

September 18, 2018

Notice of Proposed Rulemaking:
Copyright Office Proposes New Fee Schedule
37 CFR Part 201 [Docket No. 2018-4]

COMMENTS OF THE ASSOCIATION OF MEDICAL ILLUSTRATORS (AMI)

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About the Association of Medical Illustrators (AMI)

Established in 1945, AMI is the sole professional organization for medical illustrators and animators. Without exception every member is an author of copyrighted works and the licensing of such works, whether directly by them or by an institution employing them, is their primary source of income. In the case of freelance illustrators, it is their only source of income. These professionals, whether they are running small businesses as sole proprietors or studios, or are employees, have graduate level training or higher in science and visual communication, including advanced courses in human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

These highly accomplished visual artists are scientific partners in the leading edge of advances in medicine as well as new techniques of illustration, such as those associated with advances in software and digital technology. Such technology includes animation, 3D modeling and augmented reality, medical models and medical simulation, novel molecular visualization, prosthetics and anaplastology as well as stand-alone illustration created by hand and also incorporating digital biologic data.

Copyright Registration and the Associated Fees are of Vital Interest to AMI Members

Except for the minority who are salaried employees of hospitals and research organizations, medical illustrators work as independent contractors whose income derives solely from licensing their right of reproduction to those who commission their works. Copyright registration is a prerequisite for all medical illustrators when they find it necessary to protect themselves from unauthorized use of their works by initiating infringement actions. Therefore, the burden and cost of registration of works at the United States Copyright Office is of paramount importance to AMI's illustrator members.

AMI recognizes that the current rulemaking is narrow in focus in that it is limited to adjusting the current schedule of Copyright Office Fees. However, these comments go beyond that narrow focus in that AMI views it as an opportunity to create a public record not only of its concerns with the proposed fee schedule, but also as an opportunity to bring to the attention of the Office related issues which AMI believes worthy of further study and consideration.

The Booz Allen Hamilton Report is Not Credible

The fee schedule set forth in May 24, 2018 Federal Register Notice is based on the *2017 Fee Study Report* prepared for the Copyright Office by the consulting firm, Booz Allen Hamilton. First among the “fee setting objectives” set forth in the study is a description of the value of registration to the Library of Congress. Section 2.1 in the report states:

“Because of the copyright registration system, the Library of Congress can collect books, movies and other items it would otherwise have to purchase.... Without the copyright system, the Library would have had to purchase these millions of dollars’ worth of material on their own.”

AMI believes that any report based on the above quoted “fee setting” objective is inherently flawed; therefore, its recommendations lack credibility. The nation’s founders made no mention of saving money for a national library when they authorized Congress to grant exclusive rights to authors and inventors in clause 8 of section 8 of its powers as enumerated in the Constitution. The Congress’s power to collect taxes to fund government activities is found in section clause 1 of section 8 and has no relationship to the Copyright Clause. That funding the collections of the Library of Congress should be listed as the first justification for registration fees and deposits imposed on authors attests to the inherent bias of Booz Allen Hamilton’s work. Clearly, the author had vested interest in perpetuating this misunderstanding of the constitutional scheme underlying the law. The Report’s bias points to the need for an independent Copyright Office that serves the interests of U.S. copyright owners not the Library of Congress.

Authors Should Not Have to Pay for Examinations of Applications or Databases Created for Searches

At least half or more of the Copyright Office budget is spent on “examinations” of applications for registration. Section 410 (a) of the Copyright Act states that the Register of Copyrights can issue a certificate of registration upon a determination that “the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements have been met.” This statutory mandate is the basis for the examination function.

In contrast to patents, a valid copyright subsists from the initial fixation of a work of authorship in a tangible medium of expression. Therefore, examination is unnecessary to confer exclusive rights to the author. As the statute recognizes, examination only relates to *registration*. While examination is inherent in the patent system, it has little practical utility in the copyright system. For the most part, it simply is a way to assure that works that are more appropriate to patent or trademark protection or are entitled to no protection at all are weeded out and not included in the registry. No other country in the world has found this limited utility to justify the costs of an examination bureaucracy.

AMI would prefer that the United States join the rest of the world in abandoning all formalities that impede its members’ ability to inexpensively enjoy the benefits of their exclusive rights. To the extent that any individual or entity attempts to bring an infringement action based on non-copyrightable subject matter, the issue can easily be dealt with upon a summary judgment determination of the District Court. And, that is already the case, since an infringement action can still be initiated even if the Office refuses registration of an application. All that is required to get into court is having tried to register. In such cases, which are very rare, the court will make the copyrightable subject matter determination anyway.

AMI recognizes that the financial burden the examination function imposes on the Copyright Office is the result of a statutory mandate and is not subject to the discretion of the Register. However, that does not mean that the examination function should be supported by fees imposed on authors. If Congress elects to impose the burden of examination on the Copyright Office, that function should be supported by

appropriated tax revenue, not fees. Were it clear that taxpayer dollars are necessary to support the examination function, Congress might have a stronger incentive to reconsider the statutory foundation for examination and seriously consider the question of whether it is necessary to safeguard any public interest.

In contrast to the Copyright Office, the U.S. Patent and Trademark Office is entirely funded by user fees. This is appropriate because the statutory tests that must be met for an inventor to obtain a patent require a complex examination of the prior art. A patent cannot issue until these tests have been met. By contrast, since 1978, copyright in a work of authorship comes into existence the moment it is fixed in a tangible medium of expression. No examination or other formality is required, therefore, there is no justification for a “user fee” to be imposed upon an author. To the extent that a registry of published works under copyright is of value that value is only to someone seeking to obtain information from the registry’s database. Therefore, if the Copyright Office is to be funded from user fees instead of or in addition to appropriated tax revenue the fees should be imposed upon those seeking the data, not from the author who has no need of a registry to enjoy copyright protection.

The Unfair Burden of Registration on Medical Illustrators and Other Commercial Artists

The Booz Allen Hamilton report also justifies the increase of fees on the grounds that “the Office’s public record of copyright ownership and status is critical to facilitating marketplace transactions and encouraging innovation and creativity.” This is an assertion for which there is no empirical evidence. There is no explanation of how Copyright Office records play any role whatever in “marketplace transactions,” much less “encouraging innovation and creativity.” In fact, AMI’s research indicates otherwise.

Were the registration system to provide complete and electronically accessible records of all copyright ownership and the contact information necessary to license registered works, the Booz Hamilton assertion that it is meaningful in “facilitating marketplace transactions” might be supportable. Regrettably, that is not the case. As the Federal Register notice observes, “the Office’s primary services – including registration and recordation – are mostly voluntary....” Therefore, “demand for these services is *elastic*,” meaning that the burden of fees inherently discourages authors from registering and, therefore, disincentivizes author participation in creating a database of copyright ownership that would have practical value in market place licensing transactions. The result is that there is no practicably usable record of works protected by copyright because the complexities and cost of registration discourage registration. Even the current fee level discourages many AMI members from undertaking the burden of registration. A 2014 survey of AMI members revealed that 53% of respondents *never* register copyrights. Therefore, in the field of medical illustration the current registration system provides no commercially meaningful database of copyright ownership information. And, the proposed *increase* in registration fees will further disincentivize such contributions.

Fees Are Not the Only Disincentives to Registering

As discussed above, more than half of AMI members never register their works, even at the current fee level. In part because compared to many other types of authors, visual artists are exceedingly prolific. Their income is highly dependent on the volume of the works they create for clients. Under the current office rules, they may register only by means of a Single Application or a Standard Application. There is no Group Registration option for works of visual art or animation. AMI members who undertake the burden of registration frequently must register hundreds of works each year. If they use the Single Application, they must fill out forms and pay a fee on a per work basis. To cut down on digital paperwork and lower fees they often use the Standard Application to register multiple works as a “collection.” However, registering works as part of a collection will expose them to the possibility that statutory

damages for infringement of a single work from the collection will be prorated, thus eliminating the deterrent effect on infringers that statutory damages are meant to provide.

Most AMI members who elect to register their works do so themselves without benefit of an attorney or other third party. The burden of registration of hundreds of works seriously cuts into the time they need to create new works and to handle all the other necessary business activities of a sole proprietor working alone. This discourages use of the registration system.

Further, the complexity of the electronic registration forms makes it easy to make mistakes that can inhibit illustrators' ability to enforce compliance with their rights later in infringement litigation. For example, they must be careful to make sure that the title of the work registered matches verbatim the title of the file of the accompanying image they upload. They must be careful to accurately supply the publication date of the work being registered. AMI members are artists, not copyright lawyers. Therefore, it can be difficult to be accurate about matters such as publication date. Is it the date a single copy of the work is delivered to the client? Or, is it the date the work is licensed? Publication is interpreted from the express or implied authorization of the author, so it is necessary for the artist to be clear on a license as to what he or she is authorizing. They must provide the correct answer as to whether the work is made for hire or not. They must make sure that they properly identify the author. If the work is attributed to a pseudonym they must be careful to check the box for pseudonymous works. This can be confusing for a married woman who works under her maiden name rather than her legally changed married name. They must be clear about who is the "claimant" if they are transferring ownership of the copyright. And, they must be careful to be accurate about any limitations of their claim and excluded elements such as pre-existing material or derivatives.

The twin burdens of large fees for multiple registrations and the complexity of registration forms discourage use of the registration system thereby lowering the total amount of the Office's fee collections. The result is that the objective of the Copyright system – incenting creativity by providing the economic reward of exclusive rights – is not being met.

The Deposit Requirement

As discussed above, AMI takes issue with the Booz Allen Hamilton assumption that contributing to the collections of the Library of Congress has any relationship to the purposes of the copyright law.

The deposit requirement, particularly as it relates to digital deposits, also exposes an artist to infringement risk. When deposits are submitted in digital format they can be instantly copied. There is a risk that third parties will gain access to the digitized images and copy them without permission. For this reason, AMI believes that graphic works of art should be exempted from the deposit requirement. While this is not directly related to the current request for comments on the fee schedule, there is a relationship.

Copyright Office policy is to discard deposit copies 20 years after registration even though the copyright in the works will continue in force many decades longer. This again brings into question whether deposit is an appropriate formality under the copyright law. From the point of view of illustrators, the only value a deposit can have is as proof of the original work in an action against an infringer. However, there is no such value when the infringement litigation takes place after the deposit has been discarded. Currently, the only way artists can have the Office retain physical deposits for litigation purposes after 20 years is to pay a \$540 fee for retention of the deposit for the full term of the copyright. The justification for this fee is that it is needed to cover storage costs. The proposed fee schedule establishes a new fee of \$220 for full term retention of digital deposits. Presumably this is only now relevant because 20 years ago the Office had only begun accepting digital deposits. AMI assumes that retention of physical deposits requires the

Office to pay rent and maintenance costs for warehouse facilities. However, digital copies are kept in a server, on the cloud or in a disk drive where there are no comparable costs. The Federal Register notice setting forth this new fee does not provide any explanation of what these digital retention costs are. In the absence of a persuasive explanation, AMI objects to this new fee.

The New Fee Schedule Does Not Consider Ability to Pay

As noted above the majority of AMI members never register. If the Copyright Office is ever to have a complete database of works of medical illustration and works of other visual artists, this will have to change. Clearly, it will not change by raising fees for registration of works of visual art as the new fee schedule proposes. If the Office is to increase the percentage of works created that are also registered it should cut fees instead of raising them.

One way to do this without increasing the taxpayers' contribution to Copyright Office costs is to assess fees using a methodology that takes into consideration both abilities to pay and the relative monetary value of the works being registered. Currently, the fee to register a blockbuster Hollywood film is the same as an AMI member pays to register a single illustration. AMI considers this to be grossly inequitable. This is particularly disappointing given the fact that Section 708 (a) of the Copyright Act requires that fees "be *fair and equitable* given the objectives of the copyright system." (Italics supplied.) To some extent the Copyright Act itself perpetuates an inequitable system. Each year the Office collects and distributes hundreds of millions of dollars of statutory royalties on behalf of some of the deepest pockets in U.S. industry. Yet, fees for administering statutory licenses are capped at 50% of costs. And, the Office has yet to meet even this threshold in its fee structure.

Furthermore, AMI members experience with the Copyright Office gives them little confidence that a 36% increase in fees will result in faster, more accurate service, timely correspondence, or someone who will actually answer the phone. Waiting 6 to 12 months for a registration certificate is a failure of service when the requirement for timely registration is 90 days. The Office should be accountable for the same timeliness as creators. What expectation can creators have that the new fee structure will improve the service of the Copyright Office?

The fee structure of the United States Patent and Trademark Office (USPTO) stands in sharp contrast to that of the Copyright Office. Its fee structure is designed to shift the burden away from the individual inventor, small business and non-profit applicant. The USPTO has highly discounted fees for "small entities" and "micro entities." Small entity fees are generally half the standard fee and micro entities pay less than one third the amount required of deep pocket filers. Thus, USPTO cost recovery is shifted to those with a greater ability to pay. We suggest that the Office open an inquiry into methodologies that would similarly shift the fee burden to large, corporate entities.

Group Registration

Currently, the Copyright Office has no mechanism for group registration of non-photographic works of graphic art. As stated above, many AMI members seek registration for multiple images in a Standard Application as a *collection*. While this reduces the financial burden on the illustrator, filing as a collection may limit the illustrator's ability to enjoy the full benefit of statutory damages in an infringement action. Without the prospect of statutory damages an artist's copyright has little meaning because actual damages would rarely justify the costs of litigation necessary to enforce the copyright. AMI notes that the May 24 Federal Register notice states that "the Office is considering expanding the categories of works eligible for group registration through rulemaking in the near future." AMI encourages the Office to undertake such a rulemaking and that all works of graphic art be made eligible for group registration.

Summary and Conclusions

1. Copyright Office costs attributable to examination should not be paid from application fees and should be funded either from tax revenue or users of the registration database.
2. The registry database currently includes a minority of illustration copyrights in force, therefore has little practical value and does not justify the imposition of fees.
3. In the absence of group registration illustrators face a disproportionately high fee burden because their output of works eligible for registration exceeds most other categories of authors.
4. The complexity of registration application forms is confusing to illustrators who lack expertise in copyright law and formalities thereby discouraging registration.
5. The deposit requirement has little to do with copyright and has no value as proof in litigation initiated more than 20 years after filing because the deposit will have been discarded. The current fee for retention of a physical deposit is prohibitive and there is no cost justification for the new fee for retention of digital deposits. Furthermore, AMI members report serious problems receiving deposit copies that have not yet been discarded in a timely manner when they are needed in litigation.
6. Cost recovery should be shifted to applicants and users of services with greater ability to pay and for works and services of higher value.
7. Group registration of works of non-photographic art should be an option with the assurance that each work within the group is eligible for full statutory damages in cases of infringement.