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**Copyrights & Copywrongs for  
Educators**

Speaker:  
*Trista Curzydlo, J.D.*

# Copyrights and Copywrongs: Intellectual Property Law for Real Estate Educators

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## **A Primer on Intellectual Property**

*Really boring Intellectual Property background that only Trista really cares about.*

The protection of the thoughts, ideas and inventions of Americans has a storied history. The Intellectual Property Clause of the United States Constitution, Article 1 §8, grants Congress the power “to promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive right of their respective Writings and Discoveries.” The drafters of the Constitution realized that very few thoughts, ideas and concepts are truly new, they are based on the thoughts, ideas and concepts of earlier generations. The role of intellectual property law in the United States is to find a balance that allows an individual to profit from a creation without ceasing the development and growth that can result from that creation.

The implementation of the Constitution has resulted in a framework of Intellectual Property protection found at the federal and state levels. The Federal Government has enacted laws pertaining to and regulating patents, copyrights and trademarks. State law regulating intellectual property relates to such matters as trade secrets, unfair competition, publicity and trademarks. Some states, including California and New York have adopted state laws that protect the “moral rights” of an author when the author no longer is the copyright holder. Intellectual property is frequently divided into four distinct categories; 1) Patents, 2) Trade Secrets) 3) Trademarks and 4) Copyrights.

A patent protects new and useful ideas and concepts, ornamental designs and asexually reproduced plants. This protection allows a limited time in which the patent owner may exclude others from making, using or selling the patented product. The application process for a patent requires the inventor to disclose the methodology behind what is being patented.

Protection of a Trade Secret is afforded without disclosing the methodology behind the “secret.” The recipe for your amazing barbeque sauce may be eligible for protection under you state law if you begin marketing the product. Trade Secrets are protected at the state level through state law or common law.

Trademarks are the words, symbols, names and devices that a manufacturer uses to identify its goods and separate them from others. There is a wide range of legal protection for trademarks, including common law, state law, and federal statute.

### What is Copyright?

Virtually every original work that is ultimately fixed in a tangible medium of expression is eligible for copyright protection, and in most cases, copyright protection is instantaneous upon fixation. Everything from a novel to a text message can be subject to copyright protection.

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Copyright vests in the author the following exclusive rights:

1. Make and distribute copies;
2. Make derivative works;
3. Make public performances and display.

Copyright is a personal property right and is subject to state laws and regulations governing the ownership, inheritance, or transfer of personal property, as well as the terms and conditions of contracts or the conduct of business.

To establish Copyright, there must be an original, fixed, non-functional expression.

## Originality

For an expression to be Original, the work must be independently created by the author. The author is presumed to be the individual who conceived the thought that led to the expression of the thought. The work must possess at least a minimum degree of creativity.

## Fixed

The expression must be stored somehow, this can be on paper, on a hard drive, or even in clay.

## Non-Functional Expression

Ideas, facts, processes and discoveries are not eligible for copyright. The manner in which these ideas are expressed and facts are compiled is eligible for copyright protection.

## How do I Obtain Copyright Protection?

In the United States, copyright attaches immediately when an original, non-functional expression is placed in a fixed medium. There is no affirmative action needed on behalf of the author.

Copyright registration with the Federal Copyright Office provides additional protections. You may not be able to seek a legal remedy without registration. Registration is required in advance of most infringement lawsuits being filed. Copyright registration provides prima facie evidence of the existence of a copyright. If the copyright is registered within 3 months of publication, punitive damages and attorney fees may be awarded in an infringement suit. If the copyright is filed but not within the 3 months, only actual damages may be awarded.

Filing to register the copyright requires you to fill out the appropriate forms found at [www.copyright.gov/register](http://www.copyright.gov/register). There is a fee and you must send a copy of your work. The copyright office also processes on-line requests and there is a decreased filing fee for using that system.

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Regardless of registration, it is still a good idea for the author to mark his work as protected by copyright.

The above are all acceptable methods of marking the copyright. By marking your work as a copyrighted work, if there is an infringement, the infringer cannot claim that the infringement was innocent as a defense in litigation.

### How Long Does the Copyright Last?

As with most questions that involve an interpretation of the law, the answer is “It depends”. Copyright currently falls within three categories of dated protection. For work created after 1978, the protection is for the life of the author plus 70 years. For work created after 1978 when the work is made-for-hire, anonymous or pseudonymous works, the protection is for 95 years from publication or 120 years from creation. For works created prior to 1978, it depends on the manner in which the work was copyrighted, if the author renewed the copyright and if it is a work that falls within a law offering additional protection.

### Using Copyrighted Materials

A work being copyrighted does not mean that another individual is forbidden from ever using that material in their own work.

The most effective way to use copyrighted work is to get permission from the copyright holder. Permission can also be purchased as a “license.”

The Fair Use Doctrine is a defense to an infringement suit that allows for the use of copyrighted materials in very limited circumstances. The courts have provided that there are four factors that a judge will look at to determine if usage qualifies as “fair use.”

The first factor is the **purpose and character of the use**, including whether such use is of a commercial nature or for non-profit educational purposes. If the purpose is to reap financial benefits or other business related benefits, that weighs against a finding of fair use. The material must be related to the matter which is being taught in a non-profit educational institution.

A judge will also look at **the nature of the copyrighted work**. Use of a purely factual work is more likely to be considered fair use than the use of an authors’ create work.

The third factor is **the amount and nature of the portion used in relation to the copyright protected work as a whole**. There are no set page or word limits that define the boundaries of fair use. Courts exercise common sense judgment on a case-by-case basis, about whether what is being used is too much of, or so important to, the original overall work as to be beyond the scope of fair use.

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The final factor to be weighed is **the effect of the use on the potential market for or value of the copyright protected work**. If your work diminishes the potential market for the work it decreases the likelihood that your use will be determined “fair use.” If you are using the copyrighted work in the same manner that the copyright holder would use the work, your use is unlikely to be a “fair use.”

### The Public Domain

The Public Domain is comprised of all the works that can be freely copied. There are four main categories of works that fall into the public domain.

#### **Generic Information**

These are works that fail to meet the originality standard for copyright eligibility.

#### **Works whose copyrights have lapsed due to the passage of time or the failure of the copyright holder to renew the registration.**

This can be broken down into the following categories:

1. Works published in the United States before 1923
2. Works published between 1923 and 1963 whose copyright registrations were not renewed.
3. Works created between 1963 and 1989 that were not copyrighted.
4. Works created after 1989 that are presumed to be copyrighted and the author has taken affirmative action to put the work in the public domain.

#### **Works created before March of 1989 that failed to include a proper notice of copyright.**

Earlier copyright regulation required works to contain the copyright notification in order to qualify for protection. Works created under the current regulatory scheme do not require this notice.

#### **Works created by the United States Government**

### Infringement

Attorneys are expensive. Attorneys who are experienced in federal copyright litigation are even more expensive. In the book The Musician's Business and Legal Guide, Mark Halloran, Esq. estimated the court costs and attorney's fees for one side a copyright trial in the late 1990's to average \$150,000. Those costs have only increased since then. These costs also increase if you are found guilty of infringement and are ordered to pay the attorney's fees of the party as well as damages. Statutory damages can run the range of \$750 to \$30,000 per infringement.

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### For licenses to play music:

[www.bmi.com](http://www.bmi.com) Broadcast Music, Inc.

[www.ascap.com](http://www.ascap.com) The American Society of Composers, Authors and Publishers

### To copyright your work or watch a video/rap on using copyrighted work:

[www.copyright.gov](http://www.copyright.gov) The United States Copyright Office

### Frequently used sources for web content:

#### **www.creativecommons.org:**

A non-profit organization facilitating the sharing of information through providing a “set of copyright licenses and tools that create a balance inside the traditional “all rights reserved” setting that copyright law creates.”

### ***Stump the Chump!***

*I bought the CD, I can do what I want with it!*

Yeah, Not so much.

Music can be an excellent addition to an educational experience. But music and the performance of music can be copyrighted. If you’ve heard the music on the radio or purchased the CD, it is most likely copyrighted. You must have permission, through the form of a license, to play the music for your class. Most licenses are going to be available through performing rights licensing organizations like ASCAP and BMI. Members of the national Speakers Association get a discount on an ASCAP license fee.

*If I can play the CD at a party, why can’t I play it at a class?*

Seriously? No, Seriously?

There are certain rights that you obtain when you purchase a CD or lawfully download music, one of those is to play the performance when with your family or a social group of acquaintances. The same is true of streaming services like Pandora or Spotify. The exception in the Copyright Act is for ‘terrestrial music over speakers’ which applies to radio, not a streaming service.

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*If I'm using the music or other materials as part of a class at a non-profit educational institution, it's fair use, right?*

While the fair use doctrine does provide an infringement defense for the use of copyrighted materials by a non-profit educational institution, your proposed use probably doesn't qualify. Fair use of music in an educational setting is seen in music instruction classes. A school doesn't need a license to teach the band how to play "We Will Rock You" during band practice, but, the school will need a license for the school band to play "We Will Rock You" at halftime of the football game.

*I have had this cartoon in my powerpoint for years and nobody has ever said anything or complained.*

And the last time I got a speeding ticket, I told the officer, "But I always drive that fast, and I've never gotten stopped before."