

October 9, 2015



Maria Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, DC 20559-6000

RE: Notice of Inquiry, U.S. Copyright Office, Library of Congress
Mass Digitization Pilot Program; Request for Comments (80fr32614)

Comment of the American Society of Illustrators Partnership

As board members of the American Society of Illustrators Partnership, we oppose the creation of an extended collective licensing program at this time because the current state of extended secondary rights licensing in the US raises too many unanswered questions about who is receiving artists' royalties and what the money is being used for.

Our questions start with the publisher-centric Copyright Clearance Center (CCC), which over the years has made contradictory statements about its licensing of visual art, does not pay royalties to artists and otherwise refuses to discuss the matter; and with the Authors Coalition of America (ACA), which was founded 20 years ago, apparently with CCC's blessing, but without any representation by artists. Since 2003, ACA has acted as an umbrella for various writers' trade organizations, including first one, now three graphic arts groups that divide visual arts royalties from certain overseas countries among themselves. (1) Whatever arrangements these organizations have made – either to license artists' work and/or to share artists' royalties – they were made without the knowledge or consent of artists, and the Authors Coalition has told us that we have no standing to know how the money has been, or is being, spent by its "Member Organizations." (2)

Unless something is first done to correct this preemptory collection of the earned income of American graphic artists, we fear that the imposition of extended collective licensing will only serve to institutionalize and further a system that allows third parties to profit from the growing stream of income that artists are cut off from.

Our reservations mirror those of our colleagues at the Association of Medical Illustrators (AMI) who have written:

“an extended collective license (ECL) pilot program for mass digitization is premature until existing mechanisms for collective licensing are reformed. At the present time visual artists in the United States are unable – through no fault of their own – to receive any benefit or remuneration from collective licensing of works containing their copyrighted images... While these existing licenses are

- Illustrators' Partnership of America
- Association of Medical Illustrators
- American Society of Architectural Illustrators
- National Cartoonists Society
- Guild of Natural Science Illustrators
- San Francisco Society of Illustrators
- Pittsburgh Society of Illustrators
- American Society of Aviation Artists
- Society of Illustrators of San Diego
- Society of Illustrators of Los Angeles
- Illustrators Club of Washington DC,
Maryland and Virginia
- Association of American Editorial Cartoonists
- Illustrators-at-Large (nonaffiliated)

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– Board of Directors –

- Brad Holland
- Cynthia Turner
- Dena Matthews
- Frank M. Costantino
- C. F. Payne
- Dolores R. Santoliquido
- Michel Bohbot
- Ilene Winn-Lederer
- Keith Ferris
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- Joe Cepeda
- Joe Azar
- Nick Anderson
- Donald Kilpatrick

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marketed to users as including all content, publishers actively resist any request by illustrators to receive a share of the income generated.”(3)

Re-examining the Nordic Model

We also join AMI in asking that the Copyright Office “revisit its analysis of the Nordic ECL model contained in its June 2015 *Orphan Works and Mass Digitization Report*.”

“That report mischaracterized the system currently in use in Nordic countries in failing to acknowledge that their ECLs are foundationally built on **existing and trusted collective rights organizations**. Henry Olsson, recognized for many years as the leading authority on Nordic copyright law, describes the basic features of an extended collective license as follows:

““The system presupposes that the right-owners in particular fields are grouped together in organisations that are representative in the field concerned **and that are mandated to conclude contracts on their behalf**.”

““A condition for the extended license is of course that there is an agreement. That agreement must concern the use of works or other subject matter in a certain manner. The agreement must, in other words, be specific and relate to, for instance, reproduction, public performance etc. and **should not be general** and concern all types of exploitation of the works. That would go too far, in particular in relation to foreign or other outside right-owners who might be subjected to the terms of the agreement.”

““The system of giving extended effect to collective agreements in certain areas is a typical Nordic way of finding copyright solutions to otherwise difficult situations of mass use of protected works and other contributions. That system **presupposes of course that there is a well-developed system of organisations** in the field concerned and that such organisations represent a substantial number of right-owners in the field concerned. **It presupposes in other words that the “copyright market” is well organised and disciplined.**”

(Emphasis added.) (4)

ASIP’s Efforts to Create a Collective Licensing Mechanism

In the US, the effort to organize a collective rights organization for graphic artists began in 2000 with the Illustrators Partnership of America (IPA). By 2006, IPA had assembled an ad hoc coalition of 12 visual arts organizations, incorporated in November 2007 as the American Society of Illustrators Partnership (ASIP). ASIP’s general mission has been to acquire and disseminate accurate information about artists’ rights to artists during the convulsive shift from a print to a digital economy. Our specific mission has been to create a legal collecting society and to create the protocols and infrastructure by which fugitive

income derived from new sources of licensing artists' work can be identified, collected and distributed to the proper rightsholders. Illustrators join by **mandating** ASIP. Membership is open to all published illustrators in the U.S.

In 2013, ASIP formalized its longstanding relationship with the Artists Rights Society (ARS), thus providing an indisputable chain of rights for the domestic and international rights clearance of mandated illustrators.

Artists' Declaration of Unity

On November 2, 2006 our groups presented a "White Paper" to the General Assembly of the International Federation of Reproduction Rights Organizations (IFRRO) at its annual conference in Auckland, New Zealand. A key statement in that document specified that any prior claims made by other parties to collect artists' reprographic royalties were made without the awareness or authorization of the artists these groups represented:

"Our [12] organizations have not transferred our members' mandate to collect print or digital reprographic rights to any other U.S. organization nor have the majority of our individual members knowingly or willingly given any U.S. organization such a mandate...The Board of Governors of each organization supporting the Illustrators' Partnership affirms their intent to unite to constitute the relevant rightsholder class of the reprographic rights of the American illustration repertoire of published works." (5)

History

The members of our organizations became aware of reprographic royalties at different times, most within the last decade. However none of us learned about the existence of these collective licensing schemes through any outreach by any of the organizations that have been claiming and using these artists royalties for the last 20 years. Instead we've had to learn what we could from publicly available documents such as income tax returns and from information provided by foreign collecting societies.

Because reliable information has been so hard to come by – and because, in a cottage industry, facts must compete with rumors, misinformation and disinformation – most artists are still unaware, or only vaguely aware, that a massive secondary licensing system has been developing for over 30 years, with growing revenues of roughly \$300,000,000 annually. (6) In other countries where royalties are distributed to artists, surveys by the International Federation of Reproduction Rights Organizations show that visual arts royalties average at least 15% of total collective fees and increase dramatically when digital reprography replaces analog photocopying. (7)

The responses to the recent Visual Arts Notice of Inquiry provides evidence that artists are not receiving any of the royalties from this licensing, but are at least becoming aware of the problem. Here are just 20 of the comments from those nearly 2,600 replies:

Telaina M. Muir: “[T]here is a massive secondary licensing already taking place in reprographic rights market that artists don’t see a penny of.”

Taina Litwak: “There is a SEVERELY broken domestic system of returning compensation to artists from reprographic and other secondary rights licensing in both domestic and overseas markets. The current system does not return the more than \$300 million dollars generated annually to the actual artists whose work is being licensed. This number is likely to grow and continue to benefit the few, not the many. THIS is something your agency should be focusing on instead of the current re-writing [of copyright law].”

Teri McDermott / McDermott Medical Illustration: “I am a member of ASIP (American Society of Illustrators Partnership). I do not think my secondary royalties should be paid to publishers or to a trade organization that claims to own or represent my rights, they should be paid to ME, the copyright owner...the US Copyright Office should not legalize the payment of royalties derived from the overseas commercial licensing of individual artists’ work to self-selected US trade organizations by formalizing the de facto extended collective license currently underway in the US by the Authors Coalition of America and its visual art member organizations.”

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

The Artists Rights Society: “The CCC offers blanket annual licenses to companies, universities and other institutions and advertises that it provides a safe harbor from infringement for all reprography beyond that permitted as fair use. However, the CCC does not share license revenues with visual artists for the visual component of publications included in the blanket license.”

Mark Simon: “The biggest issue I have run into is dealing with, or trying to deal with the Copyright Clearance Center. They have stolen my work and the work of others, collect money for it and do not pay the owners. I have not given them, or anyone else, permission to license my work. I wrote an article about the mystery of how they work and they called and bullied me and threatened me. They have lots of lawyers and threatened to bankrupt me. They are one of the biggest threats to creators. They are legally stealing art and income from creators.”

Ken Dubrowski: “Speaking personally, artists have seen their foreign reprographics royalties diverted away from them over the years and I fear this is exactly what is going to happen with Orphan Works. Several artists organizations privately have instead sided with internet providers to support Orphan works with the knowledge that they will benefit financially with registries.”

Amelia Davis: “The kind of system the Copyright Office has proposed to Congress seems all too familiar to me. Artists have already seen their foreign reprographics royalties diverted away from them for at least 20 years. I fear this is exactly what is going to happen with the proposals the Copyright Office has made to Congress. To prevent this unjust conflict of interest, it is imperative that no artists group that supports this legislation be allowed to receive any financial benefit from the creation of copyright registries or notice of use registries. These artists organizations have failed artists and should not be allowed to use this legislation to profit even further off the artists they were created to help.”

Cathy Horvath Buchanan: “I have recently become aware of secondary licensing market where money is collected on behalf of the artists or their copyrighted works being used by academic publishers etc., but it seems the money is never given to the artists. Someone has the money, but it isn’t the artist. I think this is a matter that needs to be dealt with so that the artist who’s ‘work’ is being used receive the benefit from their labour.”

Cynthia Turner: “*For the last two decades my work has been more widely disseminated through infringing activity than by legal publication, even though my work is usually being published worldwide in multiple territories on first publication. I find that any image of mine, once published, is likely to be widely infringed. It has already been more than a decade since the courts recognized the damage to authorial secondary rights in *Tasini*. And reprographic royalty income has, in fact, been lost to visual authors like me for more than 30 years. Yet, it is a secondary royalty stream that continues to expand in both value and marketshare. The Copyright Clearance Center boasts of returning one billion dollars to rightsholders in the last decade, yet it has not returned one dollar to visual artist rightsholders embedded within the*

published works it licenses. Billion dollar commercial databases, like LexisNexis, ProQuest, EBSCO, Ovid and other content aggregators engage in the unauthorized licensing of visual art, both within the collective work of the article, and some also *separate out* the individual image for unauthorized licensing.”

David Hohn: “Currently United States Illustrators are not considered “authors” of their work and are therefore not entitled to received monies collected through the International Federation of Reproduction Rights Organizations. This is in direct contrast to my Canadian and British peers who’s copyright laws are structured to allow them to receive these funds that are specifically meant for them.”

J. David Spurlock: “There is a wealth of secondary rights licensing going on that illustrators, photographers and cartoonists have not been made aware of and not been paid for. In other countries artists are properly paid for such and this hidden income stream needs to be better handled in America in favor of the artistic creators of images.”

Jill Marci Sybalsky: “We are already losing out to massive secondary licensing already taking place in the reprographic rights markets.”

Gabriella M. Serralles: “I am too new to the industry to miss the revenue that artists like Brad Holland have apparently missed due to a lack of education on the secondary licensing in the reprographic market. I was utterly appalled to find out that only in the US have artists missed out on a percentage of the \$300,000,000 in revenue that secondary licensing has brought in. In other countries, artists receive up to 15% from it. On top of that, not only is it up to the artist to learn about this aspect of the law, it is none of our business. It is none of our business who or what takes money from our pockets and spends it how they wish. And because this has been going on so long, those who have been collecting our royalties might try and claim that these expectations are settled and should be worked into the copyright law. That is absolutely reprehensible, and if lawmakers actually listened to them and made their continued exploitation, financial dishonesty, and theft legal it would help cripple the creative industry, and by extension the economy. It would reward these institutions for withholding financial information, claiming our hard earned revenue as “orphaned funds,” and would make it completely legal for them to take food from the mouths of artists ad infinitum.”

Joanne Haderer Muller, MA, CMI, FAMI: “I’m keenly aware that the Copyright Clearance Center is a for-profit institution that does not redistribute secondary licensing fees to visual creators. Yet another fox in the hen house is a Mistake.”

William Westwood: “I want to express one last concern relative to collecting societies in the US, or rather the lack of them – reprographic rights markets. There are apparently hundreds of millions of dollars in royalties that should be being distributed to creators for the licensing of their works. This massive secondary licensing of reprographic rights is a huge revenue stream going apparently to many other corporations even though the money belongs to creators. Why Congress cannot or will not address this unjust situation is mind-boggling.”

Kathryn Yingling: “The digitization of the world’s creative works, along with the dramatically rising arc of unauthorized secondary licensing by ever-expanding publishing behemoths, are increasingly harming visual authors. For over 25 years a passive U.S. Copyright Office has not implemented policy or recommended legislation to restore balance to the author/publisher relationship. I am grateful to this new Copyright Office administration for the opportunity to participate in the first inquiry into visual art during my 40-year career. It is all too easy for any individual or company to upload an image from Google and use it in an unauthorized fashion. Artists today invest in expensive digital equipment and software that require frequent updating. And there is a great amount of time and effort that goes into the making of the work. Please assure that royalties are paid to the artists who earned them, and not to publishers, content aggregators, commercial databases, “art” charities or “art advocacy” trade organizations.”

James Gardner: “I believe the Copyright Office and Congress should take a close look at the types of organizations lobbying in favor [of] the proposed changes. If they stand to profit while the actual artists and creators will suffer, you must ask yourself how that could possibly be an appropriate revision.”

Kevin E. Pack: “At every juncture and major decision the Supreme Court of the United States has held the interest of the creator over that of the user, what has been proposed here moves to turn that on its head. I believe that Congress can address the issue of “Orphan Works” without rewriting the existing laws, and I do not believe that the Copyright Office should be granted the expansion of the authority it seeks, one need only look at what has occurred with the FCC to see where a grant of that authority will end up. Only it will be worse, the small creators that do not have the financial means or cannot organize to create a union for lack of a better term will lose out and be left out of the discussion much like they have been here. Very few small business owners like myself can afford to travel to Washington D.C. to take part in the discussions that were held, we cannot afford to hire the lobbying firms that companies like Google, AP, Yahoo, Bing and many others hire to advocate their positions and the Copyright office takes their testimony and lists it as a stakeholder agency over the many hundreds of thousands of small business

who have seen their livelihood either ended or eroded and feel that they no longer have a voice.” (Emphasis added.)

Brad Holland: “Because this has been going on under the radar for so long, the groups now taking artists’ royalties may insist that settled expectations in the marketplace should be institutionalized into the new copyright law. This would be wrong because it would reward those who withheld financial information from artists by allowing them to retain the artists’ royalties. With the growth of digital licensing, royalties derived from these secondary licenses are growing dramatically. So unless something is first done to correct the current system, we fear that the creation of an extended collective licensing program will only serve to lock artists out of their secondary rights income forever.”

We could quote from hundreds of similar comments, but these should be more than enough to make the point.

In our opinion, the issues behind the proposal for extended collective licensing are greater than whether any organization, whether commercial or non-profit, should be allowed to benefit from the millions of dollars that, collectively, artists are losing. We believe the issues at stake in this proposal are similar to those raised by both the proposed orphan works legislation and the failed Google Book Settlement, which Federal Judge Denny Chin dismissed on March 22, 2011.

Each of these developments involves an effort by third parties to define artists’ work and/or royalties as *orphaned property*, and to assert the right – in the name of the public interest, class representation or the legal equivalent of a “finders-keepers” claim – to exploit that work commercially and/or to appropriate the royalties as their “confidential” income. We agree with those legal decisions that so far have affirmed that copyright is an individual, not a collective right, and that unless one explicitly transfers that right, no business or organization can automatically acquire it by invoking an orphaned property premise.

Respectfully submitted,

Brad Holland

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Nick Anderson

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Don Kilpatrick

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Footnotes

1. “ACA began collecting fees for graphic artists and illustrators in 2003, when Graphic Artists Guild became a member. The agreement between GAG and Kopinor [Norwegian collecting society] was dissolved and Kopinor forwarded the illustrator distributions to ACA. The total reprographic royalties distributed to ACA from 2003 to 2008 year-end is \$2,137,272.86.” Letter from Marianne Shock, Administrator, Authors Coalition of America to American Society of Illustrators Partnership, May 26, 2009.

2. “ACA has no standing to request a Member Organizations (sic) financial records. And, unless one of our Member Organizations files a challenge on ‘one of the graphic arts organizations’ ACA will not demand those records be turned over to an independent auditor. Neither will we [ACA] support ASIP calling for an independent organization to open their books or release confidential financial information.” Letter from Marianne Shock, Administrator, Authors Coalition of America to American Society of Illustrators Partnership, *Ibid.* N.B. Ms. Shock’s comments raise the question of how royalties derived from the commercial licensing of work by ALL American graphic artists can become the “confidential” “income” of certain self-selected “Member Organizations” of the Authors Coalition. These groups have done nothing to earn the money except claim it from the overseas agencies that collected it. Also, it should be remembered that the “Member Organizations” that decide how to distribute artists’ royalties are the same groups that receive the funds. In short, they distribute other people’s money to themselves. Therefore ACA’s policy of not supplying “confidential financial information” to rightsholders is self-enacted, self-referential and would appear to be self-serving.

3. Comments of the Association of Medical Illustrators to the Library of Congress, U.S. Copyright Office, [Docket No. 2015-3] Mass Digitization Pilot Program Request for Comments Federal Register Vo. 80, No. 110 June 9, 2015, p. 2, filed October 9, 2015.

4. “The Extended Collective License as Applied in the Nordic Countries,” Henry Olsson, The Ministry for Justice, Stockholm, Sweden, May 20, 2005.
<http://www.kopinor.no/en/copyright/extended-collective-license/documents/the-extended-collective-license-as-applied-in-the-nordic-countries>, as quoted in Comments of the Association of Medical Illustrators, *Ibid.*, p.3.

5. “*Declaration of Unity*,” Statement to the General Assembly of the International Federation of Reproduction Rights Organizations (IFRRO), Auckland, New Zealand, Nov. 2, 2006.

“The American Illustrators’ Partnership is a national illustrators’ rights organization representing some of the most prolific and widely published illustrators in the world. The majority of these artists are independent contractors who have retained reproduction rights to the bulk of their published works, and have made clear their desire to maintain and manage their copyrights.

“The Illustrators’ Partnership is supported by 12 independent graphic arts organizations whose combined membership numbers over 4,000 artists and cartoonists. They have come together in hopes of protecting the rights of their members collectively, and their boards have endorsed our efforts to bring accountability to the reprographic rights of American popular artists.

“Our organizations have not transferred our members’ mandate to collect print or digital reprographic rights to any other U.S. organization, nor have the majority of our individual members knowingly or willingly given any U.S. organization such a mandate.

“The great body of American illustrators wish to participate in the sharing of reciprocal rights agreements in the international reproduction rights community. Until now most American artists were even unaware that reprographic royalties are being collected and distributed throughout the world.

“The Board of Governors of each organization supporting the Illustrators’ Partnership affirms their intent to unite to constitute the relevant rightsholder class of the reprographic rights of the American illustration repertoire of published works. In this regard we have expressed our willingness to work with the Copyright Clearance Center (CCC).”

The full “White Paper,” with information about each of ASIP’s member organizations, is available at the ASIP website: http://www.asip-repro.org/images/decUnity_ifro.pdf

6. <http://www.ifro.org/members/copyright-clearance-center-inc>

7. “In 2005, RRO’s allocated an average of 15% of reprographic revenues collected to visual material...Several organisations reported a significant increase in copying visual material when scanning and other forms of digital copying are permitted which increased the share of revenues allocated to visual material,” *The Art of Copying*, “A Guide to the Incorporation of Visual Material in Reprographic Legal Schemes and Licenses,” The International Federation of Reproduction Rights Organizations, footnote, page 18.

http://www.ifro.org/sites/default/files/The_art_of_copying_web_0.pdf