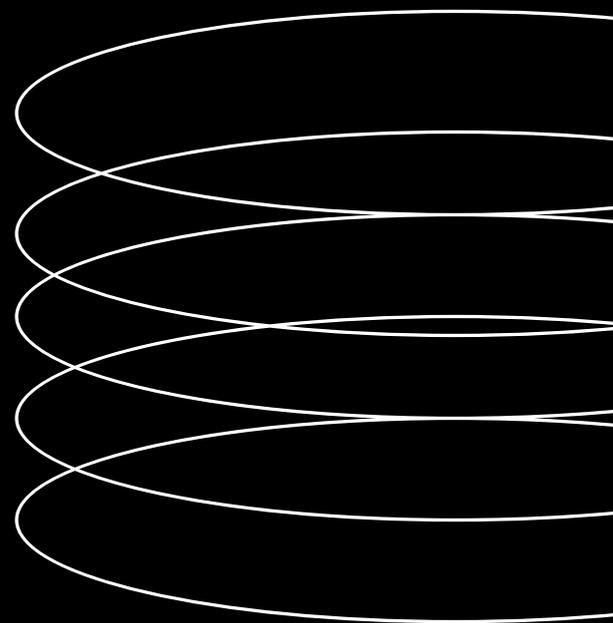
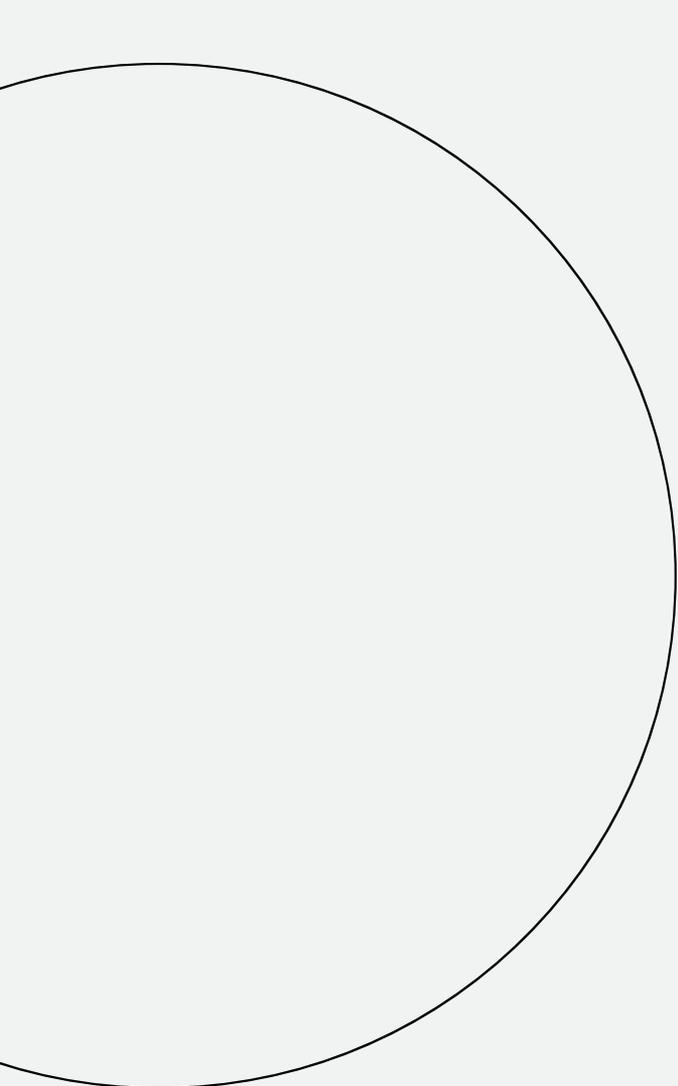




# Archiving Artist Spaces 2023 Copyright Guide

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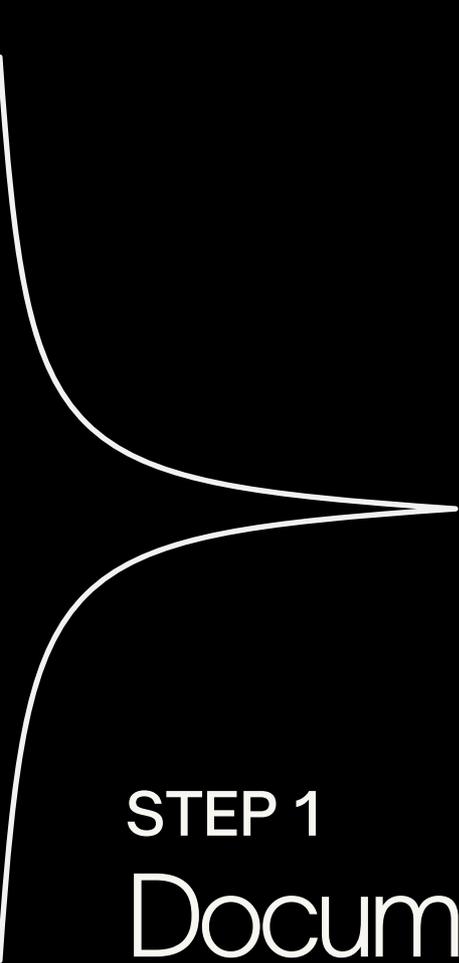
# The Guide

Archiving is generally a low risk endeavor from a copyright law perspective. However, this guide contains 3 key steps to further minimize the risk of running into copyright issues when documenting and archiving text, photos, and other information about preexisting artist spaces.

**Step 1:** Document source information.

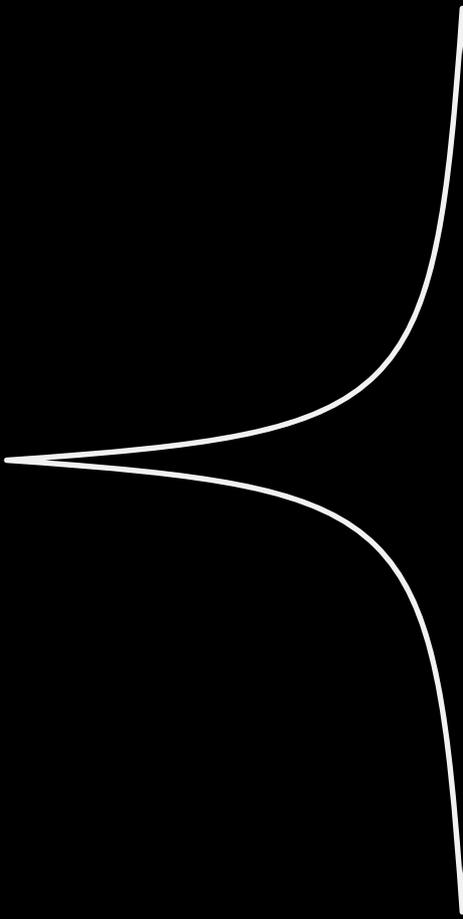
**Step 2:** Ask for permission or provide notice.

**Step 3:** Design the archive to favor fair use (a legal doctrine that permits copying in certain instances).



STEP 1

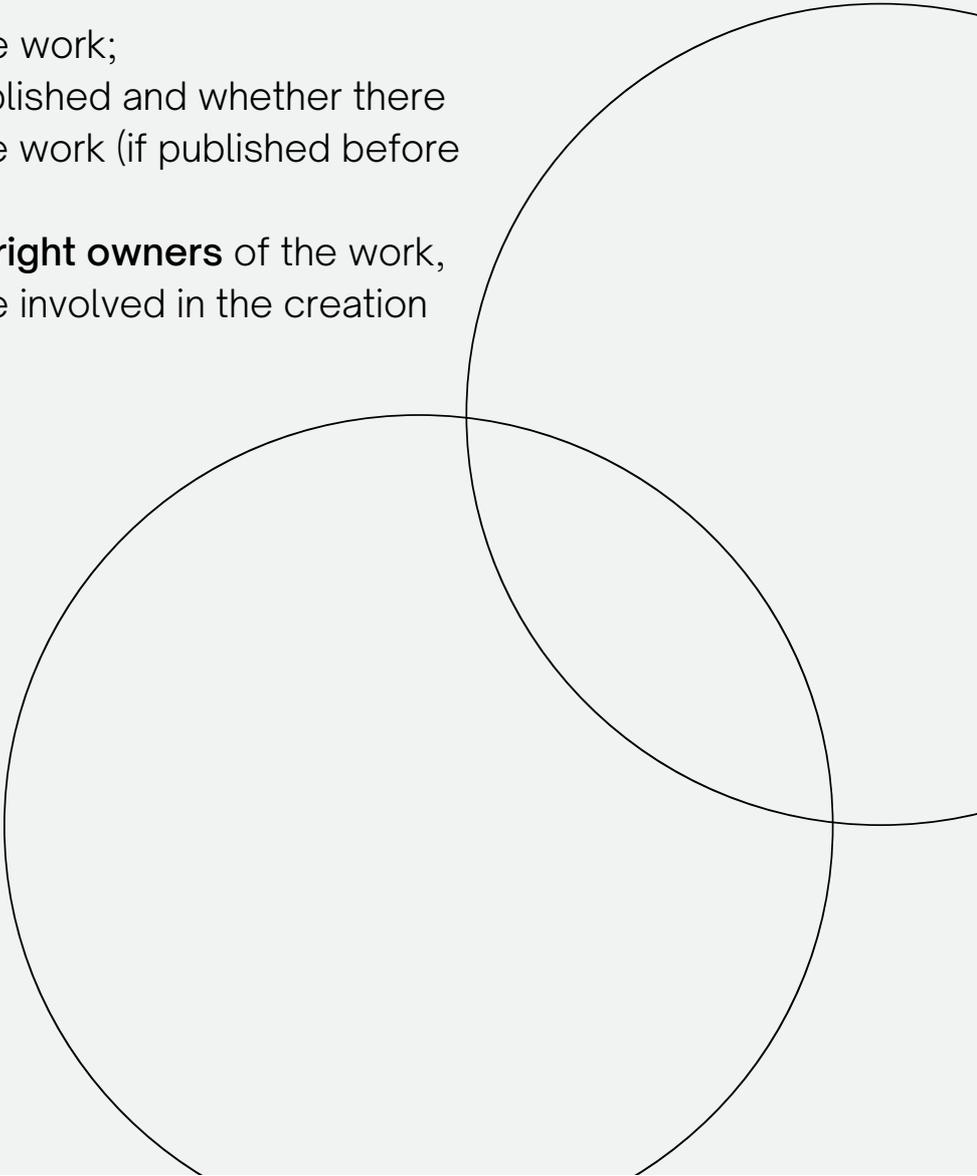
Document source information  
for works.



Prepare a spreadsheet tracking each copyrighted work you want to archive. Works can be listed individually or, when similar from a copyright point of view, in groups. These works may include photographs, written descriptions, documentaries, logos, etc. Any underlying works that appear in the work (for example, a painting that was photographed) should also be tracked.

For each, include as much information as you have. This documentation will help both with gathering permission when possible and with assessing the risks of using these works in the archive. See [Appendix A](#) for a sample spreadsheet.

The information collected should ideally include:

- The **source/location** of the work;
  - The **year** the work was published and whether there is a copyright **notice** on the work (if published before March 1, 1989); and
  - The **creators and/or copyright owners** of the work, including whether you were involved in the creation of the work.
- 

# Types of Copyright Ownership

There are three relevant categories of copyright ownership that you can track in the spreadsheet: (1) individual artists; (2) works made for hire; and (3) joint or collective authors. For each, the approach differs slightly.

**1. Individual Artists:** Typically, **the copyright owner of a work is the author or artist who created it.** If you believe the creator is the copyright owner, record their name and contact information. If an individual or institution has purchased the copyright from the artist, they are now the copyright owner of that work. This should include works obtained from copyright owners you know or are collaborating with on the archive, or obtained from someone who knows them, since they are lower risk if you can obtain permission for using those works.

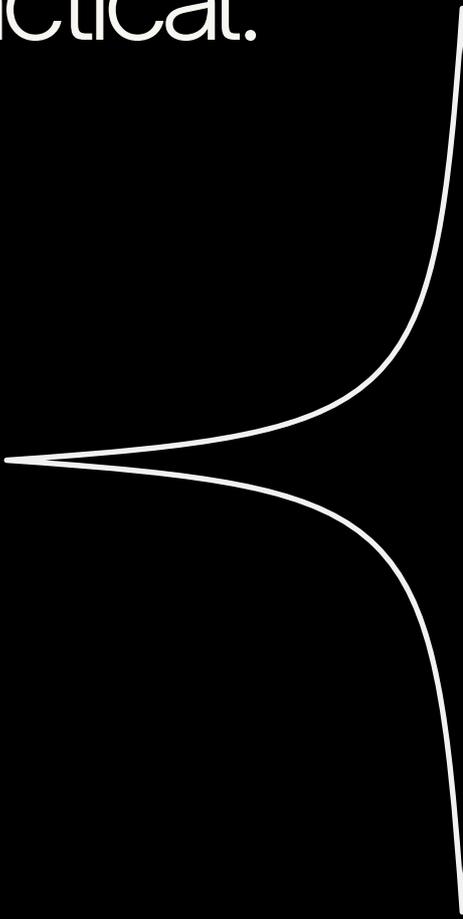
**2. Works Made For Hire:** Sometimes institutions for whom artists work become the copyright holder instead of the artist. Consider whether **the copyright holder might be an institution or individual different from the artist who created the work** because the work qualifies as a work made for hire. A work made for hire is a work prepared within the scope of an employee's job or is created via contract that explicitly assigns copyright to the contractor (see [Appendix B](#) for more information). For works made for hire, get **documentation** of that relationship – this may be contracts, payment, or anything that establishes the works were done on the date or for the purpose for which they were hired.

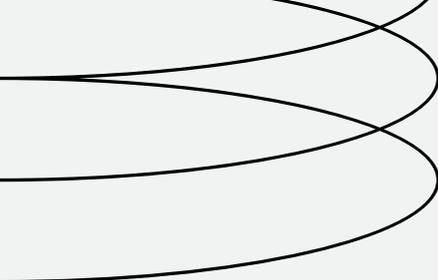
**3. Joint and Collective Authorship:** Some works have **multiple authors.** If you contributed to a work with the intent that your contributions and those of others be merged into one work, **you may be considered an author of that work and hold an equal claim in its copyright** and there is therefore no risk of using the work. See [Appendix C](#) for additional information on the definitions of joint and collective works.



**STEP 2**

Seek permission from or give notice to copyright holders when possible and practical.





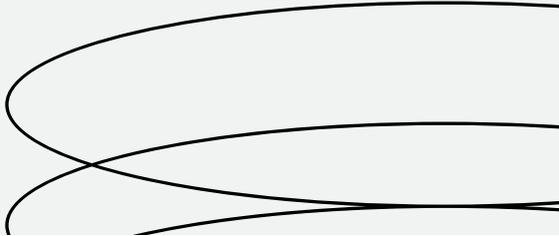
## Permission

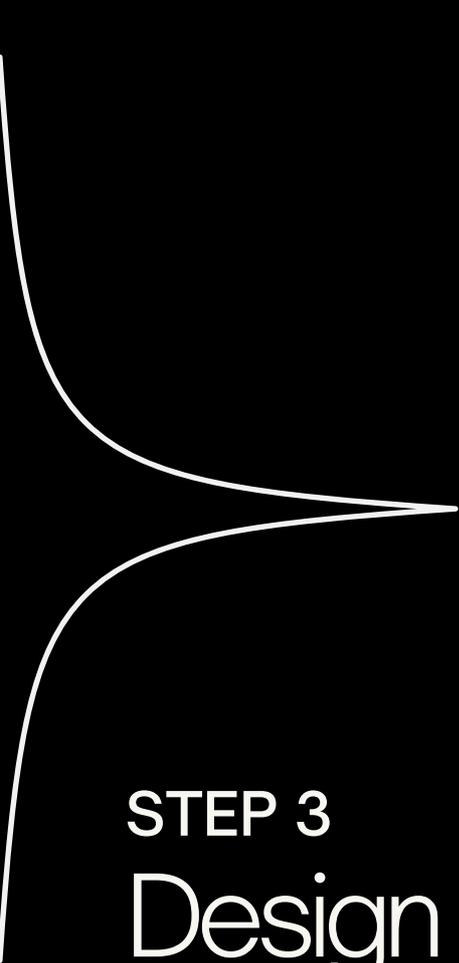
If you have explicit documented permission from a copyright holder to archive their work, there is no risk of copyright infringement. Written permission, often called a “license,” binds the copyright owner and usually those who may take over copyright ownership after them, so if they sell their copyright or change their mind about permitting use of their works in the archive, you won’t face any issues down the road. A **request for a formal license** is ideal, but **written permission via email** is usually enough for most courts. For an example email, see [Appendix D](#).

## Notice

If asking for permission is not desirable or feasible, it also minimizes risk to **send a notice to copyright holders of your archiving activity**. Notification is useful in two ways. First, it strengthens your argument that use of their work is a “fair use.” Second, it starts running the statute of limitations (a legal doctrine that limits the amount of time one has to sue). This means that after three years from the date of notice, the copyright owner loses any right to sue you.

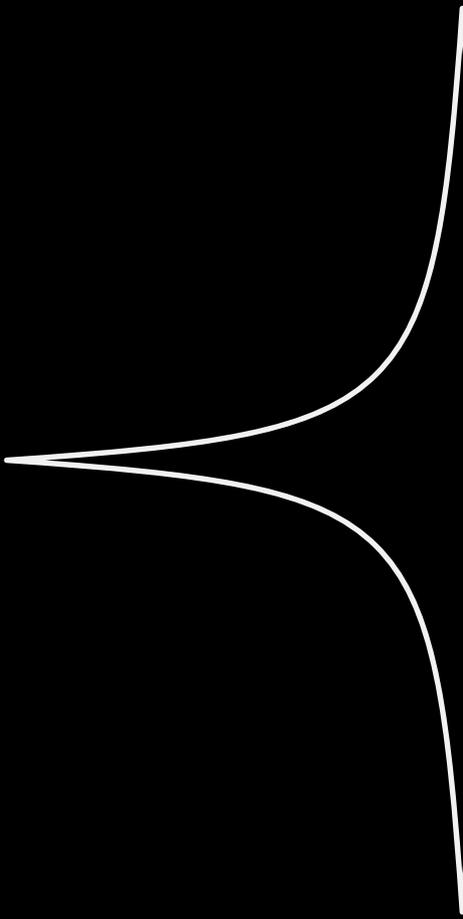
Make sure you **keep records** of any correspondence related to permission requests or notices, so they can be used later if needed to settle any complaints.



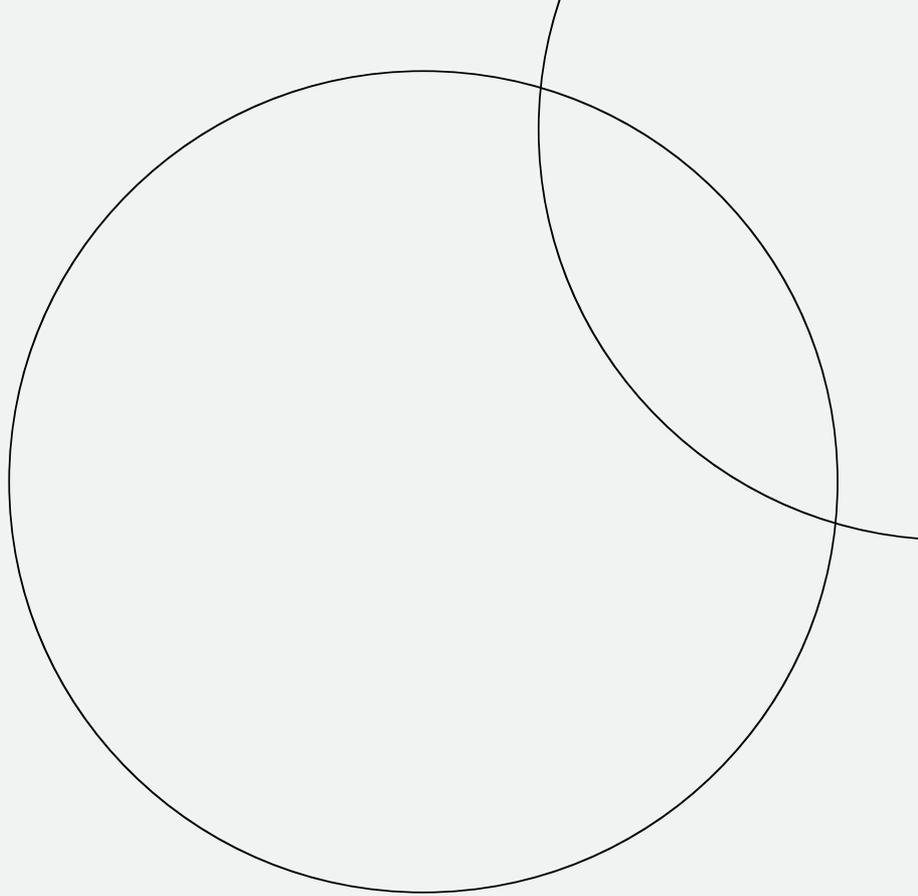


STEP 3

Design the archive to align  
with fair use.



# Fair Use Factors



The fair use doctrine of copyright law states that certain uses of original works are non-infringing, even without permission from the copyright owner. It provides courts with four factors to analyze:

1. The **purpose and character of the secondary use**, including whether such use is of a commercial nature or for nonprofit educational purposes;
2. The **nature of the copyrighted work**, including (a) whether it is expressive or creative, and (b) whether it has been published;
3. The **amount and substantiality of the portion used** in relation to the work as a whole; and
4. The **effect of the secondary use on the potential market** for or value of the copyrighted work.

These factors are used in U.S. copyright law only. See [Appendix E](#) for more information on each factor.

# Fair Use Actions

To align with the four fair use factors, we recommend the following actions. See [Appendix F](#) for more information on how each recommendation ties back to the fair use legal doctrine.

1. Fair use is favored when the purpose of the use is for education, research, scholarship, commentary or criticism. Include a **statement of purpose** on your website, or on each archive if possible, explaining how your purpose in creating the archive relates to education, historical documentation, research, scholarship, commentary and/or criticism. Add as much **additional commentary** or other materials to the original works as possible (e.g., oral history interviews you have conducted).
2. When you include **the entirety or large portions of works** in your archive, make sure the rationale for using the amount relates to the archival purpose. For example, one can include a photo of an entire painting if the purpose is to highlight the painter's or painting's role as part of the artist space.
3. Only include **unpublished works** if they are essential to your purpose in creating the archive under Factor 1 or can be contextualized with other commentary or materials.
4. Avoid **commercial activity**, including selling anything related to the works in the archive or commercial advertisements.
5. Be sensitive to the heightened risk of using **works from professional photographers or creators**. Make sure this serves your purpose. If they sell the work, make sure your fair use argument is strong and consider the cost of licensing the work to use in the archive.

# Appendix A

## Collecting Information

Below is an example of a spreadsheet you can use to document information on the works you are including in the archive.

Name of Work	Source of Work	Year of Publication & Notice	Creators/Copyright Owners	Notes
Photo of Exhibit A	Flickr	2010	Gallery Contributor John Smith	
Description of Exhibit A	Archive website	2015	Gallery Contributor John Smith	
Oral History Interview	Conducted by me	2023	Your name here	
Artwork A in Photo A	Photo is from Flickr; work pictured is from MOMA	1975; no	Artist Jane Smith; MOMA	MOMA might be a copyright owner under the work made for hire doctrine

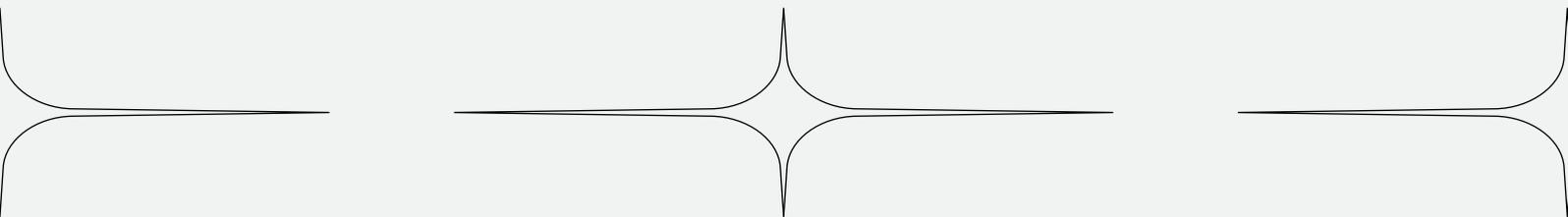
Note also that you can **search the copyright office records portal** [here](#) if you know the approximate year of registration and either the title of the work or the name of the copyright owner to determine if a work was registered with the Copyright Office. If a work isn't in the Copyright Office database, that doesn't mean it is in the public domain; it just means it wasn't registered.

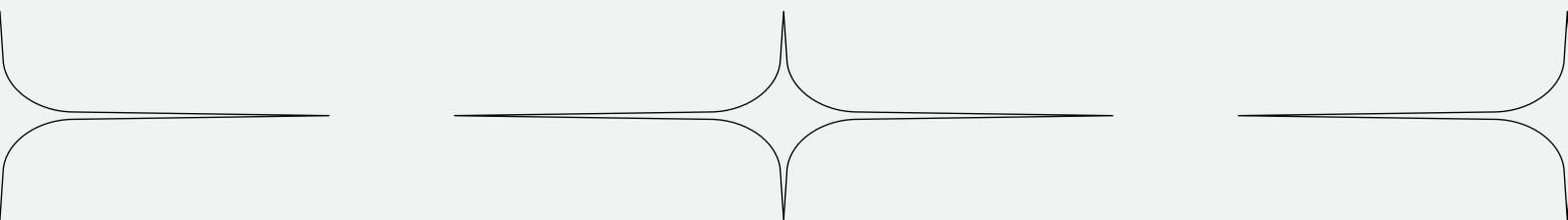
# Appendix B

## Works Made for Hire

A work prepared by an **employee within the scope of his or her employment** or a work specially ordered or commissioned for use as a contribution to a collective work would both be considered works made for hire. For example, if a photographer employed by a museum has been hired to take photographs of exhibits, the photographs would be works made for hire and the museum would be the copyright of those photographs rather than the photographer.

If there is not a **formal contract** establishing that the works are works made for hire, consider the following factors and whether they would demonstrate the creator was treated more or less like an employee: the skill required, extent of the employer's control, source of tools and materials, location of work, provision of employee benefits, whether the employer has the rights to assign other work to the employee, duration of the relationship, method of payment, hiring party's role in hiring and paying assistants, whether the work is part of the regular business of hiring party, and tax treatment. For example, an artist commissioned by a building to create a sculpture for their courtyard would be more likely to be considered an employee if the building hired assistants for the artist, provided the tools, and directed the artist in how to prepare the sculpture.





# Appendix C

## Joint & Collective Authorship

**Joint Work:** An individual work that you and the other author(s) contributed to, each with the intent that your contributions be merged into inseparable parts of a unitary whole work.

**Collective Work:** Individual copyrightable contributions brought together to form a collective whole. The author(s) of a collective work is the person(s) who selects and arranges the individual works that comprise the collective work. The copyright in a compilation only extends to the original contributions from the author, and not to the preexisting material contributed to the compilation, so **even if you are considered an author of the collective work, this would not give you the rights to any of the individual materials that you did not write.**

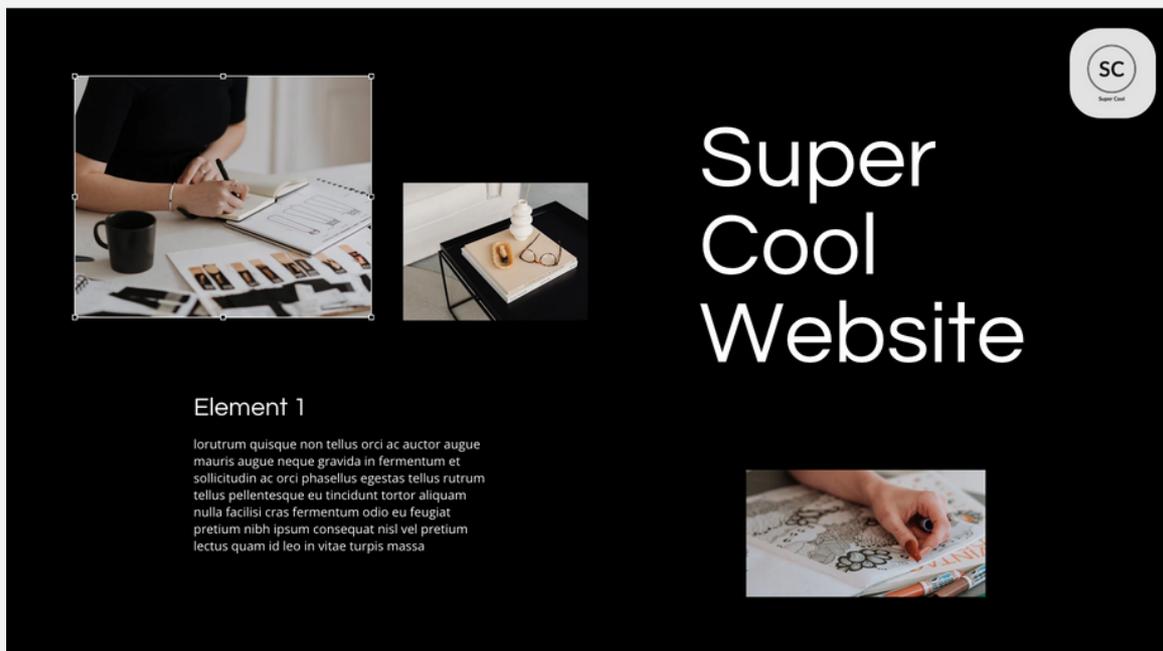
Websites are a common example of a collective work. To the extent that the copyright office recognizes registration of websites (and not just the individual works within them), they recognize websites as collective works. This means that if you designed or helped design a website to which others contributed individually copyrightable work (such as a photograph or sufficiently long description), you would be an author of the website design, but the individual contributors would still hold the copyright to their individual contributions. For an example, see the following page.

In order for a website to be considered a collective work, there must be a minimum amount of **creative expression** in the selection and arrangement of the content.

It is possible that some of the individual works within a collective work could be joint works. **If you are a joint author of these individual works, you would have equal claim to the copyright as any of the other authors, and your use of them would not be infringement.**

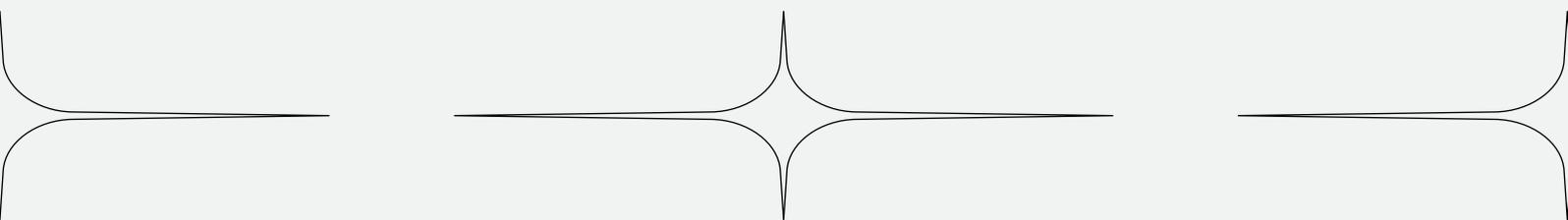
# Appendix C

Joint & Collective Authorship



The logo, text, and each of these photos are considered different works with independent copyrights. They might have the same author or different authors. The copyright in each would belong to the creator of that work. These works might be joint works if multiple people contributed to them with the intention of creating a single work. For example, if multiple people wrote some of the text in Element 1 with the intention of creating one integrated writing, then they would be joint authors of Element 1.

The copyright in the collective work (the website) would belong to whoever collected and arranged the individual works into the webpage, and that copyright would only protect the design created by the collective author.



# Appendix D

Sample Permission Email

Below is a sample email requesting permission from artists to use their works in your archive. Even if they do not respond or deny permission, sending this can provide the requisite notice discussed above.

— — —  
Dear [Name],

I am working on an archive of [artist space] and would like to include [name of work] on the website. This archive is meant to serve as documentation to enhance education, research, scholarship, and commentary related to [artist space], and including your work will help with this purpose. I want to officially get your permission to use [type of work] and permanently archive it on the website. Please let me know if this is ok with you.

Thank you,  
[Name]

# Appendix E

Fair Use Factors

**Factor 1:** Transformation or addition of new material to an original work favors fair use under this factor. The test here for courts under the test articulated in the *Campbell v. Acuff-Rose* case is whether the new work is **transformative**, i.e, whether it “merely supersedes” the original work or “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” **Criticism, commentary, news reporting, teaching, scholarship, and research** are types of works more commonly found to be fair use under this factor.

**Factor 2:** **Creative** works and **unpublished** works are less likely to be fair use, but this factor is rarely dispositive.

**Factor 3:** The question here is whether the amount of the work used, both qualitatively and quantitatively, is **reasonable** in relation to the purpose of the copying under the first factor.

**Factor 4:** This factor considers whether the new work may serve as a **market substitute** for the original or if the original work could have been **licensed** for use in the new work.

# Appendix F

## Fair Use Actions

### 1. Transformation and Archival Purpose

Since Factor 1 is most important in a fair use analysis, **aligning your archive as much as possible with an educational, scholarly, commentary, and/or news reporting purpose** can be very useful. A Factor 1 case can be bolstered by **adding additional information or creative elements** to the archive that are your own, in addition to the existing works you are including. This can include a **statement of purpose** on one page of the archive that explains the educational and historical documentation purpose of the archive.

### 2. Using Entire Works

Since Factor 3 asks if using the entirety of individual works is reasonable in light of the purpose under Factor 1, **consider reasonableness** when including individual elements. In one case, multiple concert posters were used in their entirety in a coffee table book about the Grateful Dead, but it was deemed reasonable to use the entire works to provide a **useful historical reference point** for a book about the band's history. This is an example of a situation where use of the whole work is permissible. In another case, however, a documentary about Elvis was found to have taken too much of Elvis interview clips because they were **used repeatedly and at length**, and their use as a historical reference point for the documentary could have been done by using a much smaller portion. Based on cases like these, it is important to **consider how closely use of the works ties into your purpose in creating the archive**.

# Appendix F

## Fair Use Actions

### 3. Unpublished Works

Since Factor 2 of a fair use analysis provides **heightened protection for works that have not been previously published**, be sensitive to the use of unpublished works and only include them if necessary. **Publication generally means made publicly available**, so consider whether the work was posted to the public to find through a search engine or viewable in a gallery open to the public. **Factor 2 is rarely dispositive, but unpublished works tend to weigh against fair use.** This was found in two commonly cited cases involving unpublished letters by J.D. Salinger and an unpublished portion of a memoir about President Ford. In another case, the court found that use of an author's unpublished works in a biography about him weighed against fair use, but overall the use was still fair because of the scholarly research purpose under Factor 1. Therefore, **we recommend avoiding using unpublished works when possible. When it is necessary to use them, recognize that contextualizing them with an oral history or artist statement can help** by connecting it to your purpose under Factor 1.

### 4. Commercialization

Commercialization can work against you in both Factor 1 and Factor 4 of a fair analysis. Under Factor 1, **commerciality generally works against a finding of fair use.** Under Factor 4, **commerciality can demonstrate a higher likelihood of harm to the market** of the original work. This is generally limited to commercialization related to the use of the works, but to be safe **it is best to avoid all commercialization.**

### 5. Professional Artists

Professional artists are **more likely to sue** to protect their rights in their works. They are also more likely to have registered their works with the Copyright Office, allowing them to seek **statutory damages which could be more financially damaging** to you. This also shows **more harm to their markets** under Factor 4 of a fair use analysis because they have potential markets for their works to be purchased directly or to license use of their works for archiving purposes, and this archive arguably harms those markets. If they have **licensed their works for similar purposes in the past**, this can contribute to the argument.