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Notice of Inquiry: Registration Modernization

COMMENTS OF THE ASSOCIATION OF MEDICAL ILLUSTRATORS (AMI)

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Overview

In comments on the Copyright Office's (referred to hereinafter as "the Office") proposed revision of fees filed by the Association of Medical Illustrators (AMI) last year, we raised questions about the registration process in general, which the AMI believes cannot be fully separated from fees. Therefore, the AMI is appreciative that shortly thereafter, the Office initiated this Notice of Inquiry (NOI) on the larger question of registration reform. As stated in our comments on the fee schedule, the AMI strongly believes that the United States should join the rest of the world and abolish the registration formality entirely. However, recognizing that is a determination to be made by Congress and is not within the power of the Copyright Office, we believe that this NOI offers an opportunity to consider administrative reforms that could make registration simpler, easier, and equitable for visual artists.

The NOI states that in FY 2017 the Office received 539,662 claims and issued 452,122 registrations. In FY 2018 the number of claims rose above 600,000. Given the number of works authored each year in all categories, we can assume that only a fraction of copyrighted works coming into existence each year are registered. Comprehensive statistics are unavailable. However, 412,541 new book titles were reported published in the U.S. in 2017 and 408,985 scientific journal articles were published in the U.S. in 2016.¹ The number of works in these two categories alone substantially exceeds the number of U.S. works registered annually. The number of individually authored articles in all periodicals undoubtedly exceeds these numbers substantially. Then, there are all the other categories of works: music, computer programs, audiovisual works, and of course, works of visual art and sculpture. Works of medical illustration and animation follow a similar pattern. A 2018 survey of AMI members revealed that 59% of

¹ https://en.wikipedia.org/wiki/Books_published_per_country_per_year;
<https://data.worldbank.org/indicator/IP.JRN.ARTC.SC>

respondents never register their copyrights. Medical illustrators who do register their works report that the cost, time, and complexity of registration limit their ability to file claims to only a fraction of the works they actually create.

Because statutory damages are unavailable as a remedy if a work is not registered prior to infringement, copyright is meaningless for the overwhelming majority of authors—including visual artists—who discover that an unregistered work has been infringed. Legal fees necessary to initiate and prosecute a federal court action nearly always exceed actual damages for a freelance writer or artist for whom a commission may range from hundreds to thousands of dollars. The result is that copyright scofflaws are encouraged by the existing registration system in the United States. As a practical matter the U.S. copyright system is skewed overwhelmingly to the benefit of corporate rights holders who are the only entities with the financial and human resources capable of meeting the registration burden. Individual authors, for the most part, are fair game for pirates.

The primary value of the Copyright Office's database of registered works to the public at large is as a source of information to distinguish between works for which reproduction requires a license from those that may be used without permission because they have fallen into the public domain. Yet, because most works—including newly created works—are not registered, it cannot be relied upon for this purpose. Further, prior to the 1976 Copyright Act, many, if not most works, fell into the public domain because registrations were not renewed.

Even if the Copyright Office makes all visual art registrations text-searchable online, without the capability of searching by image, the registry is of extremely limited utility. The title of a visual work is not sufficient to identify the work sought by a search. The searcher may not know the title of the work. Further, there may be hundreds of thousands of similar or identical titles in the registration records of visual works. Other visual works have ambiguous non-descriptive titles like "Untitled", "Works on Paper", or "Series 1." Nor is it uncommon for an artwork to be known by multiple titles, especially since visual art is often re-titled by editors or publishers at the time of each publication. Without the image deposit linked to a registration, the searcher cannot be sure they have located the correct registration or the correct author, or cannot even reasonably find the author.

Furthermore, any attempt to create an image-searchable registry would have deficiencies that cannot be overcome. Visual artists have been shortchanged due to the Copyright Office's policy to discard most visual art deposits 20 years after registration. This has created an extremely prejudicial situation to visual artists who have registered their works and complied with all U.S. formalities.

In view of the foregoing, the AMI welcomes the Copyright Office's effort to improve a fundamentally flawed system. While the concerns set forth above cannot be fully addressed without statutory reform, the AMI agrees with the premise of the NOI that the Office, itself, has the ability to make meaningful reforms in the registration system. We see this as an opportunity to make registration easier and less costly for authors.

The Application Process: How Users Engage with the System

1. New Solutions for Delivering Application Assistance.

The AMI's comments on the proposed fee schedule discussed the problems its members have with what they perceive are overly complex electronic registration forms that make it easy for them to make mistakes in registration that can be asserted against them as defenses in infringement litigation. They report that in almost all infringement suits the first action of the defense is to challenge the validity of the registration.

For example, AMI members 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, even though the system does not make this clear or automatically detect and alert that there is a discrepancy. It can be difficult to be accurate about matters such as publication date of the work being registered; is it the date a 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. Yet, the form is not clear that when registering pseudonymously the author must be sure to declare his or her legal name as the copyright claimant or forfeit the validity of the registration. Authors must also 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 AMI strongly urges the Copyright Office to reconsider whether this level of detail should be required in an application for registration. However, to the extent that such detail is required, a multi-tier application assistance program would be helpful. The USPTO maintains an inventor assistance hotline as well as a call center providing live, telephonic assistance in resolving problems of formalities of electronically submitted patent applications. These services go beyond the icon display and live chat options discussed in the NOI and the AMI believes the Copyright Office should provide similar services. However, to the extent that such services are provided it is important that the service providers be adequately trained and supervised to assure consistent and uniform advice to applicants. AMI members' interactions with Copyright Office examination staff have sometimes been inconsistent and confusing.

Online chat conversations and any other electronic communications of Copyright Office guidance should be memorialized with the registration application. A preservation of the Copyright Office guidance on filing a form could provide the needed affirmation of a challenged registration by an infringer. As stated before, an infringer's first line of defense is to seek a technical mistake by the author in order to invalidate the registration. To the extent possible, guidance from the Copyright Office should be usable in infringement suits as legal support for authors' entries made when submitting registration applications.

2. Electronic Applications and Payments.

AMI members currently use the electronic application system and do not object to elimination, in most cases, of paper applications. AMI members also appreciate user-friendly electronic-only payment methods, provided an ACH payment is accepted online. The AMI believes that state-of-the-art information technology is not only essential for the Office to provide good service to registrants, but that digitization of the entire registration database is of utmost importance for the reasons described in the overview above.

3. Electronic Certificates

The AMI believes that the Office's resources should be focused on services to registrants. Therefore, resources currently utilized for printing and mailing paper certificates should be redirected to other services, such as better application assistance as described above. If defaulting to electronic certificates (with appropriate watermarks or other security measures needed to ensure authenticity) would facilitate speedier access to certificates, the AMI believes electronic certificates would be welcomed. Currently, most artists scan the official paper certificate and archive it digitally with the creative work. Many artists would prefer an electronic version. Paper certificates could be an option "by request" but there should not be an extra fee for printing since they are currently included in the cost of a registration.

The AMI also submits that a visual art registration certificate should include an imprint of the image deposit(s) on the face of the registration. With the development of a more sophisticated electronic application interface, a low resolution image(s) can be linked into the application and reviewed by the applicant during the application process.

4. Dynamic Pricing Models

Visual artists are exceedingly prolific. Illustrators need a simple, inexpensive means of filing group registrations encompassing multiple works that would enable each work in the group to be eligible for full statutory damages in infringement actions. As we noted in our fee schedule comments, this currently is not available. Illustrators can only file for multiple works in a single claim as a Collection using the Standard Application. While photographers enjoy a Group Registration option for up to 750 images by a single author, there is no equal solution for illustrators and animators. It is highly inequitable that media conglomerates can file registrations for multiple works by multiple authors for a single low fee, while sole proprietor illustrators have no similar option. The NOI notes that "claims submitted on the Standard Application tend to be more complex because they may involve works created by multiple authors, works with multiple owners, as well as works made for hire, derivative works, collective works, compilations, or other complicated issues." It seems to us that the current system shifts the burden of financing the Office to those most prolific and least able to pay.

The 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.

Any fee model based on the number of works registered is inherently prejudicial to certain types of authors—especially in the absence of a group registration option. Subscription models, where an author pays a yearly rate to register unlimited works with common pertinent facts, has the potential to incentivize more medical illustrators to register their works. Then an author wouldn't have to selectively choose which works to register in a year due to cost constraints. All works could be registered for one flat rate that could be built into their yearly budgets—similar to how artists budget for monthly software subscriptions (e.g., Adobe Creative Cloud).

Application Information: The Information Requested on the Application for Registration

5. Authorship Statements and Administrative Classifications

Visual art is vast and varied and visual authors are expanding into virtual reality, augmented reality, and other new realms. Additional administrative classifications and/or checkboxes will never keep up with the new authorships and creative collaborations visual artists are engaging in to create new works. We also submit that creating pigeonholes that artists must force their work into will create additional pitfalls for authors who face ministerial challenges to their registrations when infringed.

Rather than creating new administrative classifications, an authorship statement allows an artist to make a declaration of the work in his or her own words and acknowledges that there is no higher authority on the nature of the work than the author who created it.

AMI strongly supports the suggestion of an authorship statement.

6. Derivative Works

This is an issue of concern and complexity for AMI members. Works of medical illustration and animation are often created using an artist's pre-existing art or 3D computer generated models (e.g., visualizing common anatomy views) with modifications and additions to satisfy a client's needs. We support efforts to eliminate cumbersome check boxes and allow applicants to more easily explain in their own words the elements that are pre-existing versus the "new material to be included." These changes would simplify registering derivative works.

When a medical illustrator wishes to register a revised work (which is classified as a derivative) the author must have the VA# of the previously registered work in order to register the derivation. However, the VA# of the first registration is often not available to the author for 6–14 months. This effectively means that a timely registration on a revised work is effectively denied to the author. Allowing a universal number, (like a Unified Case Number as suggested in 11. of this NOI) to be referenced in lieu of an in-progress, but unavailable and unknown VA# would solve this problem. The AMI would like to submit for further consideration that revisions to an author's work be registrable with the same title as the first registration and simply appended with a version number like v2, v3, etc., without the necessity of excluding previously registered work and including new work. Linking together registrations of revisions of the same work is sensible and streamlines paperwork and records.

The AMI would not object to asking applicants to affirmatively state whether a work submitted is derivative *providing the application form makes it crystal clear as to what constitutes a derivative work*. With regard to compilations and collective works, the answer would be the same as long as it is emphasized that there should be clarity as to the meaning of these terms. They should be explained in simple language that non-lawyers can easily understand.

Again, AMI members are concerned that mistakes in registration may be used as defenses when they seek statutory damages in infringement litigation. The registration process should not be turned into a game of “gotcha” where mistakes in formalities defeat the purpose of copyright, which is to grant exclusive rights to authors. To the extent possible, Copyright Office regulations should reflect this fact and state clearly that mistakes regarding such formalities do not constitute defenses in infringement litigation.

7. Simplifying Transfer Statements

The AMI supports simplification of transfer statements. However, the Copyright Office’s first priority – as long as the registration formality continues to be mandated in statute – should be to encourage initial registration by making it as simple, easy, and inexpensive as possible. While the concept of creating a single, easily sourced public record of copyright ownership has theoretical merit, as a practical matter it is beyond the ability of illustrators to take advantage of it or to bear the associated costs. As noted in the overview, that is currently the case as reflected in the fact that only a minority of copyrighted works are actually registered. Only a small percentage of AMI members or assignees of copyrights utilize the Office’s recordation services.

8. In-Process Corrections

The Effective Date of Registration (EDR) is another requirement fraught with pitfalls which exemplifies the complications that arise out of a system of burdensome formalities. The EDR is of importance primarily in determining eligibility for statutory damages in infringement litigation when the question arises of whether the registration predates the infringement. Currently our members wait 6–12 months for a registration certificate—this is a failure of service when the requirement for timely registration is 90 days. The current system backlog prejudices the author by creating additional burdens in navigating the registration process so that he or she can obtain the intended benefits of a Constitutionally granted exclusive right. Therefore, the AMI welcomes the willingness of the Office to permit a registrant to more easily edit and correct mistakes while the application is waiting to be processed by an examiner.

Some artists are applying for registration earlier in their workflow (in some cases upon first delivery of a work to the client) as a tactic to fight piracy. However, the real world production process of illustrations and animations often involves numerous rounds of revisions, such that by the time a copyright registration application is opened by an examiner months later, the work has some minor material changes. For in-process corrections to benefit visual artists, the applicant must be able to upload a minor revision to the deposit copy.

Additionally, we anxiously await the Supreme Court decision on *Fourth Estate Public Benefit Corp. v Wall-Street.com*. If the court rules in favor of the Certificate Rule, which the Office has endorsed, there will be significant harm to creators who will effectively be denied full copyright protections while they wait the long 6–12 months for processing of their registration application.

Anything that creates a hurdle for an author in securing the right to statutory damages defeats the entire purpose of copyright and only gives a free pass to copyright scofflaws. It cannot be emphasized enough that for the majority of authors, such as visual artists, actual damages alone will never justify the legal costs of copyright infringement litigation. Therefore, every detail of the registration system should be engineered as much as humanly possible to be author friendly. We live in an era where the ability to infringe is no longer limited to those with a printing press. If the Copyright Office is to continue to have a rationale for existence this must be recognized and taken into consideration in every administrative decision made by the Office, especially with regard to registration reform.

9. The Rights and Permissions Field

The Rights and Permissions field, containing contact information of the creator, should only be editable by the copyright registrant/owner. We welcome database improvements that would allow authors to keep their contact information updated free-of-charge. However, the AMI continues to assert that a text-only searchable database of visual art registrations has extremely limited utility to users. This deficiency cannot be overcome because the Copyright Office has a policy of discarding visual art deposits.

10. Additional Data

The AMI has no objection to the *option* to include data such as ISBNs, DOIs or other unique identifiers in registration applications. However, it should not be mandatory. To do so would add yet a new formality setting the United States apart from a world in which no other country has any formalities. The imposition of formalities are prohibited by the Berne Convention, of which the U.S. became a party to in 1989.

11. Application Programming Interfaces (APIs)

The AMI does not object to the use of APIs as long as they are completely *optional* and not a precondition to electronic registration by an individual applicant. In this regard, the AMI concurs with the NOI statement that any such *optional* system should not “facilitate business models that charge excessive premiums or otherwise prey upon individual authors who may be less sophisticated about the copyright system.”

The AMI supports third-party APIs that enhance an author’s ability to “push” registration application information to the Copyright Office. For example, software plugins that integrate with creator software and platforms, like Adobe Creative Cloud or digital asset management software. However, at this time we oppose APIs that “pull or export” registration information from the Copyright Office database—third parties should never be allowed to pull the deposit copy image. APIs also should never be able to pull works registered as unpublished. If API integration is implemented, there should be a rigorous application and evaluation process that includes public comment from rights holders before any API is granted “export” access.

The Copyright Office has the burden and the duty to safeguard any deposit that is made to them. “Public display” is a right of the copyright owner, and as such the Office would be in violation by allowing the public to view the deposit images, much less access them in a way that enables a business model for third parties. If authors want to display their works with third parties, they are free to do so by express permission, but not through copyright registration compliance.

Public Record: How Users Engage and Manage Copyright Office Records

12. The Online Registration Record

The AMI submits that online registration records include only the final registration, and not the application or any internal correspondence between the author and the Copyright Office. Refusals, appeals, and corrections of mistakes should remain available upon request of the author.

The AMI strongly believes that participation in any expansion of online registration records be purely optional and that failure to provide any such records would in no way prejudice the author or rights holder in enforcement of rights.

However, while such expansion may have utility to some registrants and users, there are other information technology investments that should be undertaken and completed before *any* of the Office's resources are directed at such a project. As we have emphasized throughout these comments, the Office's first priority should be making the core function of electronic registration simpler, easier, and cheaper for non-institutional applicants such as illustrators. As long as only a minority of copyrighted works are registered, Copyright Office records—digital or otherwise—are of limited utility to anyone seeking to determine copyright status or authorship of a work. Equally as important to users of the Office's registry is the urgent need to digitize the entire registration database so that anyone online can search copyright registrations prior to 1978 that currently require a physical search at the Office in Washington. It cannot be over-emphasized that results of text-only searchable visual art registrations, that are themselves text-only, are of extremely limited utility. The absence of deposits duly submitted to the Copyright Office by authors complying with all formalities to protect their rights, is a problem and a burden created by a long-standing Copyright Office policy.

13. Linking Registration and Recordation Records

There is no question that such linking makes sense. However, the AMI would again emphasize that any such investment should stand behind investments that 1) facilitate registration by individual authors and that 2) expand access to registration records that currently are not available electronically.

14. Unified Case Numbers

The elimination of multiple identification numbers required to keep track of applications, correspondence, and requests for reconsideration and replacement with one single case number is consistent with the AMI's view that the first priority should be to make registration simpler and easier for an individual applicant, such as a medical illustrator. As mentioned previously, any online chat or other electronic support given to a registrant should be linked to the application and registration through a Unified Case Number. Therefore, the AMI supports this suggestion.

Deposit Requirements: The Deposit Requirements for Registration and Related Security Considerations

15. Digital First Strategy

The AMI supports the proposal to eliminate the need for physical deposits for purposes of registration. This is consistent with our desire to make the registration process easier. We object to the requirement of a mandatory physical deposit when demanded by the Library of Congress (LOC) for its collections, but we recognize that this is beyond the power of the Register and would require legislation. Anything that simplifies the burden of registration for the individual illustrator applicant is to be welcomed.

16. Digital Deposit Security

Unauthorized access to images created by professional illustrators is particularly damaging to illustrators in comparison with other categories of works. Therefore, preventing unauthorized access is vitally important. However, the quality and resolution of the images required for deposit is of equal importance. High resolution, commercial grade images are not necessary for examination determinations such as copyrightable subject matter. The damage to the artist of unauthorized or inadvertent access and downloading can be catastrophic if the purloined image file is of the same resolution and quality as that provided by the illustrator to a publisher client. Therefore, we applaud the inclusion of this priority in the NOI. The AMI would be willing to work with the Office to develop standard protocols that would address this issue.

Additional Considerations

The NOI did not contain a section or specific question about group registrations. However, this issue is raised at the outset of our comment on dynamic pricing models. The AMI wishes to emphasize that the option of group registration for multiple published images for a single, reasonable fee should be available for works of visual art and we would welcome the opportunity to work with the Office in developing such an option.

Another consideration that has bearing on the registration system function and budget is the unresolved matter of the vacant Register position. The Register of Copyrights Selection and Accountability Act of 2017 passed the House, but remains pending in the Senate. Additionally, discussions about an independent Copyright Office separate from the LOC could have ramifications as it relates to demands for mandatory deposit requirements to add to the LOC collections. We question whether the Copyright Office should be undertaking such massive reform of the registration system under the Acting Register who could be discharged and replaced at the Librarian's discretion? We continue to press Congress to decide these issues and bring stability to the Copyright Office.

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About the Association of Medical Illustrators

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. Approximately 60% of our members are small business owners who rely on copyright law to protect their creative works, manage their rights, and license reproductions to earn a living. These professionals have graduate level training in science and visual communication, including advanced courses in human anatomy, pathology, and molecular biology. Medical Illustrators 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 AMI “has codified the profession: by setting 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 board certification of medical illustrators.”²

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