Common Questions & Answers About Copyrights

A Simple Guide for Photographers, Artists, Illustrators, Writers, Musicians and Other Creative Individuals

Q. What is copyright?

A. Copyright is a form of protection, authorized by the United States Constitution, that gives photographers, artists, authors, musicians, choreographers and architects the exclusive right to use and reproduce their works. Essentially, all original works can be copyrighted. This includes photographs, art works, sculpture, writings, music and computer software. Virtually all works created or first published after January 1, 1978 are protected by copyright. Many works created prior to 1978 are also protected.

The Copyright Act is federal law, not state law. Consequently, the law is uniform throughout the United States. Also, since the United States has signed several international copyright agreements, copyright protection is effective essentially all over the world.

Generally, owners of copyright have the exclusive right to use and copy their works. Copyright owners can also authorize others to use their works. The use or copying of any work without permission from the owner of the copyright is a violation of the United States Copyright Act.

Q. What does copyright do for artists?

A. Copyright gives the creator or author of a work the power to control the work. The owner of the copyright has the exclusive right to control if, when, how and how often his or her work can be used or copied.

Copyright is not a single right, as the word may suggest, but is a bundle of rights. Any part of the bundle can be retained or sold, leased or given away, either individually or in groups. The ability to dispose of any portion of the bundle of rights is reserved exclusively to the owner of the copyright.

For example, if a company is authorized to use a particular photograph in a brochure, the brochure is the only place that the photograph can be used. The use of the photograph in an advertisement without permission would be a violation of the exclusive rights of the copyright owner. Similarly, if a person is authorized to use an illustration for advertising purposes for only one year, the illustration cannot be used for more than one year without permission.

Q. Who owns the copyright?

A. Generally, the person who creates a work is the owner of the copyright. Thus, independent artists, photographers and writers own the copyrights to their works. The only exceptions to this rule occur when a work is created by an employee as part of his or her job duties or when a work is created under a written work-for-hire agreement.

For example, free-lance photographers own the copyrights to the images that they allow to newspapers or magazines to publish. However, absent an agreement that provides otherwise, a newspaper or magazine will own the copyright to all works that their staff journalists and photographers create as part of their job responsibilities. The same is true for art directors working in advertising agencies. The only way that the copyright could belong to the creator in these situations is if there is an assignment of the copyright. Of course, any stories, photographs or artwork created by employees on their own time, would belong to the authors of the works.

Sometimes it is difficult to differentiate between an independent contractor and an employee as that term is defined by the Copyright Act. Most employment situations imply a regular, salaried employment relationship between the parties. However, there is no precise standard for determining whether a person is an employee or an independent contractor under the Copyright Act. A person can be an independent contractor under state law while he or she is an employee under the Copyright Act.

The copyrights to works created under written agreements as works for hire belong to the employer. The law requires that there is a written agreement between the parties. Unfortunately, work for hire agreements can be very simple documents that masquerade as invoices or receipts. Most independent artists, photographers and writers will not operate on a work for hire basis. They feel that to do so, would deprive them of their right to fully exploit their creative talents. Also, they feel they will be treated as employees without having job security or getting any employee benefits.

Q. Can two or more people own the copyright to a single work?

A. Yes. Copyrights can be owned jointly. If two or more people create a work with the intent that their individual contributions merge into the final product, they will be joint owners of the copyright. The determination of joint ownership is a question of the intent of the participants. Joint copyright ownership can sometimes create difficult situations because joint owners become equal partners of each other with respect to their joint works.

Each joint owner can deal with a joint work as if he or she owns the property independently of the other. Unless otherwise agreed, the only responsibility one joint owner has to the other is to share any money that is earned from exploiting the joint work. Unless otherwise agreed, neither joint owner has a right to control to whom a work is licensed or for how much. Furthermore, one joint-owner can sell or assign his or her rights to a third-party without notice to the other joint-owner.

For collaborators such as musicians and lyricists, joint copyright issues may be of little consequence because both participants usually intend to create a single unified work. However, if an art director creates a very detailed layout for an advertisement that is executed by a photographer, the art director may assume that a joint copyright was created. However, unless the parties intended otherwise, the photographer generally owns the copyright.

Q. How do I get permission to use a copyrighted work?

A. Permission to use a copyrighted work is called a "license." A license must be obtained from the owner of the copyright prior to using the work. The license can be oral or written. Obviously, the use of a clearly written licensing agreement will avoid confusion. The writing does not have to be detailed to be effective. A simple letter or invoice is usually sufficient. For example, 'one-time usage rights for photograph in brochure with press run of 5,000 copies and regional newspaper use for six months - $2,500."

Q. What if a copyrighted work is used without permission?

A. The unauthorized use of a copyrighted work is called an infringement. The Copyright Act provides stiff penalties for infringing copyrighted works. Under appropriate circumstances, penalties can include monetary damages, all profits earned by the infringer from the unauthorized use of the copyrighted work and attorneyís fees. A court can also order the destruction of all infringing copies.

Q. What works are protected by copyright?

A. Copyright protects original works of authorship that are fixed in tangible form. This includes photographs, literary works including non-fiction and fiction, letters, music as well as accompanying lyrics, sound recordings, pictorial, graphic and sculptural works, motion pictures, audiovisual works, computer software, and architectural works. Even such ordinary things such as simple letters, catalog descriptions and doodles are protected by copyright. The only essential condition that the law requires is that the work is original.

For example, if a photographer were to make an exact copy of the Mona Lisa, the resulting image would not be protected by copyright because an exact copy does not constitute an original work. However, if the same photographer were to photograph several people standing in front of the Mona Lisa, that picture could be copyrighted because there is some element of originality in the image. The law does not require much originality, but there has to be some. Also, only those parts of a work that are original can be copyrighted. Therefore, the copyright would not extend to any part of the Mona Lisa that might appear in the photograph.

No one can acquire rights to works that are not their own or that are no longer protected by copyright. However, if an artist interprets a public domain artwork such as the Mona Lisa by painting it in a style completely different from Leonardoís, the derivative work -- that is, the work derived from the original -- may have enough originality to be protected by copyright.

Q. If I have an idea for a work such as a photograph, is my idea protected by copyright?

A. No. Ideas cannot be copyrighted. The only thing that can be copyrighted is the expression of the idea. This is sometimes a tricky concept. Copyright protection can extend to a written description of an idea or to a sketch for a proposed photograph that might be drawn by an art director in an advertising agency. However, copyright protection does not extend to the idea itself. Only the tangible expression of the idea is protected, that is, the particular literary or pictorial expression of the idea conceived of by the author.

For example, no one can claim the exclusive right to photograph the Statue of Liberty. This landmark has probably been photographed from every conceivable angle since it was constructed. However, if a photographer were to combine an image of the Statue of Liberty with a picture of recent immigrants, then the combined photograph, if it is original, would be a unique expression and thus be protected by copyright.

Q. What about names, titles, short phrases and expressions. Can they be copyrighted?

A. No. Names, titles, short phrases or expressions are not protected by copyright. Some brand names, trade names, slogans and phrases may be protected under trademark laws or the laws of unfair competition, but not under copyright law.

Q. How do I copyright my works?

A. A copyright originates at the moment a work is created. For a written work, the copyright comes into existence as the words are typed, printed, or saved to a computer disk. For a photograph, the copyright is created at the moment the image is developed. If a photograph is taken with a modern digital camera, the copyright originates at the time the image is saved on a computer disk or on a hard drive. As long as the work exists in tangible form or can be understood or reproduced with the aid of a machine, it is copyrighted.

Q. Do I have to file anything in Washington, D.C., in order to get a copyright?

A. No. A copyright is secured automatically when a work is created. This concept is frequently misunderstood. Some people still believe that there are formalities required in order to create a copyright. This is not true. Under the latest version of the Copyright Act, neither publication nor registration with the Copyright Office of the Library of Congress is required in order to secure full copyright protection. When a work is created, it is automatically copyrighted.

Q. What is registration?

A. Although a copyright is created automatically when a work is created, there is a procedure for registering a copyright with the Library of Congress. Remember, registration is not required for copyright protection.

There are three benefits to registering a copyright. First, registration creates a public record of a copyright. Second, registration of a copyright is required in order to file a lawsuit for copyright infringement. Third, if a copyright is registered before there is an infringement or within three months after the first publication of a work, the owner of the copyright can claim certain alternate damages plus attorneyís fees. These alternate damages are called statutory damages and they can be awarded in a sum of up to $100,000 for willful infringements. The registration process itself, does not alter the fact that the owner of a copyright is always entitled to his or her actual damages plus any profits earned by the infringner. However, the suggestion that statutory damages and attorneyís fees are available can act as a catalyst for the quick settlement of a copyright infringement claim.

Q. How do I register a copyright?

A. Registration is accomplished by filling out a simple form, paying a small fee and sending one or two copies of the work to the Copyright Office. The number of copies generally depends on the whether the work has been published before registration. Basically, only one copy or photocopy needs to be sent to the Copyright Office for unpublished works. For published works, two copies of the work need to be filed. Also, several related works can usually be registered at the same time with the payment of only one $20 fee.

Forms can be obtained from the Copyright Office forms hot line at (202) 707-9100. Use Form VA for works of visual art and Form TX to register mainly textual material. Form SA is used for sound recordings. Request Circular 1 from the Copyright Office for general information about copyrights and Circular 40a for guidance as to how many copies of a work need to be filed.

Q. Should I register the copyrights to all of my works in Washington?

A. Not necessarily. It may be a good idea to register books, plays, musical recordings, portfolio photographs and illustrations and any other significant or important works. However, it may be cumbersome and expensive for a professional photographer who creates thousands of images each year to register all of his or her images. In this case, it may be sufficient to register only portfolio images, or images taken for clients with whom the photographer expects to have difficulties. Also, authors or musicians who produce relatively few works, may want to register all of their creations. It is also a good idea to register all writings and songs before sending works to prospective publishers or before public performance. This gives added protection in case of unauthorized usage.

Q. Has the Copyright Act kept pace with the computer age and changing technology?

A. Yes. The Copyright Act was designed to be responsive to all technological advances. For example, an illustration or photograph must be licensed for use on the internet. Similarly, an illustration or photograph taken off the internet without permission is as much an infringement as if the same image were taken from a magazine and used without permission. The unauthorized reproduction of a copyrighted work even if taken off the internet is still an infringement.

Q. What if I have an idea and I hire a photographer to execute my idea, pay for his or her expenses including models, film, processing, assistants and special equipment, does the copyright belong to me?

A. No. Usually, the person who creates the work and in this case, the person who trips the shutter -- owns the copyright. Of course, the parties can make other arrangements such as assigning the copyright or agreeing in writing to create the photograph on a work-for-hire basis. Also, under some circumstances there could be joint ownership of the copyright.

Q. If I buy a photograph or painting from a photographer or an artist for display purposes, can I use the image for any other purpose?

A. No. Mere ownership of a photograph, a painting or any other copyrighted work does not convey any right to copy or to use the work other than for personal use. For instance, a painting can be hung in a home or office but, absent permission, it cannot be copied, reproduced or used for any other purposes.

The law provides that the transfer of ownership of any material object that is protected by copyright, does not of itself, convey any rights to the copyright. For example, the purchaser of a copyrighted photograph, painting or poster, intended for display purposes, does not acquire any right to copy, reproduce or use the work other than for its intended purpose. Even if one were to purchase an original portrait that was specially commissioned, the purchaser would only be able to frame and display the work. Unless the parties otherwise agree, the artist owns the copyright and the work cannot be copied or reproduced. Thus, without permission, the subject of the portrait cannot even make a holiday card from the painting. Similarly, no one can photocopy an entire book without violating the copyright ownerís exclusive rights in the work. In fact, radio stations and jukebox operators have to purchase licenses to broadcast or play music even if they own the records they are using.

Q. What is a copyright notation?

A. A copyright notation consists of the word "copyright" or the international copyright symbol, which is the letter "C" within a circle, together with the year of first publication and the copyright owner's name. For example, a proper copyright notation for this work would be either of the following: c 2008 Andrew D. Epstein or "Copyright 2008 Andrew D. Epstein."

Q. Do I have to use a copyright notation on all copies of my work?

A. No. Since March 1, 1989, a copyright notation is no longer as absolute necessity of the Copyright Act. Nevertheless, it is still a good idea to do use a copyright notation as a reminder that the work is protected by law. Also, the copyright notation may act as a deterrent for would-be infringers. The regulations require that the notation be put in a reasonably conspicuous place. This could be on the surface of a phono record, the back of a photograph or the base of a sculpture.

Q. If a work does not have the word "copyright" on it, can I assume that the work is in the public domain and can be used?

A Probably not. The safest thing to do is to assume that all works are protected by copyright and that no work can be used or reproduced without permission. The reason for this is that since March 1, 1989, a copyright notation is not an absolute necessity for copyright protection.

Prior to this time, it was generally necessary to include a copyright notation on all works in order to maintain the copyright. In fact, before 1978 it was generally necessary both to use a copyright notation with a work as well as to register the work with the Copyright Office. However, since 1978 registration is no longer required.

Q. What is copyright infringement?

A. Copyright infringement is the unauthorized use of a copyrighted work. Even the simple act of photocopying a copyrighted image without permission can be an infringement. When there is an infringement, the owner of the copyright can sue for damages. All lawsuits for copyright infringement must be brought in federal court, not state court.

Q. If I change a few things in a copyrighted work by adding or taking something away, am I guilty of copyright infringement?

A. Yes. The right to make derivative copies is reserved exclusively to the copyright owner. While the idea for a work of art can be copied, the expression of the idea is fully protected. Sometimes, it is difficult to differentiate between an idea and an expression because the idea can sometimes get lost in the expression.

For example, one court had to decide if a pin made in the shape of a bumblebee was protected by copyright. The court said that the bumblebee was taken from nature and there was only one way to express this idea. Consequently, when there is only one way to express an idea, copyright will not prevent the copying of the expression. Furthermore, even though the pin was decorated with colored jewels, the placement of the jewels had to follow the form of the insect. Therefore, the jeweled bumblebee pin was not a expression that would be protected by copyrighted. The court held that it was an idea that could only be express in one way.

Q. If someone infringes my work, do I have to catch the infringer in the act?

A. No. It is not necessary to have finite proof that an infringer copied a work in order to prove copyright infringement. Infringement can be established simply by proving that the alleged infringer had access to the copyrighted work and that the offending work is substantially similar to the original.

The concept of substantial similarity is another tricky copyright concept. For example, making an illustration directly from a photograph without permission would be risking infringement. If the illustration were substantially similar to the photograph, there will be an infringement. The degree of similarity between an original work and a copy can cover a broad range from an exact copy to substantial similarity to some similarity to no similarity. The degree of similarity is a question for the court to decide. Common sense and good judgment must prevail.

Q. What are the damages for an infringement?

A. The owner of a copyright can always claim whatever damages he has actually sustained as a result of an infringement plus whatever profits were earned by the infringer from the unauthorized use of a work. In addition, if the copyright to a work which was infringed was registered with the Copyright Office either prior to the infringement or within 90 days after first publication, there are alternative damages that can be awarded. The owner of the copyright can elect to seek the greater of either his actual damages plus the profits earned by the infringer, or damages of up to $100,000 plus attorney's fees and court costs. The total damages that can be awarded by a court depends upon the degree of willfulness of the infringer.

For example, if a company has an agreement with a photographer to use certain photographs for one year only, the photographs can only be used within the one-year term. The company cannot use existing printed matter that contains any of the photographerís images beyond the one-year term. Simply, the continued use of copyrighted materials beyond the licensing period constitutes copyright infringement.

Q. Are there any times that I can use a copyrighted work without risking infringement?

A. Yes. The concept of **fair use** permits the utilization of copyrighted materials for certain purposes. For example, a newspaper can publish copyrighted works for purposes of reporting news and a teacher can make multiple copies of certain works for classroom use without risking infringement. In order to determine if a use is fair or is an infringement, one must determine how much of the copyrighted work is used and the impact this use will have on the potential market for the copyrighted work. If large portions of a copyrighted work are used or if the use lessons the potential market for the work, there will be infringement.

Parody is a form of fair use. In parody, an artist, for some comic effect or for social commentary, may closely imitates the work of another artist, as long as the new work ridicules or comments on the style or expression of the original. Thus, the rock group, Two Live Crewís song, "Ugly Woman," which was a rendition of Ray Orbisonís song, "Pretty Woman" was held to be a parody and not a copyright infringement.

Q. I make collages. Are there any problems that I might encounter?

A. Yes. If a collage artist incorporates any copyrighted material into the collage, there is a risk of infringement. In making a collage, it is fine to use your own work or work that is in the public domain. However, when collage artists take work from other artists, there is a risk of copyright infringement. As with fair use of copyrighted materials, one must inquire as to how much of the copyrighted work is used and the impact this use will have on the potential market for the copyrighted work. This is another instance where common sense and good judgment should rule.

Fair Use

Fair Use (or Fair Dealing in some countries) permits copying for some purposes, but is a complex issue. Generally, copying is permitted for personal use, research, teaching, criticism, parody, news reporting and editorial use.

Beyond that, the law is deliberately vague and is decided on a case-by-case basis. A lawyer can render an opinion, but there's no accurate answer until a case is adjudicated by a court. Questions include: how commercial was the use, has the market of the original work been affected, how different is the derivative work, has a significant amount of work been copied. Note that "fair use" is an "affirmative defense", where the infringer has the burden of proof to show that the use was indeed fair.

Fair Use / Fair Dealing

There is a complex doctrine associated with copyright law which allows certain types of copying without permission in areas where it is felt that some more important social principles would be violated otherwise.

The "fair use" doctrine (fair dealing in Canada and some other nations) in its purest form, lets a film critic include a clip from a film in her review to illustrate a point. Since negative critics would never get permission to do this, the fair use exemption exists to stop copyright law from being used to stifle criticism.

This means that if you are doing things like comment on a copyrighted work, making fun of it, teaching about it or researching it, you can make some limited use of the work without permission. For example you can quote excerpts to show how poor the writing quality is. You can teach a course about T.S. Eliot and quote lines from his poems to the class to do so. Some people think fair use is a wholesale license to copy if you don't charge or if you are in education, but it isn't. If you want to republish other stuff without permission and think you have a fair use defense, you should read the more detailed discussions of the subject you will find through the links above.

Fair Use has also seen some expansion in recent days, to things like time-shifting video recordings, computer backups, space-shifting media files and more.

To use the net

There's a pretty simple rule when it comes to the net. If you didn't write it, and you want to reproduce it, ask the creator, or ascertain that it meets the complex public domain rules if it's pretty old. Most people don't really need to know much more than this. If you do, check the other documents.

Some legal Basics

Under the Berne copyright convention, which almost all major nations have signed, every creative work is copyrighted the moment it is fixed in tangible form. No notice is necessary, though it helps legal cases. No registration is necessary, though it's needed later to sue. The copyright lasts until 70 years after the author dies. Facts and ideas can't be copyrighted, only expressions of creative effort.

The Public Domain

ABSOLUTELY FREE! MUSIC, TEXT AND ART!! COPY ALL YOU WANT!! If you saw an advertisement like this, you might wonder, "What's the catch?" When it comes to the public domain, there is no catch. If a book, song, movie or artwork is in the public domain, then it is not protected by intellectual property laws (such as copyright, trademark or patent law) --which means it's free for you to use without permission.

As a general rule, most works enter the public domain because of old age. This includes any work published in the United States before 1923. Another large block of works are in the public domain because they were published before 1964 and copyright was not renewed. (Renewal was a requirement for works published before 1978.) A smaller group of works fell into the public domain because they were published without copyright notice (copyright notice was necessary for works published in the United States before March 1, 1989). Some works are in the public domain because the owner has indicated a desire to give them to the public without copyright protection. The rules establishing the public domain status for each of these types of works are different and more details are provided throughout this chapter.

The term "public domain" refers to creative materials that are not protected by intellectual property laws such as copyright, trademark or patent laws. The public owns these works, not an individual author or artist. Anyone can use a public domain work without obtaining permission, but no one can ever own it.

An important wrinkle to understand about public domain material is that collections of it may be protected by copyright. If, for example, someone has collected public domain images in a book or at a website, the collection as a whole may be protectible, even though individual images are not protected. You are free to copy and use individual images but copying and distributing the complete collection may infringe what is known as the "collective works" copyright. Collections of public domain material will be protected if the person who created it has used creativity in the choices and organization of the public domain material. This usually involves some unique selection process, for example, a poetry scholar compiling a book, *The Greatest Poems of e.e. cummings*.

There are four common ways that works arrive in the public domain:

- expiration of copyright: the copyright has expired.
- failure to renew copyright: the owner failed to follow copyright renewal rules.
- dedication: the owner deliberately places it in the public domain.
- no copyright protection available: copyright law does not protect this type of work.