Protecting a school’s intellectual property is likely not a primary focus for educators. As intellectual property owners, however, schools need a basic understanding of the various types of intellectual property, how each is created and protected, and how to exploit their rights and address common intellectual property problems. Also, as users of intellectual property, schools must understand appropriate guidelines for use of one’s own intellectual property and that as others.

Recent instances in the news related to intellectual property and schools include:

- A decision that an unauthorized, ad-supported website focused on the Ohio State University Buckeyes football program likely infringed OSU’s trademarks;
- Intellectual property policies that were recently implemented in various Pennsylvania districts relating to ownership of intellectual property created by employees (to address, among other issues, websites such as TeachersPayTeachers), and
- The decision that use of plagiarism-detection software constitutes fair use of the students’ copyrights in the works screened by the software.

This article is not intended to discuss specific guidelines, regulations, or laws applicable to schools, such as the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, the Technology, Education and Copyright Harmonization Act of 2001 (the “TEACH Act”), application of the Digital Millennium Copyright Act to peer-to-peer file sharing of copyrighted works, nor the application of specific contracts (such as labor contracts with teachers unions) to intellectual property. Instead, its goal is to explain how general intellectual property law is applied in the educational context focusing on the school as an intellectual property owner.

**Intellectual Property Basics**

In the United States and in a vast number of other countries in the world, intellectual property laws protect four fundamental categories of human creativity:

- **Trademark** laws protect words and phrases that are used to distinguish products and services.
- **Copyright** laws protect written expression.
- **Trade secret** laws protect confidential information that affords a competitive advantage.
- **Patent** laws protect ideas and inventions.

In addition to the intellectual property rights to works that humans create, **rights of publicity** are the rights of an individual to control the commercial exploitation of his or her likeness, name, and image.

We address each of these rights separately, first providing a quick-reference chart for each type that sets out specific parameters of the right, then discussing specific issues that often arise in the educational context.
### Trademarks

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<tr>
<td>A <strong>trademark</strong> is a symbol of goodwill between a product and the owner of the product or brand under which it is sold (KODAK® film). A <strong>service mark</strong> is a symbol of goodwill between a service and the provider of that service or brand under which it is sold (AT&amp;T® long distance services). (The term “trademark” often is used to refer both to product marks and service marks.) Marks can include words, phrases, symbols, sounds, and colors.</td>
<td>A school name is a trademark in that the name is connected to the educational services the school provides. Trade dress, such as school colors, school logos, and sports team and school mascot names and likenesses also are types of trademarks.</td>
<td>In the United States, <strong>trademark rights are created not by registration but by use</strong> of the mark in commerce in connection with the goods and services sold, although registration provides additional protection and rights for a mark and possibly greater chance of, and remedies in, enforcement of rights against third parties. Registration also can expand the geographic scope of rights.</td>
<td>Trademark rights give their owner exclusive rights to use the mark for a particular product or service so that the public will not be confused as to the source of a product or service.</td>
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**Trademarks**

Like other trademark owners, schools have the right to control the way in which their marks are used and need to exercise that control in order to maintain rights. Thus, schools have the right to prevent others (including, in some cases, fans) from using their marks (and domain names affiliated with the marks) without a license or other permission if that use is likely to create confusion. Often, issues arise as to how to balance the right of legitimate other users (such as fans or news organizations) to refer to and discuss a school (this right is called “nominative fair use”) with that school’s right to control its marks and the public’s right not to be confused.

Ohio State University was recently successful in shutting down an alleged fan’s ad-supported website because the way in which OSU’s marks were used on the site (used with content related to OSU and its football program and links to OSU’s website) gave the impression that the site was affiliated with OSU.

Maintaining control of one’s brand simplifies and strengthens the ability of a school to enforce its rights. Schools should register their marks when possible (federally and/or on a statewide basis). Schools also should use consistent branding and ensure that other authorized users (such as licensees) do the same, which can be accomplished by having a written brand style guide.

Schools also should enforce their trademark rights under available protection procedures, such as eBay’s VERO program and recording of registered marks with U.S. Customs in order to prevent the importation of counterfeit products. As a related procedure, one can minimize the ability of unauthorized users to set up infringing websites by registering multiple domain name variants and related social media user names.
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<td>The author of a work owns the copyright unless and until the author assigns rights in writing.</td>
<td>All written original works are copyrights. Important copyrights to schools are the content of school websites, school guidelines and manuals, and instructional materials created by the school.</td>
<td>Copyright rights exist upon “fixation” not registration; however, registration is beneficial because it provides greater protection and deterrent factors through the statutory damages and attorneys’ fees.</td>
<td>Copyrights protect works of authorship--text, photographs, audio, video, graphics, computer programming in source code and object code form--from, among other things, unauthorized copying, distribution, and publication. Copyright affords no protection for ideas, concepts or inventions; it protects only the expression of the ideas, concepts and inventions.</td>
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<td>The duration of copyright protection for new works authored by a school is the shorter of 95 years from first publication or 120 years from creation. The duration of protection for older works varies.</td>
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**Copyrights**

Schools create significant copyrightable works, including instructional and curriculum materials, guidelines and manuals, and school websites. The primary issue for schools in this area is ensuring that the school has sufficient rights in materials created on its behalf.

The employer is considered the author of copyrightable works its employees create but only if creation was within the scope of the employee’s job responsibilities. School instructors typically are considered employees with respect to educational materials they create for use in instruction; intellectual property they create in connection with research and publishing might not be considered within the scope of their employment.

Contractors and other non-employees (such as students and board members) are authors and owners of works they create unless a written agreement says otherwise. Even if the parties have used a written agreement carefully identifying a contractor’s work as work-made-for-hire, any resulting copyrights will still be owned by the contractor unless the work falls within one of the nine relatively narrow statutory categories. Thus, all such agreements also should include a catch-all assignment provision assigning all rights to the school, or providing the school with a license to use the materials.

Schools should register all significant copyrights (anything that it does not wish those outside the school to copy or distribute), which can be done quickly and cost-effectively using the Copyright Office’s online eCO system. All original materials should be used with a copyright notice, whether or not the work is registered:

© [year of publication]. [Name of copyright owner].

**Fair use** is a defense to copyright infringement that allows some use of another’s works without permission. The test weighs four factors including the reason for and manner of the use, the type and portion of the work copied, and the impact, if any, on the value of the work copied. School employees in a position to use works of others (including students) need to understand the limits of fair use and when they may need further permission or a license. See Copyright in the Classroom on the NAIS website for more information.
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<td>A trade secret is any information that gives an entity a competitive advantage, that is unknown to others, and for which the entity has taken reasonable steps to keep secret.</td>
<td>Although schools often have confidential information (including student information) that gives the school a competitive advantage, this can qualify as a trade secret. This could include an innovative process or procedure (that is not patented), whether it relates to the classroom or administrative functions of a school.</td>
<td>A trade secret is created by developing proprietary information; no registration is necessary. The trade secret is lost if the information becomes known by others.</td>
<td>Trade secret owners have the right to prevent others from misappropriating the trade secret, meaning learning the information, by improper means, and making use of it. Trade secret protection does not prohibit the independent development of a similar or the same trade secret by another.</td>
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**Trade Secrets**

All schools have confidential and proprietary information, although not all such information might rise to the level of trade secrets (certain student and employee information, for instance, is confidential, but does not necessarily give the school a competitive advantage and is thus not a trade secret). Schools should maintain strict controls over confidential information (and likely are under regulatory guidelines with respect to maintaining the confidentiality and privacy of certain information, such as student records).

The following steps allow for the protection of confidential information:

- **Identify** what information the entity possesses that qualifies as a trade secret, possibly with different tiers depending on the type, function, and importance of the information.
- **Determine** what steps should be taken to protect each type.
- **Use nondisclosure agreements** that require the recipient of information to keep that information secret. Everyone to whom confidential information is disclosed—employees, independent contractors, prospective investors and others—should (a) acknowledge that the information they will receive is confidential and (b) promise not to disclose the information or to use the information for any purpose other than the purpose(s) for which it was disclosed.
- **Use confidentiality notices** and legends such as a “CONFIDENTIAL INFORMATION” stamp.
- Implement firewall protection for the school’s computer system, and controlled access to a school’s confidential files.

Train employees to follow the implemented confidential information protection policies.
Patents protect novel, useful, and non-obvious designs, processes, procedures or business methods. Patent application process makes invention public once patent is issued or published.

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<td>Patents</td>
<td>Except for universities with technology transfer arrangements with professors (subject to the school’s patent policies), schools rarely own patents. Novel and non-obvious methods of providing educational services, such as through innovative online learning processes, can be, and have been, patented.</td>
<td>By issuance of a patent by the U.S. Patent Office (or equivalent foreign jurisdiction). To obtain a patent, you must submit a patent application no later than one year after you have publicly used, described, or commercialized your invention. The patent process can take three years or more and may cost from $8,000 to $20,000 or more. That investment of time, effort, and resources secures what is perhaps the strongest type of intellectual property protection available.</td>
<td>Grants a 20-year monopoly to prevent others from making, using, or selling an invention in the U.S. Having a patent on an invention does not necessarily mean you can make, use, or sell your invention, only that you may prevent others from doing so – your invention may rely on another’s patent and require a license.</td>
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Patents

Outside of the university and innovative online learning setting, most schools do not hold patents, nor are they open to much risk of being found to have infringed patents of others.

Schools use products, systems, and methods that are protected by patents, however, and might become involved in patent litigation if products they buy or license (such as software) are alleged to be infringing, which by extension would mean that the schools’ use of the product is an infringement. Schools have been implicated in patent suits involving artificial turf for sports fields, technology for a school-wide notification and response system, and software for automated duplication of compact discs.

It is, thus, important to verify that purchase and license agreements contain indemnification provisions whereby the product provider agrees to be responsible for any such claims or suits. If a school changes the use of a product and it is only the change that creates the infringement, however, the indemnification provisions might not apply.

Schools also should be aware that, absent a written agreement to the contrary, schools do not own patentable inventions created by employees, although they might have a limited use license called a “shop right”.

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<td>Rights of publicity are the rights an individual has to control over the commercial exploitation of his or her likeness, name, and image.</td>
<td>Schools use rights of publicity whenever photographs of personnel or students are used, such as in school catalogs, in advertising campaigns, or on a school website.</td>
<td>For the most part, rights of publicity are inherent, although because these rights are created and governed by state law, the rights vary.</td>
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Rights of Publicity

Others obtain rights to use an individual’s likeness, name, and image through written releases. Limited licenses can be implied if the scope of the use is understood by the individual, such as teachers sitting for photographs knowing that such photographs will be placed on the school website.

With respect to employees, anytime a use of an employee’s name or photograph is to be made outside of a clear implied license, the use should be covered by a written release. A release is not an assignment of rights, but is instead an acknowledgement that the particular use is authorized. There is a fair amount of flexibility in the manner in which the authorization can be obtained with the overall goal being that both the school and the individual understand what use will be made, with the school having the ability to prove the authorization, if necessary.

Any changes (from the individual’s clear authorization or understanding) in the way in which the name or image are to be used requires a further release. For instance, absent a written release to the contrary, photographs of former employees should not be used in recruitment materials (because the implied scope of use is only while employed) and no photographs of individuals should be used prominently (such as on a cover of such materials or on a school website).

Rights of publicity also apply in the facility-naming context, where a naming agreement typically outlines the obligations of the parties and scope of authorization with respect to the name. In this area (as in the area of school names that reflect a living individual), rights of publicity overlap with trademarks.
Common IP Scenarios Schools Face

Issue: Non-licensed companies are selling sweatshirts with our school name, in our school colors.

Response: Unauthorized use of the school name on products constitutes trademark infringement if those to whom the products are offered will think the sweatshirts are licensed by the school. Use of the school colors increases the likelihood that purchasers will be confused into believing there is a connection or affiliation.

Action: Develop strong trademark rights by using consistent branding and trade dress. Register trademarks where possible. Establish a licensing program to increase ease of product licensing. Take appropriate action against all visible infringers, such as by sending cease and desist letters and seeking injunctions where warranted.

* * *

Issue: Our instructors want to create their own instructional materials by posting articles and chapter-length book excerpts from various sources on the student portal. Fair use?

Response: The non-exclusive factors to a fair use analysis include: the reason for and manner of the use, the type and portion of the work copied, and the impact, if any, on the value of the work copied. Copying and publishing copyrighted material of others can be fair use, particularly in the educational context where no fee is charged for the materials. If too much of one work is used, however, or the use of the work in this way means that an author or publisher will not be compensated for his or her work, the activity can constitute copyright infringement. Also consider the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions, although the agreement is not legally binding and some consider its requirements to be more restrictive than allowed under a straightforward application of the fair use doctrine.

Action: Obtain written consent before publishing or disseminating copyrighted material of others.

Note: Certain exemptions to copyright apply in the educational context, including the face-to-face teaching exemption and those further exemptions in the TEACH Act.

* * *

Issue: We would like to publish certain student works.

Response: Students are not employees of a school; thus, a school may only use student works (in which the student would own the copyright) with the express permission of the student and, if necessary, the student’s parents. Use of a student name invokes rights of publicity (as well as possible privacy concerns), so any authorization should address that issue also. Depending on the desired use, however, the school might not need an assignment of rights; a license might suffice.
While assignments must be in writing, licenses may be implied, although a written license aids the clarity of the scope of a licensed use.

**Action:** Obtain a written release or license for the specific use of the student material and identifying information desired, with involvement of parents as necessitated by the student’s age and other factors.

* * *

**Issue:** We hired an outside consultant to develop a new curriculum. What intellectual property issues should our agreement cover?

**Response:** Although some educational works created by consultants or independent contractors qualify as “works made for hire” (including instructional texts, tests, and answer materials for tests), most, including curriculum development, do not.

**Action:** Enter into a written agreement to address ownership of intellectual property (with such rights assigned to the school). Also require that the consultant represent that the contributions are new and original (or, if not, appropriately attributed). If any aspects of the consultant work or the information or documents provided to the consultant so as to enable the work are confidential, impose non-disclosure and non-use obligations on the consultant.

* * *

**Issue:** How should we address plagiarism by our students and staff?

**Response:** Plagiarism is primarily an ethical issue rather than a legal one. Incorporation of phrases or short excerpts of works of others should always be attributed, but typically constitutes fair use and, thus, regardless of whether proper attribution is given, is not copyright infringement. Plagiarism, however, typically violates school conduct and ethical codes and constitutes misrepresentation of the authorship of one’s work.

**Action:** Provide clear guidelines to students (and instructors) that outline how the school defines plagiarism (as well as other collaboration issues), what the expectations are with respect to attribution and obtaining permissions for the inclusion of works of others, and what action schools take with respect to violation of those guidelines. These guidelines can be enforceable if, for instance, their acknowledgement is necessary in order to submit student work electronically. Use of electronic plagiarism detection software, which runs the work through a database often necessitating making a copy of the work, has been deemed fair use of copyrighted works but best practice is to inform students that their work will be evaluated using such software.

* * *
Intellectual property rights are complex, overlapping, and varied. In the educational context, the issues are further complicated by the addition of specific laws and regulations that focus on or change the application of intellectual property rights and those that, while not relating specifically to intellectual property, are sufficiently close to impact the handling of intellectual property matters (such as privacy constraints). Public policy also might impact decisions about whether to claim intellectual property rights, such as deciding whether to protect or share developed curricula.

This article is for informational purposes only and is not intended as the basis for decisions in specific situations. This information is not intended to create a lawyer-client relationship.

1 Valerie Brennan's practice includes strategic counseling related to intellectual property (IP) protection; counseling clients on brand strategy, trademark, copyright, and right of publicity matters; obtaining trademark and copyright protection for clients; advising clients regarding trade secret protection; drafting and implementing employee proprietary information and inventions agreements; advising companies regarding fair use of copyrights and trademarks, social media issues, and intellectual property collateralization; supervising IP due diligence reviews in connection with internal audits and corporate transactions; advising clients on domain name-related matters; and drafting, negotiating, and reviewing trademark, copyright, franchise, and technology license and assignment agreements. She may be reached at 703 610 6100 or valerie.brennan@hoganlovells.com.