



Smithsonian Institution

Office of General Counsel

May 9, 2005

By Electronic Mail: orphanworks@loc.gov

Mr. Jules L. Sigall
Associate Register for Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Bldg., Room LM-401
101 Independence Avenue, SE
Washington, D.C. 20540

Dear Mr. Sigall:

These reply comments are submitted in connection with the Notice of Inquiry issued by the Copyright Office regarding Orphan Works. Although these comments do not endorse any specific proposals, they hopefully illuminate the need for a flexible and reasonable solution to the issues raised by "orphan works."

The Smithsonian Institution is a trust instrumentality of the United States created by the U.S. Congress "to increase and diffuse knowledge." 20 U.S.C. § 41 *et seq.* Its governing body, the "Board of Regents," includes the Chief Justice of the United States Supreme Court, the Vice President, three United States Senators, three members of the United States House of Representatives, and nine private citizens appointed by Congress. As an entity of the United States, any action against the Smithsonian for copyright infringement must be brought in the Court of Federal Claims. 28 U.S.C. § 1498 (b); *O'Rourke v. Smithsonian*, Docket No. 04-0151 (2d Cir., February 16, 2005).

In addition to having an unique legal status, the Smithsonian is a large and complex organization. Its museum collections alone include approximately 316,312 works of art, 17,420,299 cultural and historical artifacts and 126 million specimens in the collections of its National Museum of Natural History. Smithsonian Institution *2003 Collection Statistics*. When the holdings of the Smithsonian archives and libraries are added, the Smithsonian's estimated collections exceed over 281 million holdings. Further, each Smithsonian collecting unit maintains its own unique collection, purpose, character, and role in achieving the Smithsonian's mission of the "increase and diffusion of knowledge."

As stewards of these vast and diverse national collections, the Smithsonian "has a unique responsibility to manage and preserve the collections held in trust for current and future generations to behold, enjoy and study." Smithsonian Institution *Highlights of Smithsonian Institution Collections*, page 8. Unfortunately, problems with orphan works, or works whose owners or owners' locations are unknown, have hampered initiatives to make these works more widely available, particularly for on-line use.

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Because of the Smithsonian's public, non-profit status and educational purposes, its use of copyrighted works owned by third parties is defensible as a "fair use," on a case by case basis, under Section 107 of the federal copyright law. Depending on the circumstances, a proposed use also may be permissible, without consent of the copyright owner, as a non-infringing archival, library, non-profit performance or other exempted use or privilege under Sections 108, 109, 110 or 201 of that law. However, there are many more instances when the Smithsonian does not own the copyright¹ or a proposed use may not be a "fair use" or permissible under one or more statutory privilege. The Smithsonian's policy is, whenever possible, to confirm the existence of, or to obtain, a license before any reproduction, public distribution or performance, or adaptation of the work. Such a standard museum license would apply broadly to all exhibition, research, archive, publication, scholarly and other educational uses. A license also may be sought to permit the specific use of materials for commercial products, such as postcards, note cards, t-shirts, and other products.

However, licenses or clearances were not readily available when staff recently proposed to use for exhibition or other standard museum purposes: 500,000 to 600,000 corporate brochures and other trade literature from 1923- 1960, where the advertisers, through mergers, closures or for other reasons, no longer exist; the award winning "Eyes on the Prize" documentary for performance during an annual commemorative program, whose current copyright owners were unresponsive to staff inquiries; approximately 1,000 Japanese prints, where, in the absence of documented consents, extensive due diligence efforts are required to clear rights; and a large collection of sheet music of defunct publishing companies. A significant commitment of staff resources and time must be used in trying to identify and then locate current copyright owners in many of these instances. Or, rather than assume an inordinate risk of possible infringement, consistent with the Smithsonian's policy, Smithsonian staff often refrains from using these types of orphan works.

Given the uniqueness, size and complexity of the Smithsonian's collections, it would be difficult to assess the full impact of any specific proposal on its practices and operations. But, it is clear that a solution is needed. The solution hopefully should be flexible and should not impose any mandatory formalities and attendant transactional costs on potential users with vast and widely divergent collections.

Thank you for the opportunity to provide these reply comments.

These comments reflect informal staff views and as such are not binding on the Smithsonian or its Board of Regents.

Sincerely,

Rachelle V. Browne
Assistant General Counsel

¹ The Smithsonian may own copyright in objects in its collections that it has acquired by sale, gift or other transfer of copyrights. The Smithsonian also owns the copyright in works created by its trust fund employees as part of their duties or its contractors by assignment. However, the Smithsonian cannot own copyright in works prepared by Smithsonian employees paid from federal funds. Under the United States Copyright Law, 17 U.S.C. § 101 *et seq.*, the term "works of the United States Government" has been interpreted to include works created by the Smithsonian's federal employees, but not trust employees. Under Section 105 of that law, therefore, a work prepared by a federal employee is considered to be uncopyrightable and in the public domain. See, *Application for Registration of Claim to Copyright Protection of Publication Entitled "The White House - An Historic Guide,"* Op. Off. Legal Counsel (October 26, 1962); *In re Boorstin*, Comp. Gen. No. B184705 (September 4, 1975).