Q. What is copyright?

A. Copyright is a form of protection that gives people and corporations the exclusive right to use and reproduce works that they create or that they own. Essentially, all original works, including photographs, art works, sculpture, writings, music (words and melodies), architectural drawings, choreography, and computer software, can be copyrighted.

Virtually all works created or first published after January 1, 1978, are automatically protected by copyright. Many works created prior to 1978 are also protected. The Copyright Act refers to all people who create works, whether artists, photographers, writers, musicians or architects as "authors."

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 reproduce their works, and to authorize others to use and reproduce their works. The rights given by a copyright owner to another person or company to use and reproduce their works is called a license. The use or copying of any work without permission from the owner of the copyright is an infringement of a copyright and it is a violation of the United States Copyright Act.

Q. What works are protected by copyright?

A. Copyright protects original works of authorship that are fixed in tangible form. 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 contains some "spark" of originality.

For example, if a photographer makes 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 to a photograph of people standing in front of the Mona Lisa would be copyrighted but the copyright would not extend to the Mona Lisa. Once a work such as the Mona Lisa is in the public domain, there is nothing that can be done to make it private and protected.
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 Leonardo’s, the derivative work -- that is, the work derived from the original -- may have enough originality to be protected by copyright.

Q. What does copyright do for authors?

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, copied and publicly displayed. The owner of the copyright can also prevent someone from using his or her work.

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 an institution 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 on a poster without permission would be a violation of the exclusive rights of the copyright owner. Similarly, if a person is authorized to use a photograph in a brochure for only one year, the photograph cannot be used for more than one year without permission without infringing the rights of the copyright owner.

Q. Who owns the copyright?

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

For example, free-lance photographers and writers own the copyrights to the images and stories that they license for publication to newspapers or magazines. However, staff photographers and journalists are different. Absent a contract that provides otherwise, a newspaper or magazine will own the copyrights to all works that their employees create as part of their job responsibilities. The same is true for staff photographers working for art museums. The only way that the copyright would belong to the author of the works in these situations is if there is agreement granting the author the copyright despite the employment relationship. 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 relationship between the parties. However, there is no precise way to determine whether a person is an employee or an independent contractor under the Copyright Act. A person can be an independent contractor under a particular state law while he or she is an employee under the federal Copyright Act.

The copyright to a work created under a written agreement as a work-for-hire belongs 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 can masquerade as invoices, receipts, and emails, or be hidden in fine print in what someone might call “standard” terms and conditions or “standard” purchase orders. Just because someone calls certain terms and conditions or purchase order language “standard,” does not mean that these terms are universally accepted or that they cannot be changed or modified.

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 with respect to their copyrights but without having job security and without 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 the joint owners agree otherwise, the only responsibility one joint owner has to the other is to share any money that is earned from exploiting the joint work. 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. Something like, “go ahead and use the picture” is sufficient. Obviously, the use of a clearly written licensing agreement will avoid confusion and future problems. The writing does not have to be detailed to be effective. A simple email letter or invoice is usually sufficient. For example, “you can use our photograph,” is sufficient to grant a license. However, “we grant you one-time usage rights for a photograph of the work of ark in our museum in your upcoming book with a maximum press run of 5,000 copies for $2,500,” is much better.

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 money damages, all profits earned by the infringer from the unauthorized use of the copyrighted work and attorney’s fees. A court can also order the destruction of all infringing copies.

Q. How do I know who to ask for permission to use a work?

It is easy to say that you need to ask the owner of the copyright for permission to use the work. However, determining the identity of the owner is not so easy.

Let’s consider that a museum owns a painting created by an artist in 1979. Clearly, the painting is protected by the current version of the Copyright Act. The museum could have acquired the painting by purchase, by gift or through an estate.

Just because the museum owns the painting does not mean that the museum also owns the copyright to the painting.
For instance, if someone buys a book from a bookstore, that person owns the book, and can read it, lend it to someone else, give it away or resell it. It would be an infringement of the copyright for that person to copy the entire book or to reprint it without permission or to read the book as part of a public performance. Of course, the owner of the book could quote a short passage two or publish an article about the book as part of criticism or comment, but only small excerpts could be reproduced for limited purposes.

So, if someone wants to use a picture of a painting hanging in a museum, one has to determine if the museum owns the copyright to the painting. If the museum purchased the painting, did it also purchase the copyright or did the artist assign the copyright to the museum? If the painting was purchased through a gallery, did the gallery have the right to assign the copyright? Is the artist still alive? Did the artist use a copyright clearance company such as the Artist Rights Society [www.arsny.com]?

If the museum was given the painting, did the artist donate the painting or did someone else donate it? Did the artist give the museum any rights to use the painting other than for public display? If someone other than the artist donated the work, what rights did the donor have to give? What if the museum received the painting through an estate? What rights if any, did the estate have to convey?

There are lots of questions but not always easy answers.

Q. How do we determine if we own the copyright to a work?

The answer to this question is also complicated.

If the work is old, say before 1923, the copyright may well be in the public domain, that is, free to be used by anyone. However, just because a work is old, does not automatically mean that it is the public domain.

Examine all papers that came with the work such as a bill of sale, will, trust or gift document. Read them carefully. Do they say anything about copyright? Is the artist still alive? If so, contact the artist and have the artist assign the copyright to your institution. While a license or permission to use a copyright work can be oral, a copyright assignment must be in writing. An email will probably suffice but make sure to keep a copy with the artist's email address on it. If the artist is dead, contact the beneficiaries of his/her estate. They can often assign the artist’s copyright to your institution.

Has the work been published within the meaning of the Copyright Act? Publication in book or on the Internet is not the same as publication as defined by Copyright. Publication under Copyright asks if copies of the work were distributed to the public by sale or other transfer of ownership, or by rental, lease, or lending? If so, the work is considered to be published. Also, offering to distribute copies of a work to a group of persons for purposes of further distribution or public display, constitutes publication. However, a public display of a work does not of itself constitute publication. To display a work publically means to display the work in a place open to the public or at a place where a substantial number of persons, outside of a normal circle of family and social acquaintances, is gathered.

If a particular work was published within the meaning of Copyright before it was acquired your institution, you may not own the copyright. However, if the work was not published within the meaning of Copyright law before it was acquired your institution, the work may still be under copyright. The question then becomes, who owns the copyright? The answer is not always easy and it is not always clear.

Q. We are a museum. How can we limit the use of photographs of the art and artifacts in our collection?

If your museum owns the copyright to things in your collection, you can control if, when, how and how
often the works can be used, copied and publically displayed. You can also prevent someone from using copies of the copyrighted works.

If you do not own the copyrights, contract law can fill the void left by the lack of copyright ownership. Before supplying a picture of a work of art to someone, you can require by contract that the photograph be used only for a particular purpose and that it cannot be further distributed and that if the user breaches the contract, they will owe the museum a specified sum of money as damages.

Q. What about sculptures or other 3-D museum artifacts? Is there enough originality in photographs of these kinds of things that they are protected by copyright?

Perhaps. Taking pictures of three-dimensional objects, like sculptures or other artifacts, often requires a bit more originality than making a verbatim copy of a two-dimensional painting. Courts have generally held that “elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression and almost any other variant involved.” Since lighting and angles often come into play with three-dimensional works, there is likely the necessary “spark” of originality that the law requires for copyright protection.

Q. If I have an idea for a work, 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 work of art. 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. Keep in mind, however, that anyone can combine images of immigrants with the Statue of Liberty, as long as the second image is not a substantially similar copy of the first image.

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. For example, museum names are protected by trademark laws, not copyright.

Q. How do I copyright my works?

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 or it is saved on a memory card or computer. As long as the work exists in tangible form or can be understood or reproduced with the aid of a computer, camera or other device, 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 attorney’s fees. These alternate damages are called statutory damages and they can be awarded in a sum of up to $150,000 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 infringer. However, the suggestion that statutory damages and attorney's 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 a single payment.

Forms can be obtained online from the Copyright Office (www.Copyright.gov). Use Form VA for works of visual art and Form TX to register mainly textual material. Form SA is used for sound recordings. Look for Copyright Basics on the Copyright Office website for general information about copyrights, and Circular 40 for guidance as to how many copies of a work need to be filed with the Application for Registration.

Q. Should my museum register the copyrights to all the works we own?

Maybe not all of the works, but certainly the most significant works in its collection. However, be careful because your museum may not own the copyrights to all works in its collection.

Just because the museum purchased the work or was given a work of art, does not necessarily mean that the museum owns the copyright. You should examine all acquisition documents carefully to see if the copyrights were given to your organization. If an artist gives one of his/her paintings to you, make sure the artist also conveys the copyright to the work. If your museum acquires a work by will, make sure the will gave your organization full rights to the work preferably including the copyright.

Second, it may be cumbersome and expensive to register all works to which you do own the copyrights. It would be a good idea to register copyrights to all significant works in your collection (if you do own the copyright), but it may not be cost-effective to register works that are in storage or works that are rarely seen or are relegated to storage.
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 copied on-line 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 in this case, the photographer 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: © 2012 Andrew D. Epstein or "Copyright 2012 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. Generally 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 $150,000 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 photographer’s 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 Crew's song, "Ugly Woman," which was a rendition of Ray Orbison's 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.

Q. Can I ever make a “fair use” of copyrighted images?

A. Yes. The Copyright Act says a copyright owner has the exclusive right to do or authorize others to do the following with copyrighted works: to reproduce the copyrighted work, to made derivative copies of the work, to distribute copies to the public, to perform literary, musical, dramatic and choreographic works, and to display copyrighted works publicly. Fair use is an exception to the exclusive rights granted to a copyright owner.

Under the fair use doctrine, copyrighted works can be used for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use) scholarship or research. In determining whether a particular use is a fair use in any particular case, the court must consider four factors:

1. The purpose and character of the use, including whether the use is for commercial or for nonprofit education purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect of the use upon the potential market for or value of the copyrighted work.
(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) The effect of the use upon the potential market for or value of the copyrighted work.

The distinction between what is fair use and what is infringement is not always clear and cannot be easily defined. There is no specific number of words, and no percentage of an image that may be used without permission. Also, acknowledging the source of the copyrighted material does not substitute for obtaining permission.

Courts have regarded as fair use the quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article with brief quotations in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction in a newsreel or broadcast of a work located in the scene of an event being reported.

The safest thing is to get permission from the copyright owner before using copyrighted material. When it is impracticable or impossible to get permission, consider avoiding the use of copyrighted material unless you are confident that the doctrine of fair use would apply to the situation.

Q. How long does copyright last?

A. Generally, for works created after January 1, 1978, copyright lasts for the life of the author and for 70 years thereafter. In case of joint works, the copyright expires 70 years after the death of the surviving joint author.

For anonymous or pseudonymous works, and for works made-for-hire, the copyright endures for 95 years from the year of its first publication, or for a term of 120 years from the year of its creation, whichever expires first.

After 95 years from the year of first publication of a work, or 120 years from the year of its creation, whichever expires first, there is a presumption that the author has been dead for at least 70 years.

For works created before January 1, 1978, which are not published or in the public domain, the rules are complicated and are beyond the scope of this commentary.

The information contained herein is intended to be informational and not to be a substitute for competent legal advice. It is a summary of a very complex area of law. Please use reason and good sense in reading and using this information. If in doubt, go to a good lawyer for advice. Drew Epstein