Copyright Office – concerning Notice of Inquiry on Copyright Protection forCertain Visual Works

I have worked my whole life as a visual artist, almost exclusively without earning much in the way of royalties. It has always been a challenge to get appropriately compensated in accordance with the truly unique contribution I've made to many types of projects when faced with the already-existing teams of lawyers and contract writers or American corporations (not to mention foreign corporations, against whom I never felt truly protected.) The copyright as we've known it is my only shield and even that is a thin guard which needs bolstering.

The new bill being presented completely devalues my contributions to future work I am slated to do. If I am unable to make more than a paltry sum up front on illustrations that will be published in various forms without being able to pursue future/other uses (because the rights have been given to someone else,) then I will not be able to support myself before and into my retirement.

The clients and corporations I've worked for in my regular jobs (Hallmark, Disney, Fox TV, Nickelodeon, etc.) understand the necessary value of my contributions to their products (that simply could not exist without the contributions of me or someone like me) and while I am seldom compensated with royalties, I am compensated with a salary that is well above that of most Americans. For that I feel very lucky. However, at 56 years old, I am approaching my retirement years and am attempting to set myself up to eat something other than cat food as a retiree. I will be moving from entertainment to my illustration career exclusively as my way of making a living. It has been my lifelong dream to do so and I have been building my skills and contacts toward this end since the beginning of my career. As a skilled artist, I will be successful at getting the work but if this bill passes, it looks as though I will not be successful at retaining my rights with the art I create in the field of illustration and children's publishing. I have been rightfully counting on that…

The Orphan Works Act was thankfully not put into play… this one would appear to go even further… the reforms that would be put into place only support companies who, for the most part, via the internet, would usurp the visual artists' properties and rights. It should be illegal to mass digitize any works not in the public domain without written permission from the creator - stiff financial penalties should be the result. In addition, we should be able to make our images searchable by image, not just by textual data, or it is a nearly useless endeavor. I also believe that this should not be controlled by a privately owned business because without oversight by the people, it is unlikely that our rights will be maintained.

Please do not force me to give away my rights and future income to people with whom my art did not originate. Please help me and the thousands of Americans like me, who, while being well-educated in our fields and of sufficient intelligence and a high creativity level to do well in our businesses, are ill-equipped to spend

all our time learning how to defend our rights and to be able to pay to keep them even in our current system. We are counting on you to help us make sure our art, which is what we have to market in this world – which we have indeed spent our lives learning and building, is not given away to those who would capitalize on our lack of legal power.

Thanks for issuing the Notice of Inquiry dedicated to examining copyright and visual artists.
S R

p.s. And because Cynthia Turner said it better… and because her story directly relates to most visual artists and what we do… what she said:

I am writing to ask that you create policy to protect visual authors and their exclusive rights, and support a sustainable environment for professional authorship.

Licensing my rights is how I derive my business income and my copyrights are my economic assets. Copyright is also of the utmost importance to me for creative control of my work to protect its accuracy, integrity and authenticity. The 1976 Copyright Act has enabled me to sustain a professional career. However, I have experienced a substantial and *growing* loss of rights. I am also facing threats to the integrity and preservation of my lifetime body of work, which is my business inventory and also my legacy. My concerns and experiences are shared by my colleagues and by fellow visual artists throughout this country.

The digitization of the world's creative works, along with the dramatically rising arc of unauthorized secondary licensing by ever-expanding techno-publisher 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. Additionally, there are other overdue actions the Copyright Office can implement to restore equity to the American artist.

1. What are the most significant challenges related to monetizing and/or licensing photographs, graphic artworks, and/or illustrations?

• the acknowledged **lack of negotiating power** of independent contractors · the confiscatory scour
work-for-hire and **all-rights publishing contracts** • the loss of secondary royalty income from the diversion of artists' **domestically-earned reprographic royalties** by the Copyright Clearance Center, content aggregators and commercial databases to publishers • the loss of secondary royalty income from the diversion of **foreign-earned reprographic royalties** from overseas collecting societies to self-appointed U.S. visual art charity and trade organization recipients · the need for regulatory
rights administration by the Copyright Office *to assure royalties are paid to the artists who earned them*, and **not** to publishers, content aggregators, commercial databases, "art" charities or "art advocacy" trade organizations

• the length of time before the exercise of **termination rights**

Copyright supports a property right that establishes a functioning market for the creation and dissemination of my expressive works. For professional authors like me, that property right is created through the pursuit of my craft, a lifetime of study, and my sustained expenditure of great effort, time and money in the production of my artistic creations. As a medical illustrator I have earned advanced degrees necessary to

enter the field as a qualified visual artist. I also maintain my Board certification very 5 years by completing continuing medical education. In the beginning of my career I was a traditional board artist. Like everyone else, I also now invest in expensive digital technology to serve the needs of my clients. *I have no safety net but the one I provide for myself.* Health insurance, retirement, continuing education, overhead, capital investment is all my sole responsibility. And, it all must be covered by the licensing fees I earn from the creation of original works.

My work has been published throughout the world in biomedical and scientific trade journals, at medical exhibitions and conferences, as well as consumer journals, textbooks and children's books. The majority of my work now focuses on pathophysiology and drug mechanisms of action for pharmaceutical and biotech research and device companies for their investor and advertising markets. This work is *always* conducted under non-disclosure agreements and under an exclusive license.

European publishers legitimately seek licenses from me for republication of my images they find in scientific literature. PhD candidates throughout the world frequently request permission to use my work on their theses covers and at their dissertations, and I am always pleased to support them with permission and no license fees. Other users seek free use that I cannot or do not permit. Some seek a license that I must withhold because the work is under a current exclusive license. *Key to this is my ability to clear these requests* to protect my clients, my work, and my markets according to my discretion and according to my in-force contracts.

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 to one dollar to visual artist rightsholders embedded within the published works it licenses. Billion dollar commercial databases, like LexisNexis, ProQuest, EBSCO and others engage in the unauthorized licensing of my works, both within the collective work of the article, and also *separated out* as an individual image for license.

As a prolifically published scientific artist I have experienced tremendous infringement of my secondary rights in publishing commerce. I was a plaintiff in a group of medical illustrators in a **decade-long infringement action** against a multi billion-dollar worldwide publishing conglomerate who unlawfully extended my first time North American print reproduction rights secured for one of its U.S. journals into a systematic licensing of my works to its 45 international affiliates over the course of two decades. It went undetected for many years until the world began to shrink as it became easier to find work on the internet.

It is not reasonable, not feasible and not realistic for independent creators to find justice against giant corporations. We cannot sustain the legal battle. For corporations, litigation is part of doing business, and they are staffed with entire departments and outside counsel as matter of course. As far as they are concerned, if they are in the wrong, all they need to do as their defense is keep you in court. The drain on time, productivity and procedural runarounds designed to drive up costs all take a measurable toll. The resolution was unsatisfactory, the toll of the litigation was draining, and our legal fees approached two million dollars.

I have found my work isolated from its published article and offered for sale for Powerpoint presentations or as stock art by content aggregators who have secured no authorization from me to license my work. These infringements are hidden behind expensive subscription walls to which I do not have access. (Academically-based colleagues have recognized my work and alerted me.) I am also painfully aware that my work is extensively pirated in India and China for use on commercial medical packaging.

Like all medical illustrators, I can upload an image of mine into Google reverse image search and find dozens of unauthorized uses on the internet. I am not concerned with fair use of my work, or the use of my work on blogs that celebrate or comment on art. But, I heartily object to the widespread use of my work to

promote medical clinics, vitamin companies, doctor offices, alternative health remedies and blogs, and other licensable uses.

However, these random infringements on the internet pale in comparison to the sustained, lucrative unauthorized licensing of my work for the secondary reprographic uses marketed by commercial content aggregators, databases and the Copyright Clearance Center.

It is hard to reconcile this tremendous theft of licensing revenue from American visual artists that **remains unexamined and unchecked**. *It is very hard to reconcile this outcome with the goals of the Copyright Act.*

The sustained authorship of professional authors is not indestructible. In fact, it is becoming rather frail. Our rights urgently need to be secured.

2. What are the most significant enforcement challenges for photographers, graphic artists, and/or illustrators?

Little can be done to right the current extreme imbalance between author and publisher, *or author and user if you prefer*, but I have three solutions.

1. The right to authorship in the U.S. should be inalienable. It is self-evident that work-for-hire for independent contractors *deprives an artist of authorship* in direct contravention of my constitutional right to secure the exclusive rights to my work for limited times. This loss of authorship is compounded by the loss of all secondary income created by the ongoing licensing and exploitation of that work, including the *exclusive right to create derivative works*. Meaningful copyright reform would prioritize amending the law to ***apply work-for-hire only to true employees.***

2. The length of time to exercise the termination right must be shortened. By the time a creator can exercise a termination right he or she has been impoverished for three and a half decades while those copyrights have built a billion dollar corporation *or four*. The exercise of the termination right has become a grossly unmatched legal fight against a leviathan. No example describes this more tragically than Jack Kirby and his inability to exercise his valuable termination rights during his own lifetime against the four Marvel and Disney Corporations.

3. All statutory remedies should be automatically available to visual artists at the moment an artist fixes a creative expression in a tangible form. Statutory remedies are the only viable method by which an artist can enforce and defend their property right. The substantial deterrent of ***automatic*** statutory remedies will have a significant effect on the rampant piracy and unauthorized use suffered by American visual artists.

3. What are the most significant registration challenges for photographers, graphic artists, and/or illustrators?

It is self-evident that is fundamentally unreasonable to require registration for visual artists as a prerequisite to statutory remedies. Without theses remedies, including attorney fees, costs recovery and injunctive relief, visual artists cannot adequately enforce their rights.

Most visual artists create exponentially more works than any other genre of creator. And although there is a commendable, special group registration solution for photographers, non-photographer visual artists need to be especially vigilant when using the group registration system. If the illustrator or fine artist registers a group of works labeled as a “collection” or a “compilation” the artist risks a limitation of a single grant of statutory remedies for the group, or a fractional grant of statutory remedies for an infringed image within the group.

Most artists would reasonably assume that they have “perfected” their copyright by timely registration within three months of publication, and have therefore secured statutory protections for the lifetime of the

copyright. Few know that the Copyright Office does not retain most visual art deposits after ten years, and has discarded millions of visual art registration deposits.

Even fewer artists know that the already unaffordable $55.00 cost to register a work only secures retention of the visual art image record for 10 years, and if the artist wishes to full term retention of a published copyright deposit in the Copyright Office for the life of the copyright, *the artist must pay an additional $540.00*. This means the real cost of a "perfected" visual art copyright registration is $595.00 per image.

Registration for visual artists is too burdensome, unrealistic, costly and fraught with potentially fatal technicalities of which many artists are unaware. The Copyright Office has *long known* that most visual artists are unable to afford the time and expense to register all their works. The 1976 Copyright Act was revised in part to try to prevent the loss of rights to American creators by removing burdensome formalities that caused the forfeiture of rights.

Because of this, the true spirit of the Berne Convention prohibition on formalities should be honored for U.S. visual artists.

I realize this stands in stark contrast to current policies being pushed that would limit or remove artists' remedies. Such policies favor infringers and not artists, and favor the extinguishment of professional authorship for the protection of infringers.

I no longer know the cost of overdue library fees, but when I was in college the fee for an overdue book (or never returned book) was quite small. It was to encourage you to go ahead and be sure to return the book. The penalty wouldn't become so overwhelming that it might cause you to abandon the idea of returning the book. So, it was a minor penalty, no matter how overdue, ***until*** it was time to register for the next semester when you could not re-enroll unless you returned the book or paid for its replacement if lost. Because it had the dramatic hammer of an effective penalty it worked.

If a thief steals a handful of loose candy from a convenience store the thief is charged with shoplifting, a very serious crime. If a thief steals more than a $1,000 *of anything* it is a felony. Steal $30, $3,000 or $30,000 worth of art usage and *the only penalty is on the artist*, unless statutory remedies are automatic.

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

I have never personally experienced a challenge or frustration in making legal use of other visual art. As a professional illustrator I only use other visual art for inspiration, or under the doctrine of fair use, ***or*** I secure a license from a stock house to incorporate backgrounds or other textures. I shoot my own reference photography. I do not appropriate other creators' works and I do not "remix," "sample" or "mash-up" other creators' protected works.

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

The overdue implementation of the **resale royalty, and the designation of that royalty as inalienable** would certainly make this list. American illustrators wholly support the implementation of the resale royalty and filed a detailed report with the Copyright Office in 2012.

The legislative implementation of the federal resale royalty has been in abeyance since the U.S. joined Berne in 1983, and that has resulted in a generation of resale royalties lost to artists and their heirs in the U.S. and around the world.

It is hard to reconcile this loss with the goals of the Copyright Act. The sale of American illustration paintings and drawings is an emerging market attracting sophisticated collectors worldwide, and these rights owners deserve to participate in the wealth they have created. I have observed first hand the sale of

many illustration works I remember being created and published by my mentors and peers, including this one where the National Geographic Society auctioned part of its 11.5 million image archive at Christie's in New York.

In the case of illustrators, painters and photographers, in many instances *the original art was never sold by the artist*, but passed into the hands of publishers, advertisers and others through the production process.

American illustration is evocative of a unique type of American artistry and personal expression. As more publishing archives are mined for illustrators' original works of art, the market for published illustration originals will continue to grow. Contemporary illustrators today are creating the Americana of tomorrow, and some are experiencing the market exchange of the growing value of their original art occurring during their lifetimes, *and enriching only others.* There can be no doubt that the adoption of a federal resale royalty regime would further incentivize and protect visual authors. The artists of financially productive works would finally share in the equity of the value they have created.

I therefore support the Congressman Jerrold Nadler's **American Royalties Too (ART) Act of 2015** which calls for the institution of the reciprocal resale royalty in the United States, and for the Copyright Office to bring transparency and justice to artists' secondary licensing rights. I thank the Copyright Office for recommending this bill to Congress.

Summary

Each of the exclusive rights conferred by copyright can be subdivided and each divided right has a value. We rely on the divisibility of our exclusive rights to earn our livings. Any rights not specifically transferred in a license belong to the artist, including rights to uses not yet known or invented.

When the use has value, part of that value belongs to the creator; without the creative work the market—and the demand—would not exist. Yet, we experience significant difficulty enforcing our rights because of the dramatic imbalance between the individual creator and giant publishing enterprises and their cronies. In many cases, revenue streams that directly belong to visual artists have been wholly diverted to other parties, and artists are foreclosed from the exercise and enjoyment of their rights.

No meaningful copyright reform is possible without seeking solutions to this state of affairs in the U.S. today.

As Justice Ginsburg wrote in *Eldred*, "the economic philosophy behind the Copyright Clause . . . is the conviction ***that encouragement of individual effort by personal gain is the best way to advance public welfare*** through the talents of authors and inventors. Accordingly, copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . ."

It is my sincere hope that this Copyright Office will take care to firstly cause no harm to visual artists. Secondly, that the Copyright Office will proactively work with visual artists to craft policy to protect visual authors and their exclusive rights, and support a sustainable environment for professional authorship.