May 29, 2020

LIBRARY OF CONGRESS
Copyright Office Proposed Rule
37 CFR Parts 201 and 202 [Docket No. 2018–9]
Federal Register 85 FR 12704

Notice of Inquiry: Registration Modernization

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 education and in the advancement of science and medicine in the U.S. and throughout the world. Their work of complex information distilled into easy-to-understand visuals is front and center during the current pandemic of SARS-CoV-2, the virus causing COVID-19. Medical illustrators rely upon copyright protection of their visual intellectual property, utilizing a business model of licensing each of their divisible and exclusive rights granted under that protection. Therefore, AMI members have a vested interest in the outcome of the Copyright Office Modernization project.

The AMI appreciates the efforts of the Copyright Office (“the Office”) to modernize the registration system. However, as we have addressed in our comments on the October 2018 Notice of Inquiry (NOI), many barriers prevent even seasoned AMI members from properly navigating the registration process. The March 3, 2020 Statement of Policy and Notification of Inquiry raises two additional subjects of inquiry for consideration: The Rights and Permissions Field and Additional Data. These topics weigh heavily on the ability of AMI members to secure timely and accurate copyright registration of their works and we appreciate the opportunity to provide comment on these matters.

THE RIGHTS AND PERMISSIONS FIELD

Direct access for changes
The March 3, 2020 NOI notes that many respondents to the October 2018 NOI favored a more flexible approach to updating Rights and Permissions information in copyright registrations. Specifically, the NOI suggests that the current system, whereby Permissions information may only be modified by a formal written request and payment of a fee, be eliminated in favor of a system enabling a rights-holder access to registration documents and change Permissions information directly. AMI favors direct access, and urges that the Permissions update be accessible only by the copyright holder or his/her authorized agent through the Enterprise Copyright System (ECS). While
formal requests incur a fee, access of the ECS by a copyright holder or verified agent does not require any assistance from the Office staff and should be free-of-charge to encourage compliance.

The ECS should have an iron-clad ability to prevent unauthorized access. Those who do not have credentials through the ECS should be required to submit a formal written request to the Office — with the supporting documentation from the copyright holder. Registrations previously filed by third-party APIs should not be granted future access to change the record. Continuous access and updates by an API could effectively lock-out the copyright holder and could facilitate business models that prey upon individual authors by charging excessive premiums. Copyright holders or their verified agents should be automatically notified of any request to access, or change, any registration completed in their name.

Because AMI members are highly prolific, we suggest a centralized relational database be implemented to allow updates of contact information per author, as opposed to updates to each of hundreds of individual registrations. A central contact database would provide authors the ability to update contact information for all pre- and post-electronic registrations at one time. Use of a fee-based third-party API to update contact information for individual registrations would be cost-prohibitive for individual authors. Furthermore, any fee for contact updates would discourage copyright holders from updating their information, persisting out-of-date copyright records.

**More than one name and address**
The recent NOI also suggests that the current system should be changed to enable a copyright registrant to supply more than one name and address for Permissions.

While AMI members retain tight control over the licensing of their works and very rarely assign to others any role in primary licensing, the AMI requests the ability for their members to assign Permissions for secondary licensing of visual works that are part of a larger Collective Work. Our members’ copyrighted visual works are often licensed for inclusion in collective works and compilations, such as surgical atlases and journals. These collective works are generally registered by the collective works’ publisher, and the names of individual contributing copyright owners are not included in the Permission section of the registration. These collective works receive Permissions requests for relicensing of included visual works which are property of the individual contributor. It would be helpful to list or link Permissions information to all contributing registrations vested with a collective work.

Medical illustrators recommend they also be able to list (as a matter of record) their designated legal collecting society for the collective administration of their secondary rights for reprography, cable retransmission and other secondary uses. AMI members are impeded by larger organizations that claim to represent visual artists in blanket-licensing of collective works, but do not in fact return royalties to the copyright owners of the visuals works. In past NOI comments the AMI has provided an example of this, and highlighted how the Copyright Clearance Center (CCC) operates, specifically regarding non-title specific licenses. Regretfully, in spite of many years of trying, medical illustrators are not receiving such reprographic royalties collected on our alleged behalves by unauthorized parties. We welcome an investigation into such practices, and urge oversight.

Medical illustrators also continue to be damaged by unauthorized entities that falsely represent to foreign collective societies that they act on behalf of American artists. CISAC (The International Confederation of Societies of Authors and Composers) recognizes the Artists Rights Society (ARS), to represent individual AMI members in the U.S. AMI would welcome the ability of copyright holders and their authorized agents to supply an agent of record for receipt of their share of blanket licensing royalties due them under national treatment from foreign collective licensing societies.

We request that all rights and permissions fields be directly accessible for changes by copyright holders through the ECS, with no additional fee, so as to keep the Permissions information up-to-
date. Providing additional third-party contact information should not be taken as transfer of any copyright ownership to the third-party, total representation by them, or a grant to them to access every registration of an author. Copyright holders should have the ability to grant or deny third-party access to change each of the fields in their Permission information.

“Orphan works problem”
AMI objects to the NOI reference to the “orphan works problem” as a justification for expanding licensing information in a registration. No work created by an AMI member is ever an orphan work and any suggestion to that effect only invites piracy by anyone who simply finds it inconvenient or difficult to obtain a license.

ADDITIONAL DATA

Unique identifiers
AMI has no objection to an ECS that would enable registrants to supply unique identifiers to the registration documentation of an already registered work. For example, medical illustrations are commonly distributed within collective works that feature ISBN, ISSN, and DOI content identifiers. We would welcome a method to tag these collective works with an individual works' registration number and permission information. Additionally, AMI members and other American illustrators are for the first time being assimilated into the international CISAC system of unique number identifiers (i.e. Interested Party Information (IPI) system) for authors. The IPI system protects an author's identity from fraud and misrepresentation to enable the author to effectively participate in the blanket licensing systems around the world. The voluntary cataloging of any unique identifiers for work or authors by the copyright holder or their agent through ECS would not require Office staff, and therefore should not incur a fee.

Low resolution deposits
The NOI seeks comment on how the new ECS might be designed to include the option to deposit low resolution or incomplete copies of works of visual art for the online public record. In this regard the NOI notes that the Public Knowledge and the Association of Real Estate Photographers have suggested that such deposits could be used for “reverse image search” of existing registrations. AMI emphatically objects to any system that makes images available online that could be downloaded by a user and/or API and used without license. While AMI appreciates that the suggestion is qualified by reference to "low resolution" or "incomplete copies"; it is absolutely imperative that such images never substitute for the protected works. This already is a problem for AMI members in that there are currently search systems utilizing full display of visual works as “search results". The Hathi Trust case is used to justify the use of complete images of visual works as a means of identifying and searching literary works. While the Hathi Trust decision is predicated on the notion that such searches amount to nothing more than a digital card catalog; historic card catalogs have never included complete works of visual art that can easily be digitally separated from the catalog card, and used in a new work without authorization.

The AMI considers image search of deposit copies of visual works as predatory of intellectual property inherent in such works. Deposit copies are not “snippets” of visual works, even as low resolution versions; nor are they allowed to be “incomplete”. Indeed, when registering a work the written information provided by the author is entered into the “public record” for recordation. When an author supplies a deposit copy in the process of registering a work, they are not in any sense transferring copyright ownership to the Library of Congress (“the Library”), nor granting the Library a license of any kind. The purpose of the Copyright Office and the registration system is to protect the exclusive rights guaranteed by law to the author, not the opposite — to place the work in the public domain. Consider the outcry that would be heard from authors and publishers if the Copyright Office were to suggest that every single word in all deposits of literary works be scanned and posted

...
online, thereby enabling the public to access and copy entire works when performing word searches — for which the only legitimate purpose is to confirm copyright status and authorship information.

The right to display is one of the exclusive rights a creator has immediately upon creation of a work. The copyright holder can choose when, where, or to never display their work. Mandatory display of the deposit to the public should not be compulsory to registering a work, and undermines the purpose of the copyright registration.

Publication of the deposit copy by the Copyright Office or the Library is at odds with the role and obligation of the registration system to protect a creator’s rights. It is well-known that many creative commercial works are confidential and are bound by non-disclosure agreements. It is not unusual to seek copyright registration months or years prior to publication of the work. If creators can no longer register without assurance that the image remains non-disclosed and unpublished, the very purpose of copyright protection is undermined. There is no justification for the Copyright Office, under the guise of offering a public service, to display or publish a deposit if such an ostensible service to the public acts to undermine the Copyright Office’s obligation to the protect the copyright owner’s rights.

Furthermore, display and publication of the deposit copies is not needed, as copyright holders currently have the ability to publish their works online, along with contact information, if they so desire. The AMI implores the Copyright Office to not entertain or facilitate the mining of visual artist’s deposited works under the guise of “public good”. Public search of deposit copies is not the purpose of registration.

The Office has a duty to protect deposit copies.
Deposit copies should not be provided to any entity (including the Library of Congress) in any manner that undermines the licensing revenue stream of the copyright holder. As stated in 37 CFR § 201.2 (d)(2) - Request for Copies of Deposits shall only be provided with (i) request of copyright claimant, (ii) request in connection with copyright litigation, or (iii) under court order as evidence. Therefore, low-resolution display of deposit copies online must be prohibited. Any access of deposit copies by APIs aids in the digital mining of intellectual property and is in violation of a copyright holders’ exclusive and individual rights of display, distribution, publication and derivations. Any public display/distribution of deposit copies by the Library of Congress prior to the end of the copyright term is also an act of copyright infringement. AMI agrees with AAP that digital deposits must be “operated in a totally secure IT system and kept wholly separate from the collections of the Library and its access or interlibrary lending or surplus book policies”. AMI vehemently rejects any display, distribution, publication or reprography of deposit copies required as a matter of copyright registration compliance, with exceptions noted in § 201.2.

Conclusion
The AMI thanks the Copyright Office for the opportunity to submit the above comments. If there are any remaining questions, please contact The Association of Medical Illustrators at hq@ami.org.