ASSOCIATION of MEDICAL ILLUSTRATORS
201 E. Main Street, Suite 1405, Lexington, KY, 40507 | phone 866.393.4264 | fax 859.514.9166 | AMI.ORG

Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property

Comments of the Association of Medical Illustrators

September 26, 2016

The Association of Medical Illustrators appreciates the opportunity to respond to The Federal Trade Commission and the Department of Justice's Antitrust Division request for public comment on a proposed update of the Antitrust Guidelines for the Licensing of Intellectual Property.

About the Association of Medical Illustrators (AMI)

The Association of Medical Illustrators (AMI) is the sole professional organization for medical illustrators. Without exception every member is an author of copyrighted works and the licensing of such works, whether directly by them or by an academic institution or other employer, is their primary source of income. In the case of free-lance illustrators it is their only source of income. These professionals, whether they are running small businesses as sole proprietors or studios, or are employees, have graduate level training or higher in science and visual communication, including advanced courses in human anatomy, pathology, molecular biology, physiology, embryology and neuroanatomy.

AMI was established as a professional association in 1945. Since then, the AMI has codified the visual science profession: by setting the academic standards and guidelines through the accreditation of university graduate programs; by recognizing the continued competencies of a professional through board certification of medical illustrators; and by establishing a scholarly journal to disseminate their knowledge and skills. These highly accomplished visual artists are scientific partners in the leading edge of advances in medicine as well as new techniques of illustration, such as those associated with advances in software and digital technology. Such technology includes animation, 3D modeling and augmented reality, medical models and medical simulation, prosthetics and anaplastology as well as stand-alone illustration created by hand and also incorporating digital biologic data.

With the exception of the minority who are salaried employees of hospitals or other companies, medical illustrators work as independent contractors of established small businesses in which their income derives solely from licensing their right of reproduction to those who commission their works. Therefore, AMI members have a strong interest in antitrust policy as it relates to copyright licensing.

AMI is a professional trade organization and plays no role in licensing its members' works. However, most AMI members have assigned to the Artists' Rights Society (ARS) the authority to license their works for secondary reprographic reproductions of published works not covered by the original commission. Yet, despite establishing a legal chain of rights for republication of published work (reprography) and an authorized authority for engaging in the permission and international commerce of these rights, visual artists continue to be foreclosed from these licensing systems, in direct violation of US Antitrust law, US Copyright law, and the Berne Convention.

Therefore, AMI associates itself with separate comments filed by ARS. However, these comments will address the special concerns of medical illustrators with regard to anti-competitive practices of Scientific, Technical and Medical (STM) publishers.

Neither the Original 1995 Guidelines nor the Proposed Revisions Adequately Address Anticompetitive Practices in Copyright Licensing.

While AMI associates itself with all of the comments filed by ARS – particularly with regard to the failure of the proposed revisions to address copyright licensing in the Internet era – AMI would bring to the attention of the FTC and the DOJ that digital distribution of copyrighted content is now one of the largest industries in the world, and that it is increasingly concentrated in the hands of a few enormous companies, particularly Google. Antitrust regulators in the United States are lagging behind their counterparts in the European Union in scrutinizing the anticompetitive business practices of large Internet companies.

ARS' comments also describe the disproportionately negative impact on medical illustrators of the use by publishers of the Copyright Clearance Center (CCC) as an anticompetitive means to deny illustrators digital reprographic royalties.

However, in the comments that follow, AMI will raise the special concerns of medical illustrators with respect to the anticompetitive licensing practices of STM publishers.

Post 1995 Changes in STM Publishing and Licensing as They Affect Medical Illustrators

As observed above and in the ARS comments, the 1995 guidelines are directed to anticompetitive practices in patent licensing and make only passing reference to copyright licensing. This is not surprising in that there was little controversy in 1995 over anticompetitive practices with regard to copyright, particularly as regards publishing.

The STM publishing industry in 1995 could best be described as consisting of the printing and distribution of scientific, technical and medical books and journals that were printed on paper, bound, and distributed to book purchasers and journal subscribers. STM publishing was not then, and is not now, a mass market business. Consumers of STM publications are specialized communities of scientists, physicians, engineers and the specialized libraries that serve them.

In 1995 copyright licensing practices pertaining to medical illustrators had changed little since the 19th Century. Then as now most medical illustrators were self-employed freelance artists who created illustrations that visually communicated the ideas in the accompanying written material. The typical practice was that a journal or book editor, art director, or individual author commissioned a qualified illustrator to provide custom images that would illustrate the teaching contained in a given text. Creating the illustrations required the skills of an artist who could understand the technology discussed in the written text and visually represent that technology. Therefore, rarely were STM illustrations stock images. They were commissioned individually from a qualified illustrator with the appropriate technical training. Standard practice was for the illustrator to provide a one-time license for reproduction of the illustration only in the context of the given article or book and for the first printing or additional, unaltered print runs. Use of the illustration by a different author, or in a different publication required a new license from the illustrator. The right of reproduction of the illustration for any other purpose remained vested in the artist. As noted in ARS' comments the primary means for copying a licensed illustration in 1995 was use of a photocopying machine. When a text containing an image was photocopied, it was not practicable to strip the image from the text and the entire practice was sufficiently cumbersome that mass reproduction was not feasible. However, as photocopying technology evolved to permit easy reproduction in multiple copies, the court decisions referenced in the ARS comments found such mass photocopying exceeded the limits of fair use and publishers responded by offering blanket licenses through the CCC. While the CCC's practices are described in greater detail by ARS, AMI wishes to emphasize that CCCs business

practices have had a disproportionately negative impact on the licensing market for individual illustrators. AMI has no known member who has ever received acknowledgement of their rights or royalty payments from the CCC.

In the digital era, except for pirated copies, mass market copyrighted works continue to be delivered to purchasers or subscribers either in a single digital version of a book or in a digitized edition of a periodical for which a payment has been made by the user. In these situations the royalty system under which authors are compensated is not much different in practice from that governing distribution in hard copy. With regard to STM publishing, however, the situation is quite different.

Historically, STM publications have had, literally, a long shelf-life. While print runs were small relative to mass market books and periodicals, STM publications had, and continue to have, great value as reference material. Scientists, doctors, and engineers continue to need access to books and articles long after the first distribution. Traditionally, they have accessed these publications by using the services of a library with books and bound periodicals on its shelves. From a copyright perspective, checking a book out of a library does not infringe on the copyright in the book or its content because such use is permitted under the first sale doctrine. However, in the last decade the traditional library has become anachronistic. Reference libraries, whether in the STM field or other fields such as law, have been converted into digital libraries where physical copies of a bound publication are no longer necessary. However, *these digital libraries do not enjoy the benefit of the first sale doctrine* since they cannot come into existence without copying – or reproducing – in a new medium of fixation, original publications. Works contained in these new libraries are usually presented in an entirely different format from the earlier printed works. They are presented as databases and are accessed by users using proprietary search engines available only to users who pay for continued access. By contrast, in the bookshelf era publishers never collected payment when a volume was lent to a reader.

These new subscription-accessed databases provide STM publishers with an entirely new and lucrative market. They can reproduce previously printed text and images and combine them into databases that are sold anew to traditional libraries and to individual readers in the form of expensive, online subscriptions. However, **publishers assemble these digital databases without bothering to obtain licenses from rights holders of the images contained in the books and periodicals in the digital collections.** Among the STM publishers marketing these databases are: Elsevier (ScienceDirect.com); Lippincott Williams & Wilkins (Ovid.com), and Thomson Rueters (WebofScience.com) to name a few.

These new digital databases are unrelated to the *blanket* licensing practices of the CCC. That is because the CCC blanket license almost always involves authorizing a user to make a copy or copies of a previously printed work in the form of a facsimile of the printed work. This is why the type of use the CCC purports to license is best described as digital *reprography*. By contrast STM databases are entirely new electronic fixations of copyrighted works offered as subscription or pay-per-view access.

However, even though CCC's annual *blanket* license has no relationship to these new STM database subscription services, the CCC has developed a new form of *title-specific* licensing that works directly in concert with these STM databases to exclude medical illustrators from knowledge of or the ability to participate in the licensing of their works. This title-specific license is offered through a system the CCC has branded and markets as "RightsLink®."

A member of AMI's Board of Directors used this system to obtain an unauthorized license to republish her own copyrighted image even though she had not authorized CCC, the STM publisher or any other entity to sublicense her work and she had retained all exclusive rights. She did not even have to search for the journal article in which her images were embedded. Rather, she used an image search feature of Elsevier's Science Direct closed-access network that is available to subscribing university libraries. This

search feature provides high resolution image files and PowerPoint downloads. Elsevier's Science Direct enables a subscriber to use copyrighted images to search for articles in which the images are embedded. She used this to find seven of her illustrations that were included with the full text of the journal article containing one of the images. When the article was displayed on the screen, it included a legend with her copyright permission notice. At the top of the displayed article there was a link entitled "Get Rights and Content". Using this link she was transferred to CCC's RightsLink® where a title-specific license to her illustrations for use in a new journal article is offered for $363.40. Subsequently, this medical illustrator was neither notified of the transaction nor offered a share of the licensing royalty she paid. She agreed to purchase and was sold the right to re-publish her own illustrations. In spite of the clear representation that she was free to use the images as she saw fit, the "terms and conditions" fine print contained the disclaimer that *"if any part of the material to be used (for example, figures) has appeared in our publication with credit or acknowledgement to another source, permission must be sought from that source."* Of course, this disclaimer is intended to shield CCC's RightsLink® from liability for contributory infringement. Please see attached documentation of this transaction (Exhibit 1).

Relationship of Copyright Infringement to Antitrust Law

If the artist whose experience is described above were to hire an attorney and bring a copyright action against CCC or Elsevier, it can be assumed that the fine print disclaimer would be asserted as a defense. While AMI strongly disagrees that liability for infringement and contributory infringement can so easily be justified, these comments address the inadequacy of antitrust IP guidelines and not copyright law itself.

The facts recited represent only the tip of the iceberg of a serious problem of anticompetitive behavior that threatens the livelihoods of AMI members.

In recent years there has been massive consolidation in the publishing business, and especially in the STM publishing business. Historically, there were thousands of independent technical journals, each owned by an independent company or nonprofit that either published a single journal or a small number of journals within a given scientific discipline. While there still are thousands of journals, ownership and distribution of those journals – especially as part of digitized subscriber databases – has been concentrated in a few large international corporations such as Elsevier, Lippincott Williams & Wilkins, Thomson Reuters and Wolters Kluwer. Long gone is the era when AMI member illustrators enjoyed amicable personal relationships with editors and art directors who had a preference for their particular style, technique or reputation for quality or for meeting deadlines. In this lost, genteel era licensing agreements and respect for copyright reflected a high degree of respect by publishers for the illustration profession.

It is far beyond the ability of individual AMI members to purchase subscriptions to the handful of consolidated publisher databases that have replaced the traditional, bound-volume library. Because of this it is virtually impossible for medical illustrators to monitor the exploitation of their works by these monopolistic enterprises in the manner of the example described above. Control over the licensing of their copyrighted images has completely passed from the actual rights-holder to the publisher-conglomerate. And, if the example described is any indication, abuse of illustrators' intellectual property rights is legion.

To compound matters, AMI members suffer from the same abuse of the CCC's monopoly power over issuing blanket licenses as all other artists. The CCC is a monolith, and there is no other alternative for copyright users to obtain a blanket license authorizing digital reprography. Conversely, there is no other way for artist rights-holders to participate in the blanket licensing of their works. If the CCC's management refuses to discuss with the creators the relationship of their rights in visual images to the CCC's licensing practices, there is little a single professional illustrator can do, much less a relatively small CMO such as ARS.

To make matters worse, the CCC has now become a vehicle for publisher conglomerates to siphon off royalties traditionally held by artists for title-specific licensing as described in the Elsevier Science Direct example above. RightsLink® was created without the permission or participation of professional illustrators. Its governance is of, by and for the big publishing companies that established the CCC to begin with. Truly, there is no other game in town, meaning that CCC is the very definition of a predatory monopoly with regard to granting reprographic licenses. There is no competitor to which a rights holder can turn for this service. This is a landscape that did not exist when the 1995 IP licensing guidelines were issued. This is a matter ripe for antitrust regulation and enforcement. The proposed revisions of the IP guidelines should reflect that fact.

Submitted by Bruce Lehman, Counsel

On behalf of the Association of Medical Illustrators
201 East Main Street
Suite 1405
Lexington, Kentucky 40507

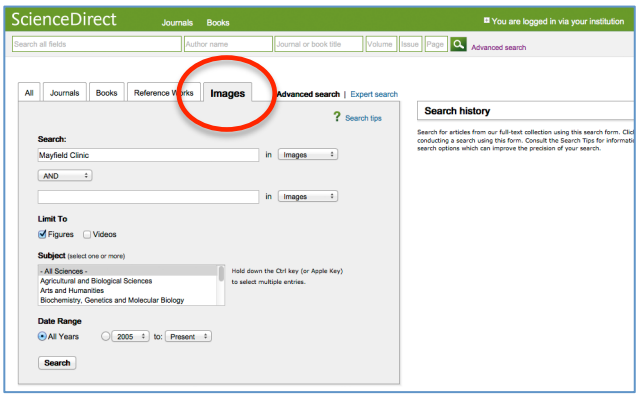
Contact:
blehman@iipi.org
(202) 262-0262

EXHIBIT 1: Unauthorized Licensing thru Publisher Databases & CCC RightsLink

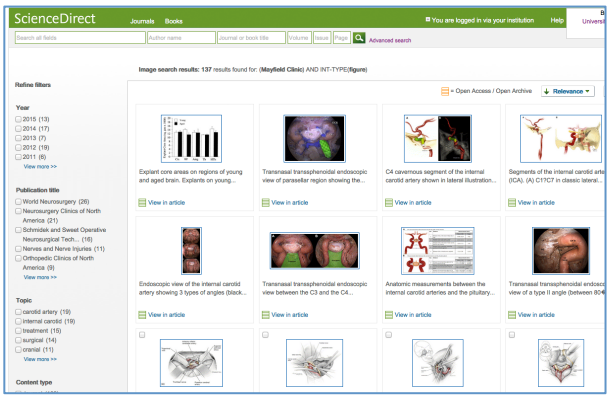
Medical illustrators produce figures that accompany author's journal articles and books. Often the artist retains copyright to the artwork and grants the publisher a limited non-exclusive license to reproduce and distribute the artwork solely in the context of the specific article/chapter and journal/book title. Extraction of the artwork from the collective work is prohibited and reuse by third parties requires the artist permission/license. All major STM publishers have subscription-accessed databases in which university faculty can search, read and download full-text publications and also license that content for reuse in new works. Elsevier's platform is called Science Direct. Lippincott Williams & Wilkins' is called Ovid. Thomson Rueters is called Web of Science.

In 2010 Elsevier created an Image Search feature in its ScienceDirect database that is **only available** by university library network access (the public site does not permit Image Search). It provides high res image files and Powerpoint downloads of figures only. It functions in the same manner as Google Images Search.

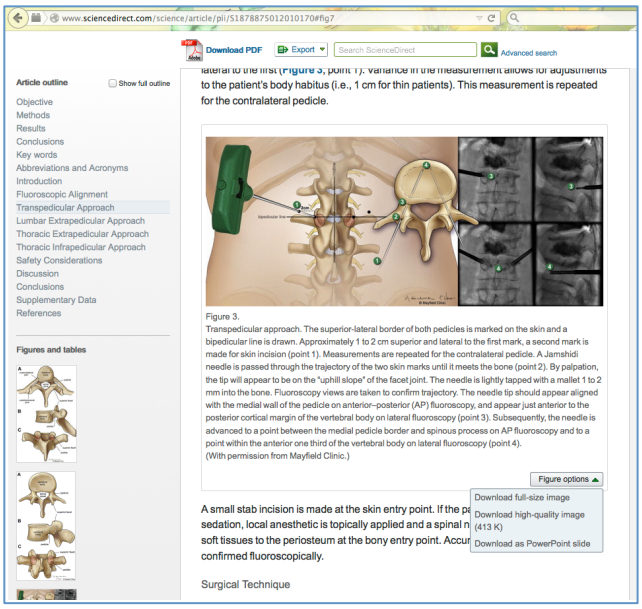
1. Image Search screen:



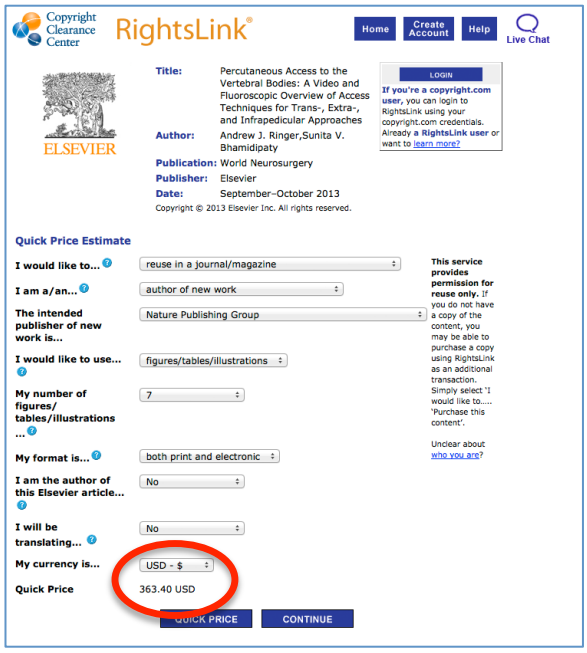
2. Search Results page
(returning 6 pages of my licensed images):



3. Select an image, takes you to the full text article. Artist copyright is on the image and permission noted in figure legend. Publisher enables viewer to download full-size high res image.



4. At top of article is a link **Get Rights and Content** that takes you to CCC RightsLink where I can license all 7 of my figures for **$363.40 in a new journal article.**



5. I submitted my request through RightsLink and was **sold a license to republish images that they do not own and without consent (or payment) of the rightsholder**:

Copyright Clearance Center RightsLink®

Home | Account Info | Help | Live Cha

ELSEVIER

Title: Percutaneous Access to the Vertebral Bodies: A Video and Fluoroscopic Overview of Access Techniques for Trans-, Extra-, and Infrapedicular Approaches

Author: Andrew J. Ringer,Sunita V. Bhamidipaty

Publication: World Neurosurgery

Publisher: Elsevier

Date: September–October 2013

Copyright © 2013 Elsevier Inc. All rights reserved.

Logged in as:
Tonya Hines
LOGOUT

Review Order

Please review the order details and the associated terms and conditions. To edit billing or contact information please click on 'account info' at the top of this page.

Licensed content publisher	Elsevier
Licensed content publication	World Neurosurgery
Licensed content title	Percutaneous Access to the Vertebral Bodies: A Video and Fluoroscopic Overview of Access Techniques for Trans-, Extra-, and Infrapedicular Approaches
Licensed content author	Andrew J. Ringer,Sunita V. Bhamidipaty
Licensed content date	September-October 2013
Licensed content volume number	80
Licensed content issue number	3-4
Number of pages	8
Type of Use	reuse in a journal/magazine
Requestor type	author of new work
Intended publisher of new work	Nature Publishing Group
Portion	figures/tables/illustrations
Number of figures/tables /illustrations	7
Format	both print and electronic
Are you the author of this Elsevier article?	No
Will you be translating?	No
Original figure numbers	Figures 1, 2 , 3, 4, 5, 6, and 7
Title of the article	Vertebroplasty
Publication new article is in	Nature Neuroscience
Publisher of the new article	Nature Publishing Group
Author of new article	George Mandybur
Expected publication date	Dec 2015
Estimated size of new article (number of pages)	15
Elsevier VAT number	GB 494 6272 12
Permissions price	363.40 USD
VAT/Local Sales Tax	0.00 USD / 0.00 GBP
Total	363.40 USD

Edit Order Details

☐ I agree to these terms and conditions.

☐ I understand this license is for reuse only and that obtaining the content is a separate transaction not involving RightsLink.

Customer Code (if supplied) APPLY

BACK | DECLINE | CHOOSE PAYMENT

6. The Terms and Conditions has a clause about third party owned materials. **CCC COLLECTED A LICENSE FEE BUT DIDN'T ACTUALLY CLEAR THE RIGHTS:**

GENERAL TERMS

2. Elsevier hereby grants you permission to reproduce the aforementioned material subject to the terms and conditions indicated.

3. Acknowledgement: If any part of the material to be used (for example, figures) has appeared in our publication with credit or acknowledgement to another source, **permission must also be sought from that source**. If such permission is not obtained then that material may not be included in your publication/copies. Suitable acknowledgement to the source must be made, either as a footnote or in a reference list at the end of your publication, as follows:

"Reprinted from Publication title, Vol /edition number, Author(s), Title of article / title of chapter, Pages No., Copyright (Year), with permission from Elsevier [OR APPLICABLE SOCIETY COPYRIGHT OWNER]." Also Lancet special credit - "Reprinted from The Lancet, Vol. number, Author(s), Title of article, Pages No., Copyright (Year), with permission from Elsevier."

4. Reproduction of this material is confined to the purpose and/or media for which permission is hereby given.

5. Altering/Modifying Material: Not Permitted. However figures and illustrations may be altered/adapted minimally to serve your work. Any other abbreviations, additions, deletions and/or any other alterations shall be made only with prior written authorization of Elsevier Ltd. (Please contact Elsevier at permissions@elsevier.com)