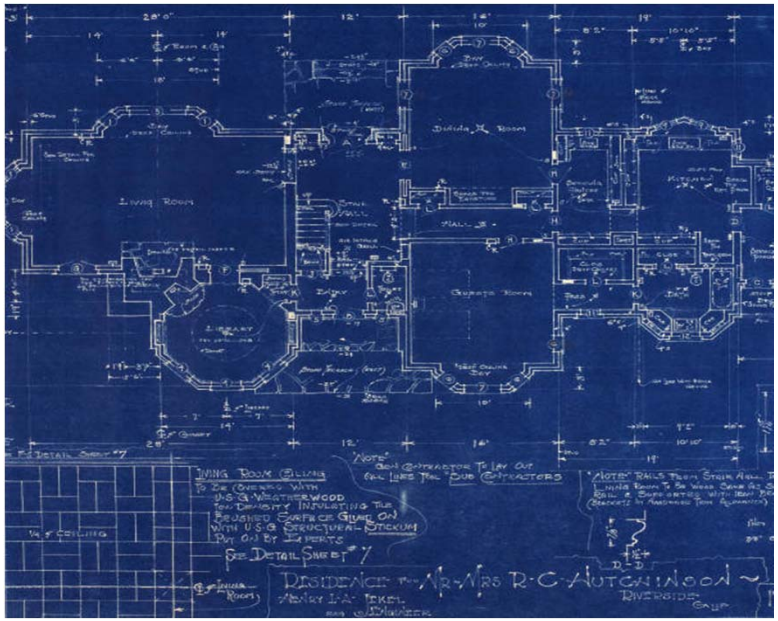
NEUSTEL LAW OFFICES LTD



U.S. Copyright Law

Presented by

Michael S. Neustel

U.S. Patent Attorney

www.neustel.com

Types of Intellectual Property

1. **Patents**
   - Utility Patents (protect *functionality* of invention)
   - Design Patents (protect *appearance* of invention)
2. **Trade Secrets**
3. **Trademarks**
   - Trademarks (identify source of *goods*)
   - Service Marks (identify source of *services*)
4. **Copyrights**

Copyrights

"Congress shall have power . . . to promote the useful arts . . . by securing for limited times to the authors . . . the exclusive right to their respective writings . . ."

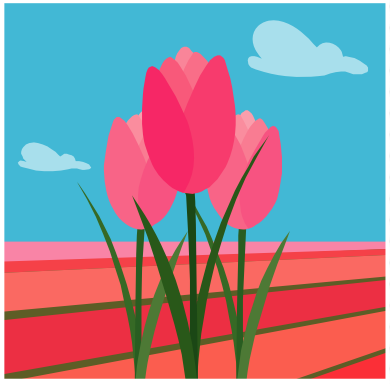
– United States Constitution Article I, §8

Original Expression of an *Idea*

A copyright centers fundamentally upon the ***original expression*** of an *idea* as recorded upon a *tangible medium*. "Ideas" are not protectable under U.S. Copyright Law (see patents or trade secrets).

Idea v. Expression

- Red barn with 2 silos behind it.
- Pink flowers with a field and sky in background.
- Purple witch on a broomstick flying.
- Knight on a horse.



Ideas

Expressions

Subject Matter for Copyrights

1. Literary Works
2. Musical Works
3. Dramatic Works
4. Choreographic Works
5. Graphic & Sculpture Works
6. Audiovisual Works
7. Sound Recordings
8. Architectural Works

Employed Author

The *author* is presumed to be the owner of the copyright immediately upon fixation in a tangible form unless created within the "scope of employment":

1. **Kind of work employed to perform**;
2. **Work occurred *substantially* within time and space limits authorized by employer**; and
3. **Purpose to serve employer.**

Acquiring Copyright Protection

1. **Originality of Work**; and
   - Did not *copy* the work
2. **Fixation in Tangible Form**
   - Paper, record, tape, compact disc, etc.

Exclusive Rights of Copyright Owner

1. Reproduce
2. Prepare Derivative Works
3. Distribute
4. Perform Publicly
5. Display

Length of Copyright Protection

Life of the author plus 70 years *unless* the copyright is *work made for hire*, then the *shorter* of:

(A) 95 years from date of *publication*; or

(B) 120 years from date of *creation*.

Copyright Notice

1. “COPYRIGHT”, “COPR.” or “©”;
2. Year of 1st Publication; and
3. Owner’s Name.

Copyright 2012 Today’s Technology, Inc.

Registration – Published Work

1. Application Form

2. Copy of Copyrightable Material

3. Filing Fee

- See http://www.loc.gov/copyright/ for forms.

Benefits of Copyright Registration

1. **Prerequisite to Suing**
2. **Statutory Damages & Attorneys Fees** (if filed within 3 months of first publication)
3. **Proof of Validity**
4. **U.S. Customs Service**
5. **Preserve Information**

Copyright Infringement

1. **Ownership**; and
2. **Unauthorized *Copying***
   - Infringer had access to the work; and
   - the two works are *substantially* similar.

Copyright Infringement Remedies

1. Injunction
2. Destruction Order
3. Actual Damages
4. Infringer's Profits
5. Statutory Damages
6. Attorney's Fees

Copyright Infringement?

Barn with 2 doors and Silo

Barn with 2 doors and Silo

Copyright Infringement?

617 13 1/2 Ave E

617 13 1/2 Ave E
Sold
$127,995
More Detail

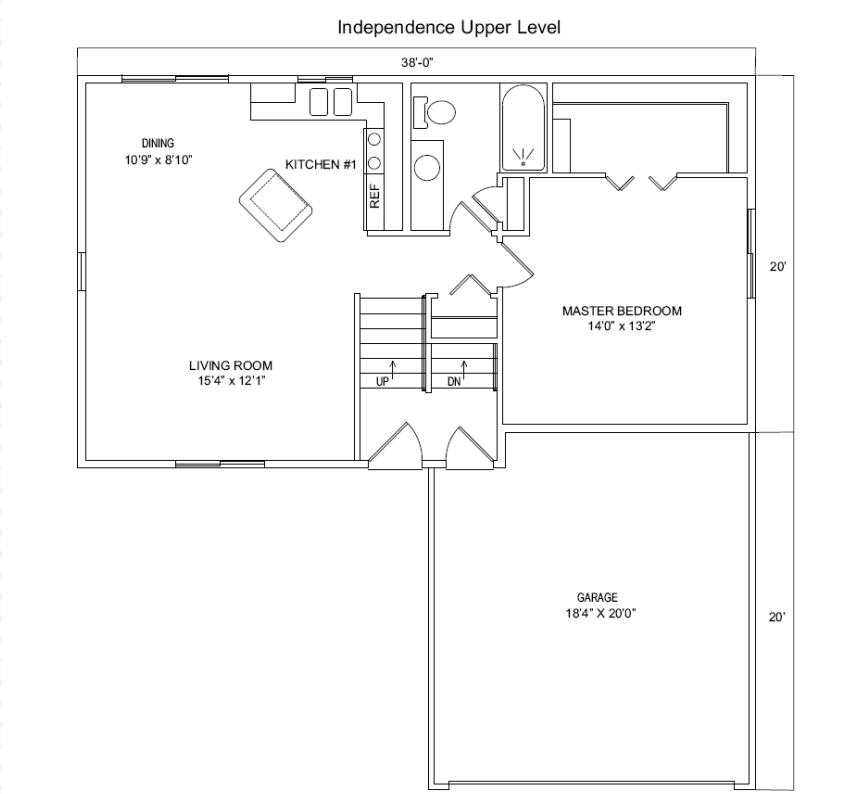
Twin Home #1

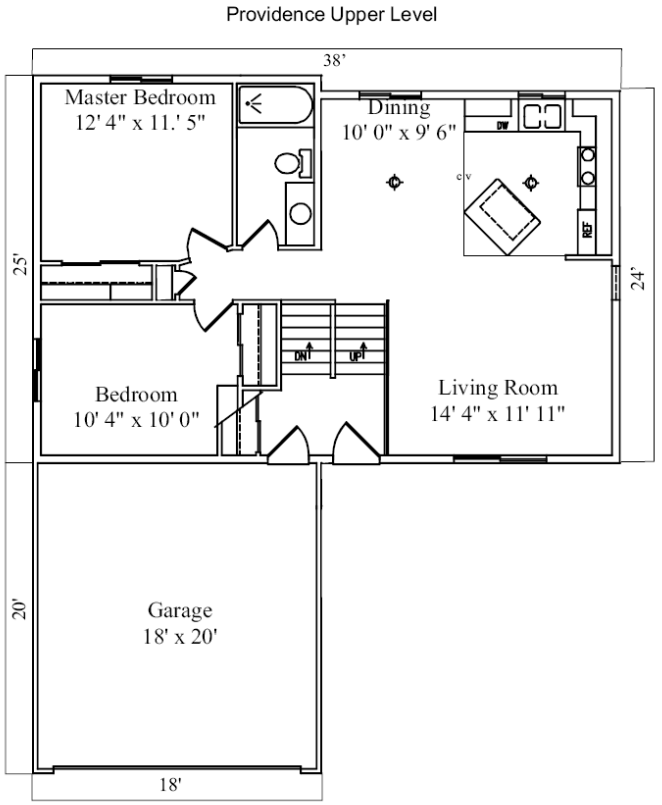
606 14th Ave E

606 14th Ave E West Fargo, ND
Sold
$124,995
More Detail

Twin Home #2

Copyright Infringement?





Twin Home #1

Twin Home #2

Defenses to Copyright Infringement

1. Fair Use (Affirmative Defense)
2. Innocent Infringement
3. Abandonment
4. Laches
5. Statute of Limitations (3 years)
6. Uncopyrightable Material
7. Merger Doctrine

"Fair Use" – 17 U.S.C §107

17 USC §107 Limitations on Exclusive Rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, the **fair use of a copyrighted work**, including such use by reproduction in copies or phonorecords or by any other means specified by that section, **for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright**. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) **the purpose and character of the use**, including whether such use is of a *commercial nature* or is for *nonprofit educational 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; and

(4) **the effect of the use** upon the ***potential market*** for or ***value*** of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair Use: Purpose and Character

- Transformative (good) vs. Derivative (bad)
- Commercial purpose not always bad (e.g. parody)
- Example: Photographer appropriated Barbie dolls for photography project “Food Chain Barbie”.
  - RULING: Court ruled it was a *parody* of Barbie and the values she represents).

Fair Use: Nature of Copied Work

- Facts and ideas are not copyrightable.
- Fictional works given increased protection over factual works.
- Public interest in having free access to work.

Fair Use: Amount & Substantiality

- Quantity or percentage of original work copied.
- The less used in relation to whole, the more likely fair use.
- Important portion vs. unimportant portion copied.
- Use only what is required.

Fair Use: Effect Upon Work's Value

- Effect on owner's ability to exploit the original work.
- Harm to owner's market.
- Harm to the potential market.
- Parodies and negative reviews do not harm the market.
- **Most important factor!**

Examples of Fair Use (Part 1 of 2)

- **Reviews.** Quotation of excerpts in a review or criticism for purposes of illustration or comment.
- **Scholarly Work.** Quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations.
- **Parody.** Use in a parody of some of the content of the work parodied.
- **News Report.** Summary of an address or article, with brief quotations, in a news report.

Examples of Fair Use (Part 2 of 2)

- **Replacement.** Reproduction by a library of a portion of a work to replace part of a damaged copy.
- **School Lesson.** Reproduction by a teacher or student of a small part of a work to illustrate a lesson.
- **Legislative.** Reproduction of a work in legislative or judicial proceedings or reports.
- **Incidental Reproduction.** Incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.

Fair Use: Summary

- Fair use vs. infringement is case specific.
- No specific number of words may be taken safely.
- Acknowledging source not enough.
- Noncommercial use is not always fair use.
- Commercial use can be fair use (tougher).
- You can still get sued despite believing work is fair use.
- Get permission from the copyright holder if possible.
- Avoid use if impossible to get permission.
- Seek the legal advice of an intellectual property attorney.

Innocent Infringement Defense

To be an "innocent infringer," he must have copied the work:

1. believing in *good faith* his conduct would not be an *infringement*; and

2. *omission* of a copyright notice.

Internet Copyright Issues

- "Windowing" of other web sites
- Copying of textual material
- Copying of graphics
- Copying of music and sounds

NEUSTEL LAW OFFICES LTD

Presenter Information

Michael S. Neustel

U.S. Patent Attorney
2534 South University Drive, Suite 4
Fargo, North Dakota 58103
Telephone: (701) 281-8822

Web Site: www.neustel.com