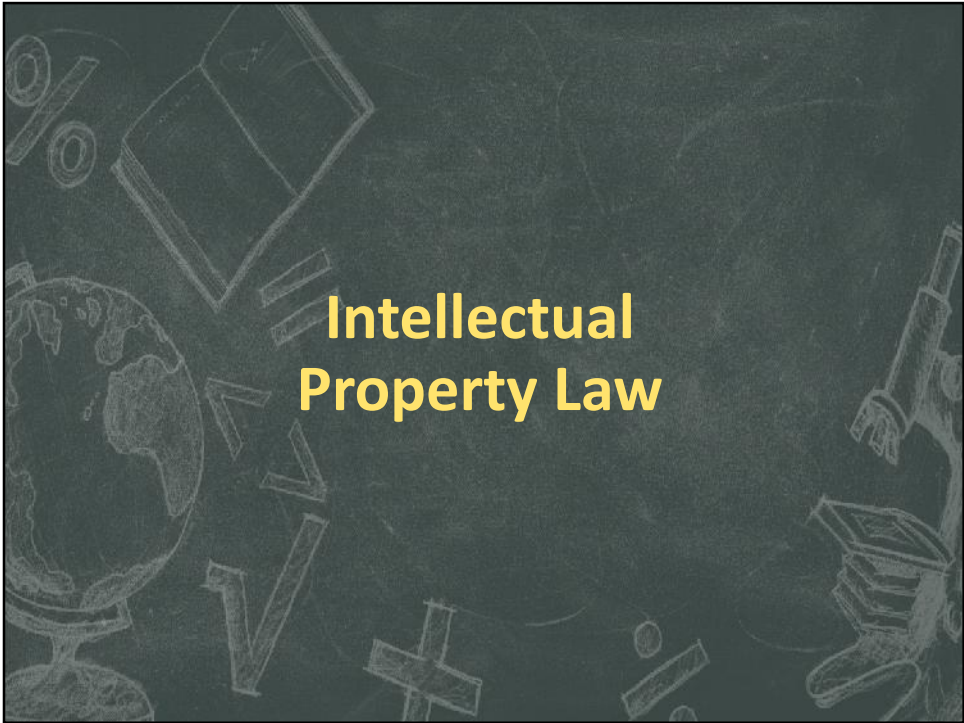


**DON'T COPY THAT!**  
AVOIDING LIABILITY FOR ONLINE AND RELATED  
ACTIVITIES

By: **Barry J. Berenberg**  
**Elena M. Gallegos**

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Albuquerque, New Mexico, 87102  
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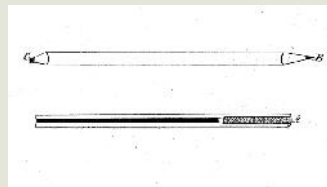
**Intellectual  
Property Law**

## WHAT IS INTELLECTUAL PROPERTY LAW?

- ❑ It protects intellectual creations.
- ❑ There are five legal categories of intellectual property, or IP:
  - Patent
  - Trademark
  - Copyright
  - Trade Secrets
  - Right of Publicity

## IT IS REALLY ABOUT TRESPASS

Real Property	Intellectual Property
Land, buildings, roads, etc.	Ideas, expressions, names, designs, etc.
Defined by physical boundaries	Defined by legal descriptions
Right to keep <b>trespassers</b> out	Right to keep <b>infringers</b> from using



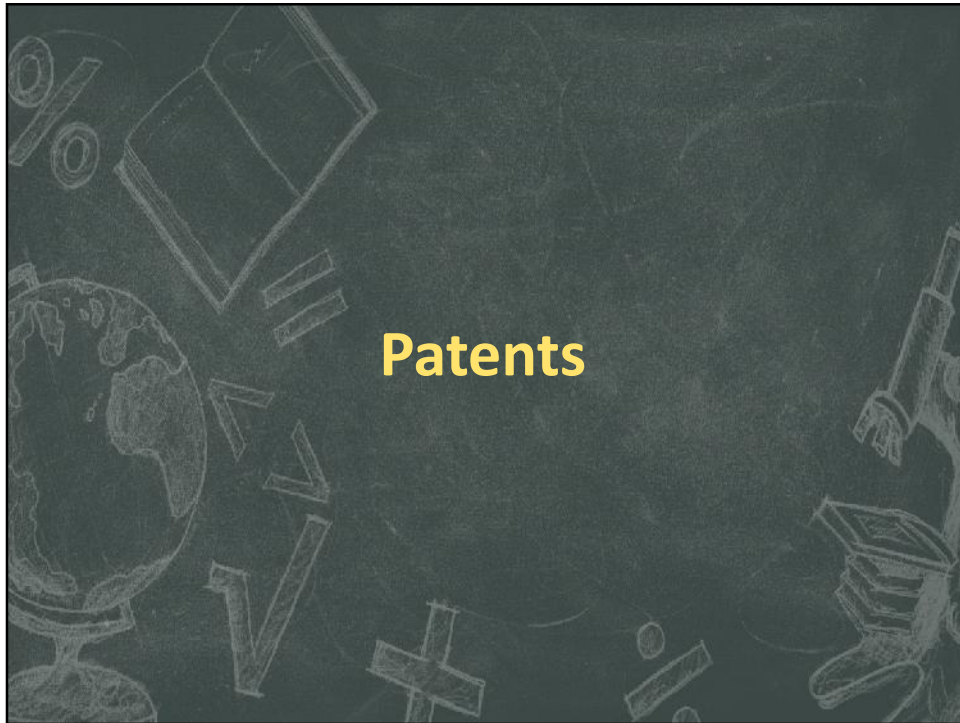
I make a lead-pencil in the usual manner, reserving about one-fourth of the length, in which I make a groove of suitable size, A, and insert in this groove a piece of prepared indiarubber . . . .

## WHY SHOULD SCHOOLS CARE?

- The internet gives schools many new and easier ways to communicate.
- It is easy to include intellectual property in those communications.
- Intellectual property owners can lose their rights if they don't protect their property.
- As a result, schools today are more vulnerable to intellectual property lawsuits.

## HOW MUCH MONEY IS AT RISK?

- Attorney fees to defend: low \$100,000s to several million
- Plaintiff's attorney fees, if it wins
- Actual damages (lost sales, lost profit, licensing fees)
- Exemplary damages (like punitive damages)
- Statutory damages – does not require proof of actual damages



## WHAT IS A PATENT?

- Protects ideas
- Gives the owner a 17-20 year monopoly to “practice” an invention
  - Make
  - Use
  - Sell
  - Offer to sell
  - Import into the United States

## BEWARE THE PATENT USE TROLLS!

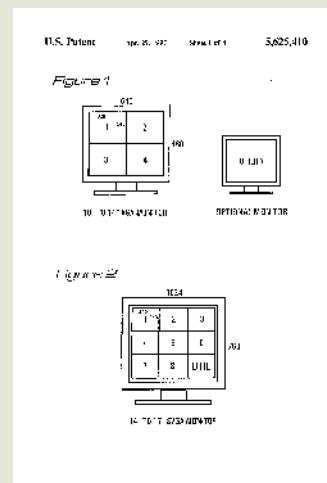
- Trolls do not “practice” their patents
  - They prefer to be called “non-practicing entities” (NPEs)
- Trolls only buy patents to get money from others who do practice the inventions
- Some trolls go after **USERS**
  - The people who buy products and use them in their businesses
  - Not the manufacturers or sellers



<http://www.seattlesrestaurants.info/photo/Seattle-WA/Bridge-Troll-Seattle-WA>

## SECURITY SYSTEM LAWSUITS

- Hawk Technology Systems, LLC owns patents for displaying video from multiple cameras – a typical security system
- It has not sued manufacturers of the security systems
- Instead, it is suing **USERS**
  - 183 lawsuits since June 2012
  - 6 against public and charter schools in 6 different states



## MAKE SURE YOUR CONTRACT PROTECTS YOU

- Warranty Clause  
Vendor guarantees that it has all intellectual property rights necessary for you to use their product
- Indemnity Clause  
Vendor agrees to pay your defense costs and damages if you are sued for intellectual property infringement
- These clauses apply to all types of intellectual property

## Trademarks

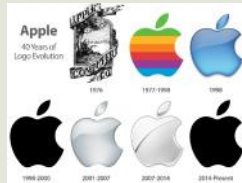


## WHAT IS A TRADEMARK?

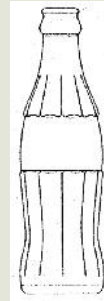
Identifies and distinguishes the source of goods or services

Can be a:

- Name
- Logo



- Color (pink insulation, green tractor)
- Scent (strawberry fuel additive, coconut in flip flop store)
- Trade dress (Coca-Cola bottle, Taco Cabana building and layout)



## TRADEMARK INFRINGEMENT

Likelihood of confusion

Would use of the name cause a consumer to be confused as to source, sponsorship, or affiliation?

Determined by 13 factors

## TRADEMARK FAIR USE

- Means your use of a mark is not deceptive
- Nominative: You can refer to another source by name
  - Coca-Cola can refer to Pepsi in a taste test
- Descriptive: You use a name to describe a similar product
  - A batter coating for fish can be called “Fish Fry” even though Zatarains has a trademark for FISH-FRI
- Parody
  - CHEWY VUITON dog toys
- Don't confuse with copyright fair use



## TRADEMARK ISSUES FOR SCHOOLS

- Creates more problems than patents
- The most common trademark issues for schools are:
  - Names used for school programs
  - Mascots

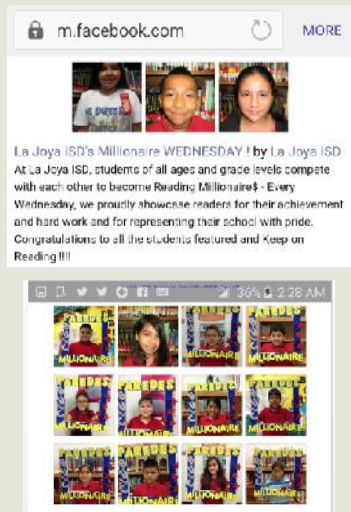
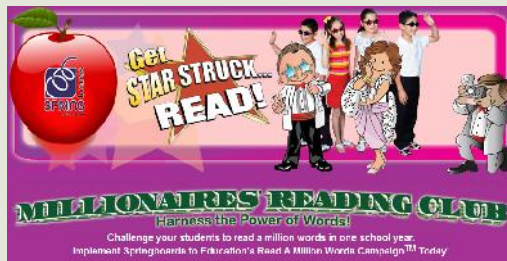


## SINGSATION LAWSUIT



Willie Wilson Productions, Inc.	Wapakoneta High School
Nationally syndicated gospel entertainment show	School show choir
Trademark registered in 1991	Started around 2002
Remedies sought in 2015 lawsuit:	
<ul style="list-style-type: none"> <li>• stop use of name</li> <li>• destroy all items with the name</li> <li>• turn over internet domain names</li> <li>• revenues from use of the name, plus exemplary damages and attorney fees</li> </ul>	

## MILLIONAIRE READER LAWSUIT



- Springboards to Education, Inc. versus 10+ Texas school districts
- Would not settle for simply halting use of the name

## WHAT SHOULD YOU DO?

- Before adopting a name
  - Search the internet and federal trademark database before adopting a name ([www.uspto.gov](http://www.uspto.gov))
  - Get legal advice if you find a similar name and still want to use it
- If you later find a similar name or get a cease and desist letter
  - Don't ignore it
  - Stop use or get legal advice
- Make sure all contracts have IP warranty and indemnity clauses

## SCHOOL MASCOTS

- Using the same mascot is okay, using the same logo is not
- The NFL doesn't care

"We support football on all levels and do not have an issue with high school and youth teams using NFL team logos."

Brian McCarthy, director of corporate communications for the NFL, November 30, 2010  
<http://www.dailyherald.com/article/20101130/news/712019831/>
- But universities do
  - Many charge licensing fees to use their logos
  - Some have taken steps to stop unauthorized use



## WHAT IS A COPYRIGHT?

- Protects creative works: the expression of ideas
- Covers
  - Literary, dramatic, musical, and artistic works
  - Movies and songs
  - Software
  - Architecture
- Does not cover
  - Facts and ideas
  - Titles, names, short phrases, and slogans
  - Systems or methods of operation
  - Works by the U.S. government

## ANECDOTAL INFRINGEMENT EXAMPLES

- Buying one software license and installing on multiple machines (settled for \$300,000 and paid \$5 million for legal copies)
- Two pages copied from professional book included in district curriculum guide (settled for \$40,000)
- Disney sues for using homemade copies of cartoon characters
- Texas district bought one copy of an assessment workbook, sent it to district copy shop, then gave a copy to every student (sued for \$7 million)
- Background music added to an educational video is not fair use

## COPYRIGHTS ARE AUTOMATIC

- Copyright protection exists from the moment of creation
- It is owned by the author, photographer, artist, etc.
- Registration is not required, except to sue
- Copyright notice is not required, but it can increase damages

## COPYRIGHTS ARE (ALMOST) FOREVER

- Copyright protection can last for over 100 years
  - Depends on when the work was created and whether the author is an individual or a corporation
  - Transfers to the author's estate at death
- After expiration, the work goes into the public domain
  - Can be freely copied
  - Cannot be taken out of the public domain
- Authors can choose to put their works into the public domain

## RULES OF THUMB

- Assume materials found on the internet or elsewhere are copyrighted
- DO NOT POST THEM ON SCHOOL OR DISTRICT WEB SITES unless
  - You get permission
  - You have a license
  - You verify they are in the public domain
- Royalty free does not mean free to copy
- Open licenses, like Creative Commons, may have restrictions
- Fair use applies to physical copies only, not internet postings

## RIGHTS PROTECTED BY COPYRIGHT

- Reproduction or copies
- Distribution of copies for sale or lease
- Derivative works (e.g. translation, movie adaptation, art print, etc.)
- Public performances
- Public displays

## Copyrights: Public Performances and Displays



## PUBLIC PERFORMANCES AND DISPLAYS

- Applies in any place
  - open to the public
  - or where a substantial number of persons outside of a normal circle of family and social acquaintances are gathered
- Includes things like
  - Showing a movie (performance)
  - Showing still images from a movie (display)
  - Performing a play or dance
  - Displaying a painting

## CAN A TEACHER SHOW A MOVIE IN CLASS?

- Yes, if it is tied to the curriculum (educational fair use)
- But not as a “reward”: that is a public performance
- Retail movies do not include a performance license  
Example from *Finding Dory*:  
[This product is authorized for private use only. . . \[A\]ny copying, exhibition, export, distribution or other use of this product or any part of it is strictly prohibited.](#)
- Residential cable and satellite plans do not include a performance license  
Example from Comcast:  
[You agree that the Service\(s\) and the XFINITY Equipment will be used only for personal, residential, non-commercial purposes, unless otherwise specifically authorized by us in writing.](#)

## MOVIE LICENSING

- Movie licenses are handled by copyright collection societies
  - Movie Licensing USA
  - Motion Picture Licensing Corporation
  - Swank Motion Pictures (school licensing for Disney movies)
- Umbrella License
  - Allows performance of all movies in the society's catalog
  - Throughout a school or district
  - Usually costs a few hundred dollars per year

## WHAT MIGHT HAPPEN?

- Copyright owners usually send out cease and desist letters before suing
  - Restaurants and bars that show television shows
  - Movie theaters that show NFL games or run unauthorized screenings or film marathons
  - Orthodontists who showed movies in their waiting rooms
- Ignoring the letter risks a lawsuit

## MUSICAL PERFORMANCE LICENSES

- Custom Arrangement License
  - Alteration: Make a marching band arrangement
  - Medley
  - Lyric Changes
- Sync License
  - Synchronize a moving image to music
  - Example: create a DVD of a marching band performance
- Master Use License
  - Use someone else's recording in a video
  - Example: cheerleading squad performs to a Top 40 song

## "GLEE" LAWSUIT

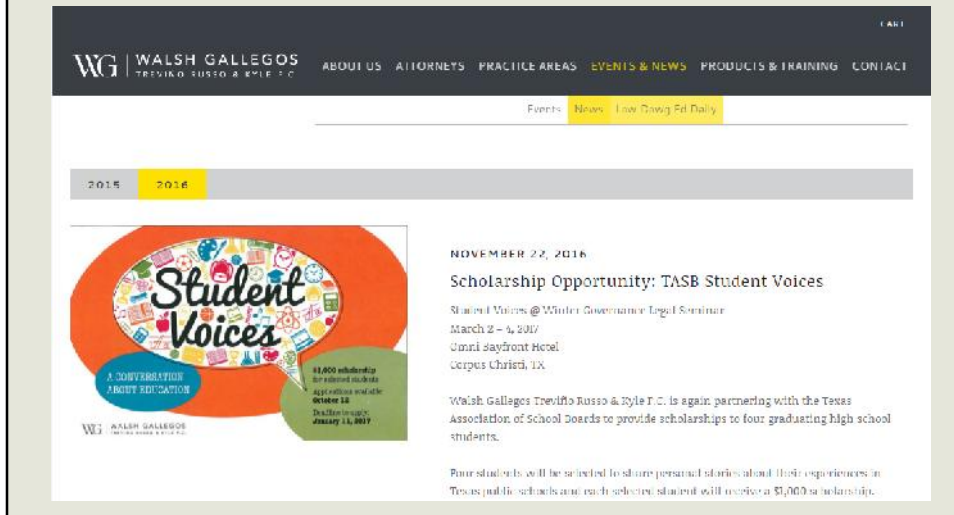
- Burbank Show Choir
  - High school choir that inspired *Glee*
  - Has revenues and expenses in the mid-six figures each year
  - Has performed at least 89 songs
- Tresóna License Exchange
  - Copyright collections society for Universal, Sony, BMG, others
  - Has not issued any licenses to Burbank Show Choir
  - School refused to purchase licenses
  - Sued the choir this year in Arizona federal court
- Other show choirs are concerned



## **WORKS MADE FOR HIRE**

- Gives ownership to someone other than the author
- Employers own the copyright to works created by employees within the scope of employment
- Anyone can own a work specially ordered or commissioned, but only if it is a:
  - Part of a larger work or compilation
  - Translation
  - Instructional text, test, or answer material for a test
  - A couple other categories
- These limits are often misunderstood, even by lawyers

# WEB SITES ARE THE CONTENT YOU SEE . . .



# . . . AND THE CODE TO DISPLAY THAT CONTENT

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NOVEMBER 22, 2016  

Scholarship Opportunity: TASB Student Voices  

        Shared Voices @ Winter Governance Legal Seminar  

        March 2 - 4, 2017  

        Omni Sayfront Hotel  

        Corpus Christi, TX



Walsh Gallegos Treviño Russo & Kyle P.C. is again partnering with the Texas Association of School Boards to provide scholarships to four graduating high school students.



Four students will be selected to share personal stories about their experiences in Texas public schools and each selected student will receive a $1,000 scholarship.


```

## WHO OWNS COPYRIGHT TO THE WEB SITE?

### Content

Written By	Work Made for Hire?	Owner
Employee	Yes	District
Contractor	Can be with written agreement	District

### Code

Written By	Work Made for Hire?	Owner
Employee	Yes	District
Contractor	No – cannot be	Contractor

## COPYRIGHT ASSIGNMENT

- Developer agrees to assign copyright to the district
- Can include various terms
  - Exclusive or non-exclusive
  - Royalty payment or royalty free
  - Perpetual or fixed time
- Assignments are not forever
  - Can be terminated after 35 years
  - That is the main disadvantage compared to a work made for hire
- Without an assignment, the developer can block the district from its web sites



## LIABILITY FOR OTHERS

- ❑ The district can be liable if teachers or students post infringing material on district web sites
  - Establish copyright policies – for example, NMSBA E-3900
  - Train teachers and students
  - Monitor postings
- ❑ The district can be liable for contract developers
  - Include warranty and indemnity clauses in contracts
  - Require developers to have licenses for all software
  - Make sure the district has the copyright or permission for all content it provides to the developer

## Copyrights: Fair Use and Lawsuit Examples

## COPYRIGHT FAIR USE

- Two types
  - Statutory
  - Educational
- Limited copying for commentary or criticism, or creating parodies, is not infringement
- No clear test, just guidelines
- Often have to compare to cases that have been decided in court

## STATUTORY FAIR USE GUIDELINES

- Purpose and character of the use
  - Amount of transformation
  - Educational or nonprofit
- Nature of the copyrighted work
  - Published or unpublished, in print or out of print, factual or creative
- Amount and substantiality of the portion copied
  - Percentage of work used
  - How important is copied portion to entire work
- Effect on the potential market
  - Lost sales

## EDUCATIONAL FAIR USE

- Voluntary guidelines, meaning authors do not have to allow them
- See <http://www.copyright.gov/circs/circ21.pdf> or NMSBA E-3900
- Single copy for teacher
  - For research, teaching, or preparation for teaching
  - Single chapter, article, short story, chart, picture, etc.
- Multiple copies for classroom
  - Brevity (short piece like above)
  - Spontaneity (decision by the teacher without time to get permission)
  - Cumulative effect (one course, one item per author, nine items per course)
- Certain prohibitions apply even under the above circumstances

## GRAY V. CLARK COUNTY SCHOOL DISTRICT

- Clark County School District (CCSD) in Nevada bought several copies of a behavioral training book
- Someone posted the entire book on a third party web site
  - The posting included the attribution “Learn more at <http://interact.ccsd.net>”
  - That was changed to “Anonymous” after the lawsuit was filed
  - Only one page was missing: the copyright page
- The author sued in Kentucky, where he lived
- This is not the only lawsuit against schools by the author

## ALIGN, ASSESS, ACHIEVE V. TOLEDO PUBLIC SCHOOLS

- District licensed books and materials for teacher training in Common Core Standards
- Agreement said district could only use the works to prepare pacing guides for teachers
- District had teachers transcribe the works in their entirety, then posted copies on its intranet for all teachers
- District settled by purchasing \$38,400 in materials, paid \$11,200 for consulting services, and \$10,000 for attorney fees (\$59,600 total)

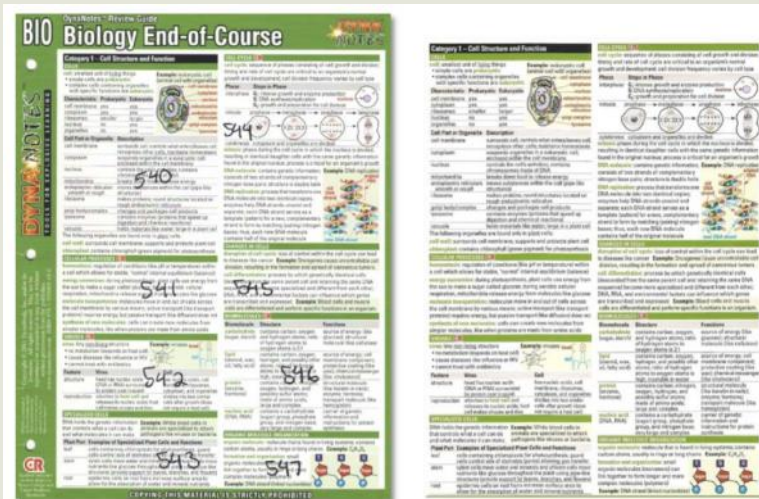
## DOES V. IPARADIGM

- Schools submit student papers to iParadigm's TurnItIn, a plagiarism-checking service
- Papers are stored in the database and compared to other papers for evidence of copying
- Students lost because:
  1. They clicked on an agreement allowing iParadigm to use their papers
  2. It was fair use
- Lesson: Require students to sign or click on an agreement if you use a plagiarism checking service

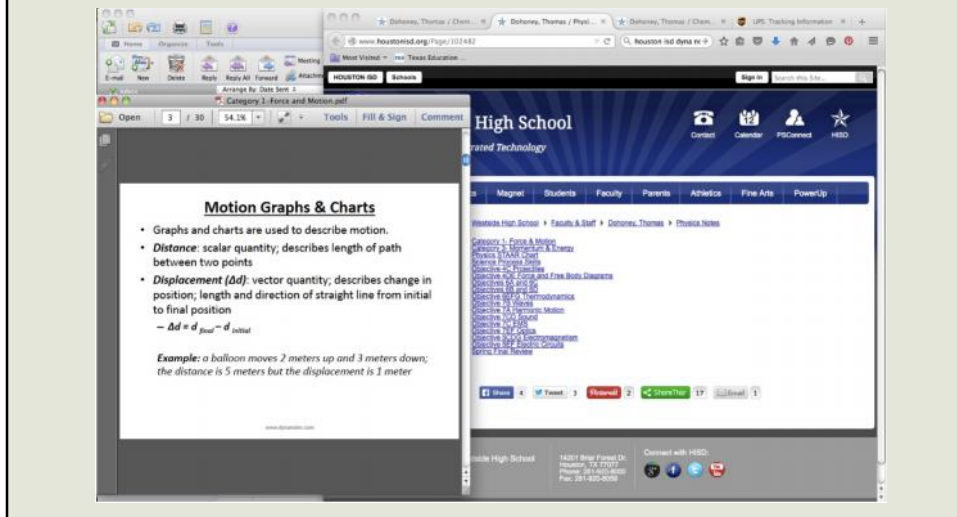
# DYNASTUDY V. VARIOUS TEXAS DISTRICTS

- ❑ DynaStudy publishes one-page study guides on various subjects
- ❑ Some teachers posted copies online
- ❑ Some teachers created outlines from the guides and posted them online
- ❑ DynaStudy sued for both copyright and trademark infringement

# ORIGINAL AND COPIED STUDY GUIDES



## OUTLINE ALLEGEDLY BASED ON GUIDE



## MOBILE ACTIVE DEFENSE (M.A.D.) v. LOS ANGELES UNIFIED SCHOOL DISTRICT (LAUSD)

- LAUSD gave iPads to all of its students
- Students hacked the iPads, so LAUSD needed a security system
- Signed evaluation agreement to test M.A.D.'s software
- M.A.D. alleges LAUSD let a competitor copy the software code
- Sued for copyright infringement, trade secret violations, and other claims
- Lawsuit is ongoing



## GREAT MINDS V. FEDEX

- Great Minds created Eureka Math, a complete K-12 math curriculum aligned with Common Core
- Available free for non-commercial use under a Creative Commons license
- Some school districts took the materials to FedEx Office for printing
- Great Minds sued FedEx, claiming the printing was a commercial use because they profited from it
- Creative Commons has asked to file a brief supporting FedEx

## STATUTORY DAMAGES FOR COPYRIGHT INFRINGEMENT

- \$750 to \$30,000 per work
- If the infringement was willful, then up to \$150,000 per work

## WHERE TO LEARN MORE

- ❑ Library of Congress Online Module:  
<http://www.loc.gov/teachers/professionaldevelopment/selfdirected/copyright.html>
- ❑ U.S. Copyright Office: <http://www.copyright.gov>
- ❑ Duke University Online Course:  
<https://www.coursera.org/learn/copyright-for-education>
- ❑ Stanford Copyright & Fair Use: <http://fairuse.stanford.edu>
- ❑ Baruch College Interactive Guide:  
<http://www.baruch.cuny.edu/tutorials/copyright/>

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