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Notice of Inquiry: Online Publication

COMMENTS OF THE ASSOCIATION OF MEDICAL ILLUSTRATORS (AMI)

Whitney Wilgus, Executive Director, Association of Medical Illustrators
E-mail: hq@ami.org

Bruce Lehman, Counsel, Association of Medical Illustrators
E-mail: bruce@lehmannilon.com

Introduction
The Association of Medical Illustrators (AMI) is the sole professional organization for biomedical illustrators and animators. The works of our members serve a critical role in the advancement of science and medicine in the U.S. and throughout the world. All medical illustrators rely on the protections of copyright and on the divisibility of exclusive rights, granted through licensing, to earn their living.

AMI members seek to fully comply with copyright laws and registration formalities, but are hindered by extremely nuanced regulations of the registration system and resulting technicalities of court decisions.

For commercial illustrators, publication is fact-specific and conferred through a license with their clients. Publication should never be inferred by any one method of distribution/transmission, known today or in the future. Some may argue that “online unpublished work” is an oxymoron. In today’s internet context, it represents the conflation of an artist’s distinct right to display a work publicly with their right to distribute a work for publication — only the latter authorizes a possessory copy to “materially change hands” and be first made available to the public.

AMI appreciates the opportunity to provide comments on the critical and growing disconnect between the Title 17 statutory definition of “published” and the real-world iterative process in which illustrations and animations are created, licensed, and distributed to the public. Our members are fraught with uncertainty in determining if their works are published vs unpublished at the time of registration. The Compendium 3rd Edition does not provide enough industry-specific examples to guide illustrators as to whether a particular work in a particular situation is published or unpublished; instead leaving the shifting legal determination to the illustrator. Artists receive conflicting advice from their lawyers. Even
Copyright Office examiners’ advice differs among themselves, and guides registrants inconsistently. Court rulings are in conflict with each other and offer no clarity.

The registration system is actually divesting artists of their rights if good faith registration errors are made, because their registrations may be later invalidated by the court (Archie MD v. Elsevier) or by the Copyright Office itself in a § 411(b) request (Gold Value v. Sanctuary Clothing). Current Copyright Office regulations do not permit artists to correct a registration from unpublished to published without stripping the author of statutory damages prior to the date of correction. The injustice of having registrations invalidated by the Copyright Office puts creators in a perilous position. It is deeply unfair to creators who are trying to comply with ambiguous registration regulations. Registration should not be invalidated over a good faith technical error that had no bearing over the facts of the infringement.

Problems with the unpublished vs published declaration is exacerbated by the high cost of registering published works one at a time, driving artists to use the unpublished option. Illustrators exercise cost savings by registering up to 10 works as an Unpublished Group before delivering final art to a client for further distribution. But this may come with a later cost of inaccurate registrations. Commercial illustrators are unduly burdened by the lack of a Group Registration for Published Visual Art.

The Copyright Office can quickly alleviate some registration problems surrounding unpublished v. published through rulemaking to:

1. Create a Group Registration for Published Visual Art (similar to photographs) so that visual artists are not driven to register works as an unpublished group to reduce their fee burden.
2. Change the Supplementary Registration process to permit partition and correction of an unpublished registration to published for works pending litigation. Allow applicants to cure an error and add a date of publication while preserving their eligibility for statutory damages.
3. Update the *Compendium* with industry-specific examples of distributions that are unpublished, published, or limited publications.

AMI members met with the Copyright Office in fall 2019 regarding the issues of registration and publication. We attach to this comment our letter with specific additions for the *Compendium* Chapter 1900 to clarify scenarios that apply to visual art and the iterative production process of commercial illustration (Exhibit 1). Particularly with examples of “limited publication” as it applies to distribution of works in-process for approvals and comps that are not yet in final format for further distribution to the public.

The remainder of our comment is devoted to the questions posed in the Notice of Inquiry.

RESPONSES TO QUESTIONS SET FORTH IN THE FEDERAL REGISTER NOTICE

1. *What type of regulatory guidance can the Copyright Office propose that would assist applicants in determining whether their works have been published and, if so, the date and nation of first publication for the purpose of completing copyright applications? Consider how the statutory definition of publication applies in the context of digital on-demand transmissions, streaming services, and downloads of copyrighted content, as well as more broadly ....*
Our recommendations reflect common practices in commercial illustration and animation. The intent of the author, as expressed in a licensing agreement with a client, should determine when online publication of digital works takes place. The date of first publication should be the date the author has authorized the publisher to distribute copies of a final work to the public, as agreed in an executed license. For example, when an artist grants online publication, distribution, and digital download of a work to an eJournal, eBook, or eZine, the publisher’s posting date may be the agreed-upon date of first publication for recordation.

In the absence of a clear license, the date the artist delivers digital copies with authorization for further online distribution would indicate the date of first publication. For commercial illustrators, this is generally stipulated by delivery of final files and receipt of payment. All digital exchanges of works in-progress prior to this date are unpublished, because they have not been authorized by the author for distribution to the public.

We support bright-line statements that mere posting of a work on a public website does not infer publication, but is only display. Illustrators commonly display their artworks on websites for marketing of their talents and services. These displays are similar to a catalog. These online works are unpublished until permission for further distribution or downloading of possessory copies is authorized.

The nation of first publication can be recorded as the country / territory in which access is first provided to the public as specified in the license. In all other cases, the nation of first publication is where the author is domiciled.

2. Should the Copyright Office propose a regulatory amendment or provide further detailed guidance that would apply the statutory definition of publication to the online context for the purpose of guiding copyright applicants on issues such as:

The operative words in the definition of publication in §101 of the Copyright Act are: “distribution to the public....” However, §101 as written is confusing in that publication can also take place by “offering to distribute copies...to a group of persons for purposes of further distribution.” (Italics supplied). The WIPO Copyright Treaty, which was promulgated to provide international standards for copyright in the digital environment, recognizes the right of “making available to the public.” This was necessary because the existing Berne Convention and the law of many of its member states recognized only the right to make copies and the right of public performance. Digital dissemination online was not encompassed clearly by either right. The United States did not create a new “making available” right in implementing legislation because existing U.S. law on distribution to the public was considered to be the equivalent.

The Office can clarify the definition of publication in the online context by issuing regulatory guidance stating that online publication consists of an author’s authorizing of possessory copies of a work being made available (in its entirety) digitally to the public. For example when the commercial artist authorizes copies of the work to be made available for download or sale online, such as in an eBook, game, app, or digital storefront.

i. How a copyright owner demonstrates authorization for others to distribute or reproduce a work posted online.
Online posting of a work should be treated no differently from display in analog format. The fact that the work is posted online does not authorize the public further distribution or reproduction unless specifically authorized under terms and conditions stated by the rights-holder in a license. If a copyright owner wishes to express permission-less use of their work, there are existing licensing schemes (Creative Commons CC BY) that confer some rights to the public as long as attribution terms are followed. A CC button and credit line should be marked on the work. If the online posting is silent as to authorization to reuse, copy, print, download or further distribute, authorization is never implied. No further safeguards to prevent such actions are required by the author.

**ii. The timing of publication when copies are distributed and/or displayed electronically.**

Timing of online publication should be determined by the date the author authorized the work for publication. For commercial illustrators, this is generally marked by the delivery of final files, and fulfillment of the agreement by payment. The publication date may be predetermined and expressed as a license term.

**iii. Whether distributing works to a client under various conditions, including that redistribution is not authorized until a “final” version is approved, constitutes publication and the timing of such publication.**

Distributing copies of draft sketches/storyboards or revisions of an illustration or animation to an art director and intermediary persons for purposes of review, approval, design comps, or motion media tests of a work in progress is not a distribution to the public and therefore does not constitute publication. However, clarity is needed that when these digital exchanges are conducted under a license for a client, that they do not invoke the second prong of the publication definition “offering to distribute copies ... to a group of persons for purposes of further distribution” because the work is not in final form and the license is not yet fully executed.

The Compendium at 1905 states: “Generally, a ‘limited publication’ is the distribution of copies of a work to a definitely selected group with a limited purpose and without the right of diffusion, reproduction, distribution, or sale.” The Compendium confirms that “limited publication” is a legal term, and does not meet the definition of publication.

Commercial illustrators exchange via email or cloud-based transfer (DropBox) multiple sketch concepts with clients and their agencies. Some of these are eliminated by the client. The artist retains all rights in these alternates, which may be reworked for other projects. Contracts assign to the client specific usage rights only in the final artwork. The iterative process of illustration stops when no more revisions are requested — the last version is the final artwork. The license is enacted upon payment.

Delays (>90 days) can occur between delivery of art to the client and the actual first distribution of the work to the public. During this time many people downstream are storing multiple versions of the work on their servers, comping in ads/layouts, and testing in apps. Depending on the project pipeline, the presumed “final art” undergoes further approvals, which can come back to the artist for revisions at any time.
The decision of WHEN to register is deeply entwined with the unpublished/published conundrum. When does an illustrator properly register their artwork to protect all sketches, revisions and final art? As unpublished at the first sketch? As published at the final art? Can the work be registered as unpublished, if the final files have been delivered, but payment has not been received (and therefore the license is not yet in effect)? Many illustrators wait to file a registration until they know the work is truly final and will not come back for more revisions — so they can deposit the best edition of the work. However, lawyers advise that this leaves artists vulnerable if a work is infringed. The date of delivery of preliminary works is often used against artists in litigation to invalidate the timely registration of their work or to invalidate an unpublished registration. This technicality of law and of the “publication” definition underlies the futility of registration for many creators.

*iv.*  *Should the Copyright Office propose a regulatory amendment or provide guidance on whether advertising works online or on social media constitutes publication for the purpose of guiding copyright applicants.*

We are unclear about this question and the Copyright Office’s use of the term “advertising works online.” Does “advertising works” refer to use of works by the creator to self-promote and advertise their skills? Or is the question referring to use of works commissioned specifically for social media campaign advertising of third-party products and services across sponsored paid ad display networks? We believe the statutory definition of publication is applied differently for each — based upon direct distribution to the public, versus distribution-for-further-distribution to the public. The first, as stated above, would constitute display only (and hence not publication); whereas the later would constitute publication as there has been authorization for further display and transfer of a copy to facilitate the distribution.

The Copyright Office should provide detailed industry-specific guidance in the *Compendium* applying the statutory definition of publication to advertising works online.
or on social media. This determination must be made by the applicant prior to registration. The determination of publication status to these works beyond registration application is irrelevant, except in litigation. Therefore, the author’s intent at time of registration, as reflected in the registration application, should be controlling as to other parties, especially in the case of litigation.

Leveraging social media sites as online marketing tools is now ubiquitous across all industries. When determining publication across current social media platforms, one must apply the principle of direct distribution to the public, versus distribution-for-further-distribution to the public.

For commercial illustrators facing a registration decision, all illustrations licensed and distributed to a client for their use in online advertising or social media must be registered as published, by their nature of having been authorized/licensed for further display distribution to the public. The requirement of materially supplying a possessory copy was fulfilled when the illustrator provided the authorized digital file to the advertiser or social media; and is not based on the public’s ability to obtain/possess a copy.

We support a bright-line statement that mere online posting of a work on a public website — absent an authorized license for further distribution by the online host (online publisher), or absent the authorization of possessory copies — is an act of display and does not in itself infer publication. Illustrators commonly display their artworks on their own websites for marketing of their talents and services. These works are not published under a license, nor are they controlled by the hosting site’s license. These displays are similar to a catalog. These online works are unpublished until permission for further distribution or downloading of possessory copies is authorized.

We request oversite of blanket, click-to-agree terms of service as a whole. These agreements are known to be overreaching and broad in scope. They often take great liberties with users’ intellectual property and vary greatly between platforms — not protecting the divisible rights to authorize display, distribution and reproduction. Illustrators rely on the protection and licensing of each of these rights for their living. Such generic overreaching terms of use licenses should never have the ability to strip exclusive rights from copyright owners, especially, when works are only intended for display purposes. The exclusive right to control each use of the work must remain with authorization of the creator.

3. **Can and should the Copyright Office promulgate a regulation to allow copyright applicants to satisfy the registration requirements of section 409 by indicating that a work has been published “online” and/or identifying the nation of first publication, without prejudice to any party subsequently making more specific claims or arguments regarding the publication status or nation(s) in which a work was first published including a court of competent jurisdiction.**

The intent of the author should be the primary determinant of the publication formality in section 409. That intent should be binding on all parties. Therefore, no Copyright Office regulation should state that
any other publication date or nation of first publication subsequently asserted by another party be considered valid in litigation. To do otherwise would create confusion and create an opportunity for copyright scofflaws to try to force authors to abandon their legitimate claims to copyright because of the expense of litigation.

Online-only publications (e.g., blogs, e-zines, news sites, e-journals) often use permalinks or digital object identifiers (DOI) as citable, persistent qualifiers. This is similar to ISBN or ISSN numbers issued for books and serials. Allowing applicants to declare a work as “published online” reflects the common marketplace licensing practices of commercial artists. Further, recording the URL or permalink where the work is published, if known, perfects the registration record of when and where it was first disseminated to the public. In the future, blockchain or other technologies may make online content persistently indexed, but the Office should allow authors to record the facts of a visual work’s original license at the time of registration.

All too often creators have been barred from effective enforcement of their rights against infringers because of a dispute over the technical formality of when a work was published. Therefore, the author’s intent, as reflected in the registration application, should be controlling as to other parties, especially in the case of litigation. Effective enforcement of copyright is best promoted when there are clear and bright line rules regarding formalities such as registration.

4. **Should the Copyright Office allow applicants who pay a fee to amend or supplement applications to partition the application into published and unpublished sections if the applicant mistakenly represented the published or unpublished nature of the work in the initial application.**

Yes. The Office absolutely should permit such corrections. Such an option should be available to the applicant if it is necessary to cure an application where an incorrect statement of the publication status is asserted by a defendant in an infringement action. Furthermore, the original “date of registration” should be preserved with the correction, so as not to alter the author’s timeliness and eligibility for statutory damages.

AMI members who have attempted to file a supplementary registration to correct an unpublished work with a publication date prior to impending litigation have been wholly frustrated. They have received inconsistent examination, refusal of the correction, and had damaging correspondence attached to the registration noting the author’s statement of error, as basis for invalidating the original registration.

In administrative consideration, the only reason to deny a correction in the past was due to the number of deposit copies required for published versus unpublished submissions. Because only 1 deposit copy is required for visual art under the eCO registration system, there is no reason to now deny the correction from unpublished to published. The cost of the fee should be as low as possible to encourage such corrections as a means of improving the quality and accuracy of the Office’s database.
5. **Should the Copyright Office amend its regulations to allow applicants to register published and unpublished works in a single application with the date and nation of first publication noted?**

Yes. Given the expense of registering published individual illustrations separately, many artists file applications for unpublished works in groups — especially when conflicted about publication status. Visual artists do not have the option of group registration for non-photographic *published* works. Therefore, the AMI urges a group registration option for non-photographic *published* works, and to expand the number of works allowed for both published and unpublished group of works.

The cost of registration is a major barrier for many commercial illustrators who create numerous works per year. For this reason, AMI strongly desires group registration options for non-photographic works of visual art should be expanded. While AMI appreciates the option to publish up to 10 unpublished works of visual art under the February 13, 2019 final rule, we believe that it does not go far enough. Photographers are able to register up to 750 published works in a single application and 750 unpublished works in a single application.

Currently, the cost and limited options for group registration of commercial illustrators’ sketches, drafts, and final illustrations means that large numbers of works go unregistered. The result is a deficient registration database which contains only a small percentage of works where a user can find authorship information. Additionally, simultaneously created works that were authorized for publication must be registered separately and individually, except where they qualify as a unit of publication. This further deconstructs an otherwise cohesive group of illustrations that could have been linked in a searchable database. This is not consistent with the purpose of the registration system.

Therefore, group registration of illustrations should be made easier and encouraged. This should include the option to register a large number of published and unpublished works in the same group application. A possible suggestion is to allow an author to use a “unit of publication” type of method for grouping all of the simultaneously unpublished and published related works together. The electronic registration form could provide a check-the-box system to identify whether each work is published or unpublished. Checking the “published” box can then call up additional fields to insert the nation and date of first publication. Such a solution should meet the requirement in §409 (8).

Another suggestion that would match the interactive process of illustrators would be to allow the illustrator to open a registration ticket, similar to preregistration, that would remain open until completion of a project. Each distribution of a work could be added to the file as an unpublished work. When a final authorized work is published, the registration could be closed. This would allow statutory damages to be available from the time of creation, and cover each iteration of a work, with all simultaneously published works as a group.

7. **Is there a need to amend section 409 to eliminate the requirement in clause (8) that the application state whether the work is published and the date and nation of first publication or should the Office be given regulatory authority to accomplish this for certain classes of works?**

Yes. We support either solution, whichever path is more expeditious. Congress should eliminate § 409 (8) the published/unpublished element of registration. Prior to the 1976 Copyright Act, the fact of publication was absolutely vital to a user. If the work was published and not timely registered it would fall in the public domain. Any user could simply check the Copyright Office records to determine
whether use of a work required a license. That utility for the published/unpublished distinction has long passed into history, especially for visual works. Commercial illustrators would prefer a simple statutory amendment deleting the published/unpublished distinction.

8. **Additional considerations relating to online publication.**

In previous NOIs on registration modernization, the date of creation has been suggested as the trigger to determine the term of copyright. We see no problems with this approach from a commercial illustration perspective.
Dear Mr. Kasunic, Mr. Bertin and Mr. Ashley,

In follow up to our meeting on September 24, 2019, the Association of Medical Illustrators is providing additional material regarding clarification for when commercial artists’ work is published versus unpublished. The *Compendium* provides examples of various authorship scenarios to help creators understand the Copyright Office Practices, yet few apply to visual art and the iterative production process of commercial illustration. We submit for your review and feedback the following examples for potential inclusion in the next edition of the *Compendium*:

**Chapter 1900, Section 1905.1 Examples of distribution to the public**

Distributing copies of illustrated posters or handouts to patients constitutes publication of that work.

Licensing an illustration in an article that is behind a subscription paywall, where the user need only pay to obtain a copy, is a distribution to the public and constitutes publication of that work.

**Chapter 1900, Section 1905.1 Examples of limited publication**

Distributing copies of draft sketches/storyboards or revisions of an illustration/animation to an art director and intermediary persons for purposes of review, approval, design comps, or motion media tests of a work in progress is not a distribution to the public and therefore does not constitute publication.

Distributing copies of an illustration or animation to an author/editor for purposes of further distribution to peer reviewers by a scholarly journal does not constitute publication. However, upon acceptance of the work by the journal and execution of the license by the author, the right of further distribution and reproduction to the public is enacted, and therefore constitutes publication.

**Chapter 1900, Section 1906.1 Examples of offering to distribute copies to a group of persons**

Publication occurs when copies of a final illustration or animation are offered / licensed to an ad agency for purposes of further distribution to production and media outlets.

Publication occurs when copies of a final illustration or animation are offered / licensed to an author for purposes of further distribution to a scholarly journal and aggregator indexing service.

**Chapter 1900, Section 1906.2 Examples of offering to distribute copies for the purpose of further distribution, public performance or public display**

Draft illustrations accompanying a draft manuscript offered to a group of persons for further distribution to peer reviewers is not considered publication. (see also 612.2)
Publication occurs when copies of an illustration or animation are offered on a website for the purpose of licensing the work as stock, but display of illustrations or animations on an online portfolio of the artist’s work with no clear offer to “download, save, or buy” copies does not constitute publication. (see also 1008.3B)

Chapter 1900, Section 1906.3 *Examples of copies or phonorecords must be in existence*

1906.3 Offering to distribute an illustration or animation that is currently in production and has not been fixed in its final form does not constitute publication.

Chapter 1900, Section 1908.3 *Examples of public performances and displays*

Exhibiting illustrations or animations in a legal proceeding to a limited audience, such as a jury, is considered private display and not publication.

Displaying illustrations or animations in a lecture to a classroom or at a professional society meeting is considered display and not publication. However, if the slide lecture is posted online for free download by the public or is recorded and authorized copies are offered/sold as CME, it constitutes publication.

Licensing an illustration or animation for a public museum exhibit constitutes publication of that work.

Chapter 500, Section 512 *Examples of registering multiple versions of a work*

Ivan Illustrator produced three sketch concepts / comps for an editorial magazine article. The client picked one concept to be developed into final artwork. Ivan can register all preliminary sketches and revisions shared with the client as a group of unpublished works. The final illustration delivered to the client can be registered as a published work on the Standard form.

Additionally, your team asked questions related to our illustration licensing practices. Enclosed is a typical license agreement that stipulates delivery of sketches, permissible rounds of revisions, and delivery of final artwork—only which is executed by the license upon payment in full. See attached Word file.

We, again, respectfully ask the Copyright Office for consideration under 17 U.S.C. 408(c)(1) to establish a **Group Registration option for non-photographic visual art**. Commercial illustrators are unduly burdened by the elimination of the Unpublished Collection option and the lack of a Group Published option. We deeply desire a group registration pathway to protect all drafts of a work of authorship that complies with the publication definition. A limitation of 10 works is too few to include all the sketches, discards, and revisions created in a typical job commissioned by a client. We are unsure of how many to suggest, but we would welcome further discussion with the Copyright Office to establish a reasonable number per group registration.

We stand ready to answer any questions or produce any requested materials to further clarify the circumstances of workflows, and to assist in the design of a registration pathway that can provide the needed protection to commercial art under development, from first draft to final art.

Thank you for your time and consideration.