

By Electronic Submission

March 25, 2005

Jule L. Sigall  
Associate Register for Policy and International Affairs  
U.S. Copyright Office  
Copyright GC/I&R  
P.O. Box 70400, Southwest Station  
Washington, DC 20540

Re: Comment – Orphan Works

Dear Mr. Sigall,

On behalf of the Visual Resources Association, please find attached our comment regarding Orphan Works.

If you have any questions or need further clarification regarding our comments, please do not hesitate to contact me at:

Kathe Hicks Albrecht  
Visual Resources Association, President  
Art Department  
American University

Sincerely,

Kathe Hicks Albrecht  
Visual Resources Association, President

Jule L. Sigall  
Associate Register for Policy and International Affairs  
U.S. Copyright Office  
Copyright GC/I&R

P.O. Box 70400, Southwest Station  
Washington, DC 20540

Dear Mr. Sigall,

The Visual Resources Association (VRA) is a multi-disciplinary community of image management professionals working in educational and cultural heritage environments. Our international membership includes: information specialists, digital image specialists; art, architecture, film and video librarians, museum curators; slide, photograph, microfilm and digital archivists; architectural firms, galleries, publishers, image system vendors, rights and reproductions officials, photographers, art historians, artists, and scientists.

Many of our members are involved with copyright and reproduction issues on a daily basis. As part of their employment duties, members may seek permission to use an image in a publication, produce a slide, or prepare an image for teaching purposes.

For many visual resource professionals acting on behalf of their institutions, the process of securing permission places great constraints on their tight budgets, limited staff, and the absence of readily available legal counsel. Some works required for use by their clientele enter a kind of copyright limbo as “orphan works.” Letters that request permission to use or reproduce images often produce no results because the request is ignored, the owner cannot be located even with repeated attempts, or because letters are sent to addresses-of-record that are no longer viable.

The element of risk in using images or works must be constantly assessed when a legitimate copyright holder cannot be located. The whole or a portion of a work may or may not fall under the “fair use” defense. Without access to what is needed for teaching in classrooms as well as on restricted online sites, education is compromised and unnecessarily hindered.

In response to the Copyright Office’s Notice of Inquiry on orphan works, the VRA Intellectual Property Rights Committee has solicited comments from VRA members regarding the issue of orphan works and their impact on use and accessibility. These comments are reproduced below.

In light of these comments and in consideration of the visual resources community's concern for the ability to make responsible use of orphaned works without infringing on the legitimate rights of copyright holders, the Visual Resources Association endorses the proposal put forward by the Copyright Clearance Initiative of the Glushko-Samuelsan Intellectual Property Law Clinic of American University's Washington College of Law in response to the Copyright Office's Notice of Inquiry.

Members' comments:

From the university perspective:

- 1 Identifying and locating the copyright owner is a constant problem. Our collection of 300,000 35mm slides, begun circa 1940-50, contains many slides with no sources mentioned. It also contains slides with the name of the photographer although no records were left by my predecessors. Out of 565 donors, we have 43 with no further information: no first name, no status, no listing in alumni directories. For example: Foreman dupe: JEJ slide: JMW dupe: Raike slide.
- 2 We also have a very strong collection of industrial and decorative arts design images, collected over a 40-year career of teaching design by Professor Herwin Schaefer. He took slides from books and periodicals, but did not include source information.
- 3 We have thousands of lantern slides, some marked with source information showing a book or periodical from which it was photographed. But we also have hundreds with a photographer's name, such as William Hayes or John Galen Howard. While both men were faculty at my institution, we have no idea of their heirs. Luckily, their images have passed into the public domain, but we have other photographers of lantern slides whose images have not yet become public domain.
- 4 All the lantern slide photographers no longer in business. Often one can't tell whether a lantern slide was photographed by the commercial photographer, or printed by the commercial photographer from someone else's photograph.

Our lantern slide collection was started in 1905 and we have images from lantern slide companies no longer in existence, like M.S. Stewart, A. Handy, Joseph Hawkes, M.E. Lewis, RCHM Photo, Kansas City Slide Co.

Those made before 1923 (1925?) are in the public domain. Those after that date are still under copyright, but these companies, by and large, ceased to exist many years ago.

- 5 I have encountered some "orphans" in the past few years that I feel have unique material that many of us may have in our slide collections and might want to digitize before film is completely gone.

The slide set "Art and Architecture of Cairo" by John A. and Caroline Williams has a 1977 copyright by Visual Education, Inc. It is a ten-part set of about 40 slides per booklet covering Islamic material in greater depth than most offerings. I have been unsuccessful in locating John and Caroline Williams or Visual Education. Our film has turned very pink and I was interested in replacing them as well as exploring permission to digitize for Islamic art and architecture courses.

Another set of orphans is the material produced by Environmental Communications, another vendor that no longer exists. This firm was active in the 1970s to early-1980s and located in Venice, California. They had many sets

documenting Southern California architecture, art, and social issues. Many of our slides are reaching the end of their color life, but the images are too useful to discard. Maryly Snow and others have sought information on the Visual Resources Association list server (VRA-L), but no one seems to know how to contact them.

From the museum perspective:

- 6 We have recently faced the challenges posed by “orphan works” while working on the upcoming Handbook of our American collections, which is supported by a grant from the Luce Foundation. In addition, we are developing an accompanying online gallery of our American collection, ultimately to be expanded to showcase our entire collection.

The Associate Registrar and the Visual Resources Manager spent months doing extensive research into copyright holders. We consulted The Visual Arts and Galleries Association’s (VAGA) list of artists represented, the ARS website, artnet.com, and performed searches on [www.google.com](http://www.google.com) and [www.dogpile.com](http://www.dogpile.com). If we could turn up a gallery that dealt work by a particular artist we would call the gallery and try to get help finding the copyright holders, which was often the most efficient method. For the remaining 20 or so contemporary artists we sent an inquiry on The Registrars Committee of the American Association of Museums (RCAAM) listserv asking registrars from other museums if they had any information on our orphan works. Ultimately we were left with 18 contemporary artists for whom we could not find any information regarding copyright representation. Due to these orphan works we added the following disclaimer to the book’s frontispiece: “We have made every effort to obtain permissions for all copyright-protected images. If you have copyright-protected work in this publication and you have not given us permission, please contact the Museum’s Visual Resources Manager.”

Finding copyright information for artists not represented by VAGA or ARS was very difficult and required many hours and many long-distance telephone calls. New legislation would reduce our anxiety about reproducing a work where the copyright holder cannot be located (we’d still always use our disclaimer plus whatever number the copyright office assigns to “orphan works” legislation). It would also stimulate wider use of these materials, and through that use copyright holders might be discovered.

Another museum occasionally uses historical photos in exhibit graphics, publications, and in brief videos for exhibits. Here are several examples of copyright problems encountered in the last year:

- 7 *Photographer unknown*  
Several wonderful images of cannery workers on the production line during the sardine heyday were provided for an exhibit by a local museum that had received

them in a box of donated photos. The images were particularly appealing because we had not previously seen them in our research. No one at the museum knew who had donated the photos. Neither the name of the photographer nor those of the people in the pictures were available from the museum. The photos had been taken locally, and we asked local people that work with historic photos if they knew any names. We asked a woman who had done her doctoral dissertation on women working in the canneries. We asked people who had worked in the canneries, and gave them xerox copies to ask other surviving cannery workers. Nobody knew. We used them anyway. So far there have been no repercussions.

8 *Photographer dead; unable to find any heirs*

Another Cannery Row photo shows workers outside on the loading dock. We were able to interview two of the people in the photo for exhibit background material, and both offered to provide the image from their personal collections. The photographer is no longer alive. We located his obituary, and found no mention of surviving family members. We used the photo, and there have been no problems.

9 *Photographer and manufacturer of postcard not identified*

We bought a postcard on eBay because we wanted to use the image in an exhibit video. The scene was a local restaurant, long since out of business. From clothes and hairstyles of people in the photo, we judged it to be from the early 1950s. The postcard has no company name or name of the photographer. Local historians don't recognize the photo. We expect to use it, but would like to be sure we aren't imposing on anyone's rights.

10 *Creator of lantern slides unknown*

A set of sixty-one lantern slides about deep-sea exploration came as a gift to the aquarium. The donor had found them cleaning out an attic. Some of the slides are commercially produced. Others are unmarked, and are very similar to Else Bostlemann's illustrations of deep-sea creatures. Had the creator infringed on Bostlemann's rights? And who was the creator? No clue. Our exhibit developers were excited at the possibility of displaying the slides, but quickly dropped the idea when copyright issues surfaced.

11 *Multiple entities claim rights*

A well-known photographer (now deceased) has given permission in a signed letter for us to use several of his works taken during the 1940s. In searching for a print or scan of one photo, we found that the image may be a work for hire, belonging to Life Magazine. A stock photo agency claims to currently manage the rights for Life Magazine. Although it seems reasonable that the photo may have been created as a work-for-hire, the stock agency has no documentation to support their claim of exclusive rights, and no copy of the photo. In our research, we spoke with the photographer's daughter, a special collections librarian at a university, officials from two research centers, several representatives of the stock agency, and an attorney for Time, Inc. We paid the agency \$600 to license use of

the photo. After that, we still had to get a scan elsewhere.

From a photographic archive:

- 12 Orphan Works whilst technically subject to copyright law should be treated differently so that their reproduction is not restricted by lack of information to the copyright holder. By not restricting reproduction, the exposure of these works will enable and encourage the copyright holder to come forward. If a copyright holder comes forward as a result of an Orphan Work's use, this use should not be unduly penalized if they have tried hard to find the author prior to publication. Could a limit be set? Should be a fee set on normal commercial rates with perhaps a 5-year term from the date of the first publication. Could we not imitate the BBC and Canadian style of creating a general account whereby if a copyright holder comes forward to claim a fee, the record of works published makes this easier to identify and administer. You ask about difficulties encountered even after the copyright owner is identified. We have found that sometimes the artist has up to 10 legatees and clearing permission can be both time consuming and difficult, particularly if not everyone wants to give permission. Again, we would be interested if you have any ideas how to get around this problem.