speakers to show their work, talk about their experiences as a professional illustrator, and demonstrate their style and techniques. Additionally, SISD assists members with the business side of illustration, by offering pricing sessions, panel discussions on illustration buying and marketing; and lectures covering future illustration trends.

APPENDIX B

The following illustrators, cartoonists, and artistic professionals individually joined this *amicus* brief to show their support:

Clay Bennett
Five-time Recipient of the Pulitzer Prize for editorial cartooning, two-time recipient of the United Nations Political Cartoon Award, and recipient of the RFK Journalism Award, Sigma Delta Chi Award, the National Journalism Award, the National Cartoonist Society's Award for Editorial Cartoons, the John Fischetti Award, the Overseas Press Club Award, and the National Headliner Award, Mr. Bennett has earned almost every honor his profession has to offer. Mr. Bennet is a former president of the Association of American Editorial Cartoonists and his work is syndicated internationally.

Mike Peters
Pulitzer Prize winning editorial cartoonist and Sigma Chi Hall of Fame inductee, Mr. Peters is also the creator of the comic strip *Mother Goose Grim*, which is syndicated in 500 newspapers with an estimated daily readership of 100 million. Mr. Peters is also the recipient of National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year, the RFK Journalism Award, the Overseas Press Club Award, and numerous other distinctions.

Mark Fiore
Pulitzer Prize-winning political cartoonist, recipient of the RFK Journalism Award, and Society of Professional Journalists' James Madison Freedom of Information Award, Mr. Fiore was referred to as "the undisputed

guru of the form" by the Wall Street Journal. His work has been featured on the San Francisco Chronicle's web site for over ten years as well as on websites for Newsweek, Slate, CBS News, Mother Jones and NPR. Fiore's political animation has been featured on CNN, Frontline, and cable and broadcast outlets across the globe.

Nick Anderson
Pulitzer Prize-winning editorial cartoonist currently at the Houston Chronicle and syndicated in over one hundred newspapers, Mr. Anderson is also the recipient of the Society of Professional Journalists' Sigma Delta Chi Award, the National Press Foundation's Berryman Award, and the Charles M. Schulz Award for best college cartoonist in the United States.

Liza Donnelly
Award-winning and internationally celebrated cartoonist at The New Yorker Magazine for over 30 years, author of fifteen books, and a Cultural Envoy for the US State Department where she travels around the world speaking about freedom of speech, cartoons and women's rights.

Hilary Price
Creator of the nationally-syndicated comic strip *Rhymes with Orange* and three-time recipient of the Best Newspaper Panel Cartoon Award from the National Cartoonists Society.

Pat Brady
Creator of nationally syndicated comic strip *Rose is Rose* and recipient of the National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year.

Brian Crane
Cartoonist for nationally syndicated comic strip *Pickles* and recipient of the National Cartoonists Society Reuben award for Outstanding Cartoonist of the Year.

Bill Griffith
Creator of comic strip *Zippy*, currently syndicated in more than 100 newspapers.

Sergio Aragones
Cartoonist for Mad Magazine, creator of comic book *Groo the Wanderer*, and nine-time recipient of the Harvey Award for Humor.

Mason Mastroianni
Cartoonist for internationally syndicated comic strip *B.C.* and grandson of the comic's creator, Johnny Hart.

Rob Rogers, Pulitzer Prize finalist and editorial cartoonist for Pittsburgh Post-Gazette.

Mark Parisi, Cartoonist for nationally-syndicated comic strip *Off The Mark* and two-time recipient of the National Cartoonists Society Best Newspaper Comic Panel.

Bill Morrison, Comic Book Editor for *The Simpsons* and the Walt Disney Co..

John Kovaleski, Artist for Mad Magazine.

Michale Jantze, Cartoonist for syndicated comic strip *The Norm.*

Terri Libenson, Cartoonist for syndicated comic strip, *The Pajama Diaries.*

Daniel Beyer, Cartoonist for syndicated comic strip, *Long Story Short.*

Jem Sullivan, Cartoonist for Hallmark Greeting Card.

Jan Elliot, Cartoonist for comic strip *Stone Soup.*

Oliver Simonsen, Animator for the feature film *Cerebus the Aardvark.*

J. David Spurlock, Artist-writer-creator of *The Space Cowboy* and *The Edge.*

Dave Blazek, Creator of *Loose Parts* and *Biz.*

Ed Siemienkowicz, Creator of comic book *Chrome and Dust***.**

John Lotshaw, Creator of web-comic *Accidental Centaurs.*

David Lawrence, Editor at Red Giant Comics.

Arlen Schumer, Author of *The Silver Age of Comic Books*.

Steve Conley, Author of *Bloop* and *Astounding Space Thrills.*

Tim Mellish, Artist of comic *Truth be Known.*

John Patrick Auchter, Creator of *Everyday People* and *Auchtoon.*

Dan Thompson, Artist for comic strip *Rip Haywire.*

Donna A. Lewis, Cartoonist for comic strip *Reply All.*

Norm Feuti, Cartoonist for comic strip *Retail.*

Mary Peaco Todd, Cartoonist and author.

Steven Brower, Author, comic historian, designer, and illustrator.

Derf Backderf, Cartoonist, graphic novelist.

Bob Englehart, Editorial Cartoonist.

Daryl Cagle, Editorial Cartoonist.

James E. Lyle, Comic book artist and illustrator.

Dan Collins, Cartoonist.

Mike Lynch, Cartoonist.

Michael Pohrer, Cartoonist**.**

Richard A. Braley, Cartoonist.

William Carr, Cartoonist.

Stacy Curtis, Illustrator.

Bucky Jones, Illustrator.

Janee Trasler, Illustrator.

Ed Steckly, Illustrator.

Mark Brewer, Illustrator.