



DIGITAL ASSET ACCESS AND USE

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I. Purpose

This directive describes the policy for access to and use of the Smithsonian's digital assets by Smithsonian and non-Smithsonian entities, specifies the criteria for use, including circumstances when restrictions on access and use may be imposed, and when it is appropriate to charge fees.

II. Background

Digital assets held by the Smithsonian are rapidly increasing both in quantity and type, and will continue to expand significantly as the Institution implements its Digitization Strategic Plan. At the same time, public demand for access to the Smithsonian's digital assets continues to increase.

Digital assets, as defined in this policy, are found in a variety of contexts throughout the Institution. They exist: (i) in the collections as works of art; (ii) as digital reproductions or "surrogates" for physical items in the collections; and (iii) as digital records generated as a result of research by the Smithsonian and its units. The Smithsonian maintains these digital assets to advance

II. Background
(continued)

the Smithsonian's mission to increase and diffuse knowledge, support the Institution's strategic goals, and facilitate access to the public for scholarly, educational, and personal use.

The commitment to share digital assets must be balanced against the Smithsonian's stewardship, management and preservation responsibilities. These obligations must take into consideration a wide range of legal, ethical and practical factors, and also reflect the staff and financial resources required to generate, maintain and render digital assets publicly accessible. Such considerations often dictate the need for access and use restrictions and the need to assess fees.

III. Scope

This directive applies to all digital assets held by the Smithsonian Institution except records of the Institution, as defined by SD 807, Requests for Smithsonian Institution Information.¹ It also does not apply to digital assets of Smithsonian affiliated agencies collocated at the Smithsonian unless ownership is transferred to, or shared with, the Smithsonian. Collections that are digital are included in the scope of this policy and also covered by SD 600, Collections Management, which specifies policy for use and sharing of collection items. In the event of any conflicts between the policies, SD 600 shall govern. Questions about collections that are digital can be directed to the National Collections Program in the Office of the Deputy Under Secretary for Collections and Interdisciplinary Support.

IV. Roles and Responsibilities

The **Secretary** is responsible for establishing institutional goals to facilitate access to and use of the Institution's digital assets for scholarly, research and educational purposes, and for overseeing the application and enforcement of this policy, but may delegate responsibility to implement the direct management, oversight, and record keeping pertaining to digital assets.

¹ SD 807 defines records as email, contracts, employee records, donor, vendor and lender records, and other information created, stored, or maintained by the Smithsonian in the course of conducting its business.

IV. Roles and Responsibilities
(continued)

The **Under Secretaries** are responsible for ensuring that access to and use of digital assets are carried out in compliance with this policy through oversight by unit directors, and for hearing appeals of decisions by holding unit directors to deny requests for access and use.

The **Deputy Under Secretary for Collections and Interdisciplinary Support** and the **National Collections Program (NCP)** are responsible for improving the stewardship and management of Smithsonian collections by providing central leadership and policy oversight of Institution-wide collections initiatives, including the administration and implementation of SD 600, Collections Management, and the review and approval of collecting unit collections management policies. The NCP is responsible for coordinating with the Digitization Program Office collections management policies that may affect implementation of the requirements set forth in this directive for collections that are digital.

The **Office of the Chief Information Officer (OCIO)** is responsible for designing, implementing and maintaining the information technology (IT) infrastructure and systems to facilitate the sharing, use and accessibility of Smithsonian digital assets within and outside the Smithsonian in accordance with this policy.

The **Digitization Program Office (DPO)**, which operates under the OCIO, is responsible for improving the overall stewardship and long-term management of the Smithsonian's digital assets by providing central leadership and policy oversight of the Institution-wide digitization program. The DPO develops and maintains pan-Institutional digitization directives, and aggregates and reports statistics regarding unit responses to requests for access and use of digital assets.

The **Office of Communications and External Affairs (OCEA)** maintains the Institution's public-facing website through which the public gains access to digital assets, posts the terms and conditions for the use of digital

IV. Roles and Responsibilities
(continued)

assets on the website consistent with this policy, provides updates to such terms and conditions of use in consultation with the Office of General Counsel (OGC), and maintains and posts on the website a current list of unit contacts responsible for handling digital asset use requests.

The **Holding Unit Directors** oversee the implementation of this policy, ensuring compliance by the holding unit's staff. This includes defining which restriction categories are applicable to the digital assets maintained by the holding unit, and resolving disputes with respect to requests for access and use. The holding unit directors also designate contacts within their respective holding units to handle requests to use digital assets, notify OCEA of the contacts, and update contact information as appropriate.

Holding Unit Staff is responsible for responding to requests in a timely manner, evaluating the incoming requests for access and use, determining whether an Allowable Restriction Category applies to the requested digital asset, documenting the decision to grant or deny access, tracking the basis for denials, completing required licensing forms, and retaining records of decisions in accordance with applicable records retention policies. Holding unit staff is also responsible for providing statistical information to the DPO in a timely manner, upon request, regarding the number of requests granted and denied.

Requesting Unit Staff will abide by the restrictions regarding access and use of digital assets consistent with restrictions specified by the holding unit.

The **Office of General Counsel** (OGC) provides legal advice to the holding unit in connection with questions concerning allowable restriction categories and in determining whether commercial use requests are consistent with existing legal obligations, in consultation with Smithsonian Enterprises. Standard and custom licensing agreements are developed in coordination with the OCon&PPM.

IV. Roles and Responsibilities (continued)

The **Office of Contracting and Personal Property Management (OCon&PPM)** assists the holding units in preparing, drafting, negotiating and executing contracts and licenses to third parties for the use of digital assets in accordance with SD 314, Contracting. OCon&PPM also pre-approves unit-specific digital image licensing forms. Standard and custom licensing agreements are developed in coordination with the OGC.

Smithsonian Enterprises is consulted when the Institution receives non-routine requests for commercial use of digital assets, enters into revenue-sharing agreements with the holding units in connection with the commercial use of digital assets as appropriate, and assists the holding units, OGC, and OCon&PPM in evaluating whether requests to use digital assets for commercial purposes are consistent with existing contractual obligations and other projects using the Smithsonian brand to generate revenue for the Institution.

V. Definitions

A. General

- *Digital assets* include text, still images, moving images and sound recordings, research datasets and other types of media originally created in digital format (i.e., born digital) or digitized from another format or state (i.e., a digital surrogate) that are created, stored, or maintained by the Smithsonian. For the purpose of this directive, digital assets also include metadata (also known as cataloguing and collections information) used to describe the digital asset and its content. Digital assets, for purposes of this policy, may be collection objects (e.g., digital art), reproductions of collection items, or content generated in digital form as a result of the research and programmatic activities.
- *Intranet* is an environment where digital assets are shared internally at the Smithsonian via the Smithsonian network (SInet).

V. Definitions (continued)

- *Internet* is an environment where digital assets are shared externally with the public via World Wide Web applications.
- *Metadata* is the information used to describe a digital asset. Generally, metadata is grouped into three categories:
 - administrative (e.g., date/time of scan, restrictions attached to the digital asset itself, such as copyright, and the unit that retains the original);
 - descriptive (e.g., subject, location, title, date of item, dimensions, restrictions attached to the underlying content of the digital asset); and
 - technical (e.g., specification of the digital asset and digitization equipment).

B. Access Terms

- *Unit*: A Smithsonian museum, research center, or office, including all subordinate organizations.
- *Holding Unit*: The Smithsonian unit responsible for approving access to and use of digital assets under its delegated management responsibilities and in accordance with its digital asset management plan. The holding unit is not the Office of the Chief Information Officer, which is the unit that manages the systems that store or provide technological access to the digital asset or the unit which aggregates content from other Smithsonian units.
- *Publicly Accessible*: A digital asset is publicly accessible if it is available on a Smithsonian or Smithsonian-sponsored or hosted website, or if it appears in a Smithsonian digital publication (e.g., DVD).
- *Requesting Unit*: The unit that wishes to use a digital asset for internal use or external dissemination.

V. Definitions
(continued)

- *Smithsonian Entity*: Smithsonian unit, employees, Smithsonian-based employees of affiliated agencies (e.g., U.S. Geological Survey), volunteers registered with the Smithsonian, interns, Fellows and research associates, who are (a) acting within the scope of official Smithsonian business; or (b) in the case of Smithsonian-based employees of affiliated agencies, volunteers, interns, Fellows and research associates, seeking access to a digital asset for an official Smithsonian purpose. For these purposes, contractors are not considered Smithsonian entities.
- *Non-Smithsonian Entity*: A person, corporation, or non-profit or organization other than a Smithsonian entity.

C. Use Terms

- *Fair Use*: Fair use is a legal concept under United States copyright law that allows the reproduction and use of copyrighted material for certain educational purposes such as news, commentary, and teaching, without obtaining permission from the copyright owner. Fair use is a legal defense to a claim of copyright infringement and is based on a four-part test which takes into consideration the purpose and character of the use, the nature of the copied work, the amount and substantiality used in relation to the whole, and the effect of the use on the market for the original. In addition to the fair use categories of news, commentary, and teaching, other uses may satisfy the requirements for fair use if such use is transformative; the new use must use the original in a way that adds and enhances its value rather than as a mere copy or derivative.
- *Internal Use*: Any use of a Smithsonian digital asset by a Smithsonian entity that is purely within the Smithsonian and for on-site usage (e.g., research on the Smithsonian's intranet),

V. Definitions
(continued)

and is not disseminated externally through the Internet, publication, or other distribution.

- *Non-commercial Use:* Use of a Smithsonian digital asset by a Smithsonian entity for standard Smithsonian uses (including exhibition, education, research, public programming, archival uses, and fund raising) or by a non-Smithsonian entity solely for the purpose of educational, scholarly, or personal use, provided that the digital asset and any product into which it is incorporated is not marketed, promoted or sold.²
- *Commercial Use:* Any use of a Smithsonian digital asset in which the asset is marketed, promoted and/or sold, or is incorporated into a product or publication, or media-form that is marketed, promoted and/or sold (“Product”).

Examples include, but are not limited to consumer merchandise (whether produced by the Smithsonian Institution or by a non-Smithsonian entity), periodicals, trade publications, scholarly journals with paid subscriptions, television programs, feature films, advertisements, websites with paid advertising, and cause-related marketing. For purposes of this policy, educational and scholarly uses of digital assets are considered a commercial use if the resulting Product is marketed, promoted and/or sold, even if the fees paid by the requesting party are intended solely to cover the holding unit’s actual costs of making the digital asset available.

- *Public Domain:* The public domain is an intellectual property designation that describes the copyright status of original content (e.g., text, images, audio, video). Content falls into the public domain after a specified period of copyright protection expires or if the content is

² Use of digital assets may be deemed non-commercial use for purposes of this policy, but such uses may not necessarily constitute a “fair use” under copyright law. The determination of fair use must be made on a case-by-case basis, in consultation with the OGC as needed.

V. Definitions
(continued)

not eligible for copyright protection in the first instance, such as work created by a federal employee within the scope of his or her official duties, or when an author affirmatively places creative works into the public domain.

VI. Access and Use Policy

Holding units will provide access to, and use of, digital assets for non-commercial use by Smithsonian entities and non-Smithsonian entities subject to allowable restriction categories in Section VII of this policy and for commercial use by Smithsonian entities and non-Smithsonian entities as specified below in (C) and (D). Holding units are encouraged to make digital assets available at the best quality (e.g., size and resolution) that is appropriate for the requested use, but decisions about quality such as size, format, resolution and other similar technical details are at the sole discretion of the holding unit.

A. Internal Use

Holding units will make their existing digital assets available without fee to other Smithsonian entities for internal access and use, unless doing so would violate one of the allowable restriction categories in Section VII of this policy, and the denial is documented in writing (e.g., Appendix A, the Internal Tracking Form for Denial of Digital Asset Requests, or equivalent electronic means). If a holding unit does not have the requested asset in digital form, it may generate the digital asset and charge the Smithsonian entity the cost of generating such asset.

Internal use is limited to use solely within the Smithsonian and is not intended for external dissemination outside of the Smithsonian.

B. External Non-Commercial Use

When a request is submitted for an external non-commercial use of a digital asset, the request will be granted by the holding unit unless doing so would violate one of the allowable restriction categories set forth in Section VII of this policy. The procedure for

**VI. Access and Use
Policy** (continued)

handling the non-commercial use request as set forth below applies regardless of whether it is made by a Smithsonian or non-Smithsonian entity. However, the procedure will vary depending on whether or not the digital asset is already publicly accessible at the time of the request. If requests for external non-commercial use are declined by the holding unit, the reason must be based on the nature of the use and not the user, and the basis must correspond to an allowable restriction category as set forth in Section VII. Requests shall be handled as follows:

1. *Digital asset is publicly accessible.* Non-commercial external uses do not require a written request and are automatically approved if the holding unit has already made the requested digital asset publicly accessible, and the proposed use meets the following criteria: a) use complies with the stated restrictions associated with the digital asset as specified by the holding unit; b) use complies with the Terms of Use posted on the Smithsonian website; c) use does not modify the asset or related metadata; and d) the digital asset is displayed with attribution and a link to the holding unit. If a requester submits a request and the holding unit determines that such request satisfies the criteria above, the holding unit may confirm to the requester that such non-commercial use is permitted automatically.
2. *Digital asset is not publicly accessible or does not meet the above criteria.* If the holding unit has not made a digital asset publicly accessible or the asset is not available at the desired quality or the proposed use is not consistent with the above criteria, the requester must submit a written request to the holding unit, specifying the intended use and any proposed modifications to the digital asset or metadata. If the proposed use is commercial, see subsections C and D below. For non-commercial external uses, the following procedures apply:

VI. Access and Use Policy (continued)

- a. The holding unit should acknowledge the request within 10 business days and notify the requester when a response will be provided.
- b. If the holding unit approves the use, it should document the approval and either (i) prepare a written agreement using a licensing form pre-approved by OCon&PPM or OGC, with the requesting party for the specific non-commercial use, or (ii) contact OCon&PPM or OGC to prepare a custom license agreement. If the holding unit elects to use a pre-approved form, any deviations must be approved by OCon&PPM or OGC. A sample Digital Asset Request and Usage Form is provided at <http://prism.si.edu/ogc/> (Forms).
- c. If the use is denied, the holding unit should notify the requester, document the denial and specify the basis for denial on Appendix A, or by other method (e.g., electronic). If the use is denied, the decision may be appealed to the unit director or, in the case of a decision to deny that is made by a unit director, to an appropriate Under Secretary. The holding unit shall maintain records of all denials on Appendix A or by other method in accordance with applicable records retention policies.

C. Internal Requests for Commercial Use

If a Smithsonian entity wants to use digital assets for a commercial product branded with the Smithsonian name or logo, or consisting predominantly of Smithsonian digital assets, and the proposed use does not interfere with the holding unit's plans for the digital assets, the holding units may grant the request provided that (a) the use of digital assets is consistent with any allowable restrictions set forth in Section VII; and, if the requesting Smithsonian entity is other than Smithsonian Enterprises (SE) (b) the requesting Smithsonian entity contacts SE to ensure that such branded commercial uses will not interfere or conflict

VI. Access and Use Policy (continued)

with existing contracts or other commercial obligations of the Institution, using the criteria set forth in paragraph (D)(6) below.

If a conflict exists, the digital asset may not be used for commercial purposes until any such conflict is resolved. If the holding unit and requesting unit disagree as to whether a conflict exists, the matter will be resolved by the directors of the respective units. If the directors are unable to reach agreement, the matter may be referred to the appropriate Under Secretary.

If no conflict exists, the requesting unit and the holding unit will work together to reach a mutually acceptable agreement for access and use of the digital asset, including but not limited to provisions for reimbursing the holding unit for the cost of generating the digital asset, if it does not already exist, and any other conditions of use. If the requesting unit is SE, the holding unit and SE will share revenue in accordance with the revenue-sharing guidelines established by the Institution.

If the requesting and holding units reach agreement on commercial use of digital assets and the requesting unit will be making the digital asset available to a third party, the requesting unit may either contact the Office of Product Development and Licensing in SE to prepare a one-time commercial license or contact OCon&PPM to prepare a written, one-time license agreement. If the requesting unit and holding unit are unable to reach agreement, the directors or the requesting and holding units will attempt to resolve the matter. If the directors are unable to reach agreement, the matter may be referred to the appropriate Under Secretary.

D. External Requests for Commercial Use

The decision to grant or deny a request from a non-Smithsonian entity for a commercial use of a digital asset is at the sole discretion of the holding unit, subject to the policies and procedures herein. Requests shall be handled as follows:

**VI. Access and Use
Policy** (continued)

1. Requests must be submitted in writing to the holding unit and must specify the proposed commercial use, and any changes to the digital asset or metadata in connection with such use.
2. The holding unit should acknowledge the request within 10 business days and notify the requester when a response will be provided.
3. If the holding unit denies the request, it must notify the requester and document the basis for the denial on Appendix A, or by other method (e.g., electronic).
4. Decisions by the holding unit to deny a commercial use of a digital asset by a non-Smithsonian entity are final and not subject to appeal, except that if the denial by the holding unit directly and adversely affects activities or obligations of another unit (e.g., commitments made to a sponsor), the affected unit may appeal to the appropriate Under Secretary.
5. If the holding unit would like to grant the request and the digital asset is not otherwise subject to an allowable restriction category, then:
 - If the request is for routine commercial licensing of digital assets in publications or other media, the holding unit may grant the request provided that it uses a written licensing form pre-approved by OCon&PPM or OGC.

For these purposes, “routine commercial licensing” means the licensing of digital assets to a third party (e.g., publisher, scholar, non-profit institution) where the third party seeks to use, reproduce or incorporate digital assets in a publication or media product (e.g., exhibition catalogue, journal article, book, CD) that is not branded with the Smithsonian name or logo and does not consist predominantly of Smithsonian digital assets.

**VI. Access and Use
Policy** (continued)

- If the external request is for non-routine commercial use of digital assets, the holding unit will first contact SE to ensure that such commercial uses will not interfere or conflict with existing contracts or other commercial obligations, according to the criteria set forth in subsection 6 below. If there is a conflict, the holding unit will work with SE to address the conflict.
 - If the request is for non-routine commercial licensing of digital assets and no conflict exists with SE, the holding unit may grant the request provided that it either uses a pre-approved written license form or contacts OCon&PPM or OGC to develop a custom license.
6. In deciding whether the external request for commercial use will interfere or conflict with the Smithsonian's own commercial and revenue-generating activities, the following factors will be considered: a) whether the quantity or prominence of Smithsonian digital assets used in the product creates the impression that it is a Smithsonian product; b) whether the proposed product will be branded as a Smithsonian product and marketed and sold using the Smithsonian trademark (name or logo); c) whether the proposed product might conflict with an existing Smithsonian project or contract; or d) whether the proposed product will violate an applicable law or legal obligation. Smithsonian Enterprises and OCon&PPM will consult with OGC as needed in making these determinations.

**VII. Allowable
Restriction
Categories**

For a variety of legal, ethical and policy reasons, it may be necessary at times to restrict access to and use of the Smithsonian's digital assets internally, externally or both. The most common types of restrictions are set forth below. Each director, or his or her designee, shall be responsible for determining when restrictions other than legal are mandatory, and when they may be

**VII. Allowable
Restriction
Categories**
(continued)

waived by the holding unit. When use of a digital asset is restricted, the nature of the restriction must be documented, preferably in the metadata that describes the asset or at a minimum in writing when responding to a request for use.

A. Digital Assets Subject to Legal Restrictions

Legal restrictions and the manner in which they apply to digital assets are the same as those that pertain to the use of tangible collection objects generally. Therefore, when collection objects are subject to allowable restrictions, digital surrogates of such objects may be subject to the same restrictions. Restrictions include, but are not limited to, the categories listed below. For a glossary of terms included below as Allowable Restriction Categories, see Appendix B.

1. Intellectual Property Rights:

- a. *Copyright* is an intellectual property law that protects original works of authorship fixed in a tangible medium of expression (e.g., books, artwork, music, websites, photographs, research, digital assets, etc.). Many of the works of art and other content generated and held by the Smithsonian are protected by copyright. Depending on how digital assets are created or acquired by the Smithsonian, the copyright may or may not be owned by the Smithsonian, and copyright ownership is an important factor that determines whether, and to what extent, the digital asset may be used and reproduced. For a general discussion of copyright, see SD 600, the *SD 600 Implementation Manual* on intellectual property, and the Copyright Office website, www.copyright.gov. Ideas and titles are not protected by copyright, but may be protected by other intellectual property laws.
- b. *Moral rights* are set forth as part of the copyright law in the Visual Artists Rights Act (“VARA”), and they consist of an artist’s right

**VII. Allowable
Restriction
Categories**
(continued)

to protect his or her name and reputation from damage caused by intentional distortion or mutilation of his or her artistic works, and other similar protections.

- c. *Trademark* is any work, name or symbol, or device, or any combination that is adopted and used by a person or entity to identify goods or services and to distinguish them from those manufactured or sold by others. The purpose of a trademark is to indicate the source of goods or services. Titles, slogans, service marks, logos, and other symbols that identify or are capable of distinguishing goods and services are protected under trademark law. Names of museums, exhibition titles, and other names or designs may be eligible for trademark protection, either under common law principles or by federal registration with the United States Patent and Trademark Office. A trademark owner may prevent others from using the same or substantially similar word, design, symbol or title in a manner that is likely to create confusion in the mind of the public. See www.uspto.gov for more information about trademarks.
- d. *Patent* is a grant conferring the right to exclude others from making, using or selling an invention. Novel and useful processes and inventions or new designs for useful objects are governed by patent laws.
- e. *Rights of Privacy and Publicity* of persons depicted in digital assets recognize that an individual has certain personal and pecuniary interests in his or her name, voice, picture, likeness, and other identifying characteristics that may restrict uses of these attributes without the individual's consent. Privacy rights also protect individuals from being depicted in a false light or in an embarrassing situation. These rights may prevent use or

**VII. Allowable
Restriction
Categories**
(continued)

reproduction of photographs of living subjects, particularly children, without express written consent of the subjects or, in the case of minor children, their parents and/or guardians. Although privacy and publicity rights are not technically intellectual property rights, they are closely related concepts that should be considered in connection with Smithsonian activities. Certain types of privacy rights are governed by state law and common law, and not by federal law.

- f. *Personally Identifiable Information (“PII”)* is information about individuals maintained by the Smithsonian, including information which can be used to distinguish or trace an individual’s identity and any other information that is linked or linkable to an individual, such as medical, educational, financial or employment information. PII includes, without limitation, name, contact information, address, personal identification numbers such as Social Security numbers, credit card numbers, passwords, or other security information and personal characteristics. Disclosure of such information without consent could violate an individual’s privacy rights. For a more detailed description of PII, contact the Smithsonian Privacy Officer, privacy@si.edu.
2. Contractual restrictions (e.g., deeds of gift, contracts, licenses, loan agreements);
3. Native American and Native Hawaiian human remains and objects (e.g., funerary objects, sacred objects, and items of cultural patrimony) subject to repatriation. If a collection object has been repatriated, any associated digital assets may be restricted;
4. Cultural items returned to their country of origin because of the circumstances of acquisition

**VII. Allowable
Restriction
Categories**
(continued)

- (e.g., illegally or unethically exported or acquired);
5. Rare, threatened or endangered species (e.g., locality or collector information);
 6. Images, other media, or data that reveal the location of archeological, paleontological, geological, sacred and historic sites;
 7. Uncertain provenance and export records (e.g., Holocaust-era assets);
 8. Conservation, management, inventory, valuation, and other business records not covered by this policy.

B. Digital Assets that Are Subject to Policy and Other Restrictions

Digital assets, like the underlying tangible collection objects from which they are derived, may be subject to a range of policy and other restrictions that have become generally accepted in museum and scholarly communities.

1. *Sensitive Content* is defined in different ways by members of individual communities, nations, tribes, ethnic groups, and religious denominations, but usually includes materials that relate to traditional knowledge and practices. Such materials may a) be considered the private domain of specific individuals, clans, cults or societies; b) require an appropriate level of knowledge to view and understand; c) threaten the privacy and well-being of a community when exposed or disclosed to outsiders; and/or d) give offense if inappropriately used or displayed, or when appropriated or exploited for commercial purposes.
2. *Unpublished Research Data/Resources* consist of raw data, primary research and manuscripts

**VII. Allowable
Restriction
Categories**
(continued)

(“Unpublished Research”) generated during the course of research by Smithsonian entities that may be temporarily delayed or restricted from access and use to provide an opportunity for the Smithsonian entity that generated the Unpublished Research to compile and publish the data prior to general access. The duration of these limitations varies by professional discipline.

3. *Resource Limitations* may provide the basis for a holding unit to deny a request if it does not have resources (e.g., staff, expertise or time) necessary to generate the digital asset or undertake the research to determine whether the digital asset is subject to an allowable restriction category, and the holding unit is unable to obtain reimbursement of the associated costs from the requesting entity.
4. *Commercial Use* is a restriction that may be applied at any time at the sole discretion of the holding unit in connection with requests by non-Smithsonian entities (see discussion under Section VI, Access and Use, paragraph D of this directive).

**VIII. Public Domain
Materials**

The public domain describes a category of creative works (i.e., intellectual property) that is not protected by copyright and, therefore, may be used and reproduced freely by any person or entity that obtains access to the property. Creative works fall into the public domain because a) the term of copyright protection afforded under applicable copyright law has expired; b) the works are not eligible for copyright protection in the first instance (such as works created by federal employees within the course of their official duties); or c) the works are placed affirmatively into the public domain by their authors and creators.

Although use of public domain materials is unrestricted as a matter of copyright law, the Smithsonian at times regulates access to, and use of, such works through

VIII. Public Domain Materials (continued)

contracts. Until a public domain policy is developed and implemented by the Institution, holding units are encouraged to make public domain digital assets available without restrictions and without licensing fees.

IX. Allowable Fees

When the Smithsonian charges fees for the use of its digital assets, it does so to generate funds for a variety of mission-related purposes, including, but not limited to, performing collections management and digitization functions, maintaining digital assets and related metadata, recovering the actual direct and indirect costs of staff and systems used to manage and provide access to the assets and making greater amounts of digital content available to the public online and through other electronic media. Subject to the availability of resources to offset these costs, units are encouraged to provide digital assets free of charge for non-commercial uses and to publicize digital assets that are available free of charge on their websites.

In addition, the following rules apply:

- Holding units *shall not* charge access and use fees to other Smithsonian entities for existing digital assets in connection with standard museum uses, but may charge for the costs of generating new digital assets and may enter into revenue-sharing arrangements for commercial use of digital assets. (For example, see SD 324, Smithsonian Enterprises Retail Revenue Sharing, which is available on Prism, for more information in this area.)
- Holding units *may, but are not required to*, charge fees for digital assets for external use by non-Smithsonian entities. Such fees may include, but are not necessarily limited to, fees to cover the costs of generating new digital assets and/or licensing fees for reproduction and use of digital assets.

CANCELLATION:
INQUIRIES:
RETENTION:

Not applicable
The Digitization Program Office in OCIO for the Office of the Secretary (OS)
Indefinite. Subject to review for currency 24 months from date of issue