



Smithsonian Institution

Office of General Counsel

March 6, 2013

Ms. Karyn Temple Claggett
Associate Register of Copyrights and Director of Policy & International Affairs
U.S. Copyright Office
James Madison Memorial Bldg., Room LM-401
101 Independence Avenue, SE
Washington, D.C. 20559-6000

Re: Orphan Works and Mass Digitization
Notice of Inquiry Docket No. 2012-12

Dear Ms. Claggett:

These reply comments are submitted in connection with the Notice of Inquiry issued by the U.S. Copyright Office on *Orphan Works and Mass Digitization*, 77 Fed. Reg. 64555 (October 22, 2012).

The Smithsonian Institution encourages the U.S. Office of Copyright to consider proposals, by prior commentators and others, for a special exemption for the non-commercial use of orphan works by non-profit museums, archives, libraries and other educational organizations.

As noted in the Smithsonian Institution's May 9, 2005, comments on *Orphan Works*, the mission of the Smithsonian, a trust instrumentality of the United States, is "to increase and diffuse knowledge," 20 U.S.C. § 41 *et seq.* In those comments, the Smithsonian also noted the breadth and scope of its archival, library and museum collections, the challenges in its effort to use orphan works for specific special collections or projects and specific mass digitization projects, and its policy of obtaining licenses for use of any copyrighted works where a statutory exemption or fair use may not apply.

Since 2005, the Smithsonian has accelerated its efforts to "increase and diffuse knowledge" through a learning model more aligned with technology.¹ This learning model, designed to both share knowledge and create new spheres of knowledge, is based on the "growing understanding of learning as a hybrid of formal education and self-directed discovery that can be brought together and enhanced by online tools and communities. Increasing online access to Smithsonian collections is part of its vision for

¹ See, *Inspiring Generations through Knowledge and Discovery: Smithsonian Institution Strategic Plan Fiscal Years 2010 – 2015*, at <http://www.si.edu/about> and the related *Smithsonian Commons* initiative at <http://www.si.edu/commons/prototype/>.

promoting learning, encouraging re-use and sharing of its assets and allowing visitors to be our partners in the increase and diffusion of knowledge.”²

As commentators on the prototype for the Smithsonian *Commons* observed:

The Smithsonian Commons will be a dream come true for educators. Providing teachers and students with copyright friendly images and information that is easy to find is an invaluable resource. The Smithsonian Commons will allow teachers and students to conduct research more effectively, affording them more time to use the information in new and meaningful ways. Thanks to the Smithsonian, students and teachers will be able to go beyond consuming information and move into creating content for others to use. I applaud the Smithsonian for considering the needs of educators and students. [Kelli Etheredge](#), Teaching and Learning Resources Director for PK-12, St. Pauls Episcopal School, Mobile, AL.

[The] Smithsonian Commons goes way beyond putting online as much of our national museum as possible — which should be enough to justify its creation. It goes beyond bringing to bear everything curators, experts, and passionate visitors know to increase our understanding of what is there. By allowing us to discover connections, link in and out, and add ideas and knowledge, what used to be a “mere” collection will be an embedded part of countless webs of knowledge that in turn add value to one another. That is to say, we will be able to take up the objects of our heritage in ways that will make them more distinctly and uniquely ours than ever before. David Weinberger, Co-director, Harvard Library Innovation Lab; Senior researcher, Harvard Berkman Center for Internet & Society; Franklin Fellow, U.S. State Department; Author, *Everything is Miscellaneous: The Power of the New Digital Disorder* ([and others](#)) Via [blog post](#)

The Smithsonian is not just about the past, but about the present and the future. The Smithsonian is not just about what goes on inside the walls in Washington, D.C., but about the communications that flow through those walls to and from citizens. The Smithsonian is not just about experts teaching citizens, but also about citizens teaching — and discovering knowledge together with — each other. The Smithsonian Commons is not just about using contemporary technology to further an enterprise that was founded with deep respect for American technological innovation, but about expanding the idea of the institution itself. Every click on a website, every video viewed, every exhibition shared via mobile device, every citizen scientist project, every teacher and student interaction with the Smithsonian via social media expands the idea of what the Smithsonian Institution is, who it reaches, what it can do. [Howard Rheingold](#)

To realize this vision and the public’s shared aspirations for the Smithsonian’s vast collections,³ the Smithsonian, as well as other nonprofit museums, libraries, archives and educational organizations

² *Id.*

³ The Smithsonian’s collections, comprising 137 million artifacts, works of art and specimens, include: 127 million specimens and artifacts held by the National Museum of Natural History; 7.99 million digital records available online through the [Collections Search Center](#); 2 million library volumes held by [Smithsonian Institution Libraries](#); and over 136,194 cubic feet, or, if boxed, nearly nineteen miles of archival material held by [Archives](#) across the Smithsonian. The latter archival research collections are among the largest collections of historical document resources in the United States, covering nearly every facet of our nation’s history and including technical drawings, photographs, letters, field notebooks, diaries and journals, sketches and sketchbooks, scrapbooks, manuscripts, rare printed materials, motion picture film, video and sound recordings, and much more. Many of the archival units are repositories within the Smithsonian’s museums, libraries, and other larger divisions, and two are

must have the flexibility to unlock the significant amount of restricted materials that cannot be licensed because the copyright owners are not known or cannot be located. As part of its overall digitization strategy, the Smithsonian is conducting a study on the costs and issues of large-scale digitization of Smithsonian collections. However, the Smithsonian's past and on-going efforts to learn about the copyright status and ownership of its collections suggest that the costs of, and resources committed to, conducting such reasonably diligent searches for copyright owners or their locations are often rendered nugatory. A significant amount of materials still may not be used and shared with the public because, despite the search, the materials remain orphaned.

Thus, the Smithsonian encourages the U.S. Office of Copyright to consider proposals, for a special exemption, as a limitation on orphan copyright owners' otherwise exclusive rights under 17 U.S.C. § 106, for the non-commercial use of orphan works by non-profit museums, archives, libraries and other educational organizations, after their searching in good faith and with reasonable diligence for the copyright owners.

Firstly, allowing such non-commercial use by these non-profit users would be one "necessary, fair and practical" response toward mitigating the orphan work problem.⁴

Secondly, a special exemption for nonprofit museums, archives, libraries and other educational organizations would benefit not only these specific types of users of orphan works but the greater public interest.

Thirdly, and mindful of similar initiatives being undertaken by the European community, any such proposed exemption would meet the requirements, under international treaties, that member country's exceptions and limitations to its copyright law occur only in "certain special cases" that do not "conflict with a normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests" of the rights holder.

There would be, of course, several issues to be resolved in considering any such proposal. Those issues include, among others: what would be deemed "commercial;" should an exempted use extend only to the right to reproduce, display, perform, distribute and otherwise make available the orphan work to the public; or what prospective rights should an owner of an orphan work have if an owner comes forward. Under existing provisions of the copyright law, there is significant case law, specific statutory definitions for terms such as "commercial," legislative history and guidance provided through the Office of Copyright to suggest possible criteria and frameworks for resolving these questions.

As other prior commentators have indicated, case law since 2005 has helped in clarifying, on a case by case basis, what uses, without the copyright owner's permission, may be fair and reasonable. However, those developments have not erased the significant transactional costs and risks that the Smithsonian must consider before making its vast collections available to the public consistent with its

independent collecting units. Nearly all have online collections and resources where visitors will find more detail about the scope of collections, collection guides and finding aids, and digitized content.

⁴ Robert W. Kastenmeier, *1989 Horace S. Manges Lecture – Copyright in an Era of Technological Change: A Political Perspective*, 14 Colum-VLA J.L. & Arts 1, 4 (1989-1990).

mission. An exemption, rather than a limitation on remedies, is a practical and reasonable approach for nonprofit museums, archives, libraries and other education organizations 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
Associate General Counsel