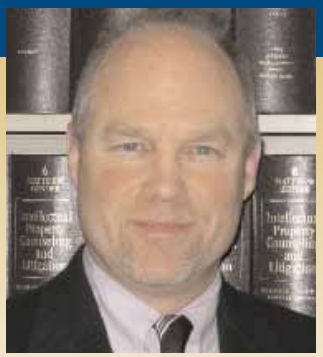

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You May Own a Copyright and Not Know It!

Copyrights are rampant in the world of orthopaedics and are, most of the time, ignored or forgotten. Copyrights can be quite valuable intellectual property to both an individual and a company and, if used strategically, can provide an immensely competitive edge. Works that are protectable under copyrights in the orthopaedic marketplace include marketing and sales collateral (e.g., ads, brochures, surgical techniques), engineering drawings (e.g., implant designs, blueprints and CAD drawings), manufacturing processes (e.g., machine tool code) and packaging designs.

To Register or Not to Register

Copyright protection comes into existence the moment that the work is created in a fixed form (e.g., on paper, electronically, etc.). The copyright in the work immediately becomes the property of the author who created it, unless other circumstances arise. No publication, registration or any other action is required. Prior to 1976, the law did require that the work be published with a copyright notice and registered in the Copyright Office. Now, the decision on whether to register your copyright is totally voluntary; however, many benefits accompany registration with the U.S. Copyright Office. The purpose of registration is to make a public record of the basic facts of your copyright.

Registering your copyright has a variety of benefits.

- It establishes a public record of your copyright claim.
- It is a prerequisite for bringing an infringement lawsuit against anyone.
- If registration occurs before or within five years of publication, a legal presumption is made that you own the copyright and that the copyright is valid
- If registration occurs within three months of publication or prior to an infringement of the work, you may recover statutory damages and attorney's fees.
- It allows you to record the registration with the U.S. Customs Services to protect against the importation of infringing copies of your copyright.

To register a work, three elements must be provided to the Copyright Office, which is located at the Library of Congress. They are a properly completed application, a non-refundable fee and a non-returnable deposit of the work being registered. The effective date of a registration is the date when the Copyright Office receives all of these elements in acceptable form.

The Copyright Office is trying to incentivize people to use the electronic application process for registering works. The advantages are a lower filing fee of $35 per work, faster processing time, an earlier effective date of registration, online status tracking, secure payment and the ability to upload the

deposit; however, only literary works, sound recordings and performing arts can be filed electronically. Non-electronic filed applications can still be used to register a copyright. The current filing fee is $50, and great care must be used to properly complete the online form and not alter it in any manner after you have printed it for mailing, or else risk an additional $65 charge for doing so.

The deposit differs for the particular type of work being registered. If your work was published after January 1, 1978, two complete copies of the best edition must be submitted. Special deposit requirements exist for motion pictures, works published only on a phonorecord and computer programs. One should always check the Copyright Office's website or call the Office directly to ensure that you are providing the correct number and form of deposits for your copyright.

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Copyright Notice Requirements

After January 1, 1978, the law changed to make the use of copyright notices optional on copies of work published on or after March 1, 1989. Although the notice is no longer legally required, it is still a best practice to use it with any of your creative works. This informs the public that the work is protected by copyright, identifies the owner and shows the year that the work was first published. Further, if the work is infringed upon and the notice appears on the published copy or copies of the work to which the defendant in the lawsuit had access, a court will then give no weight to the defendant's claim of innocent infringement.

Use of the copyright notice is the sole responsibility of the owner and does not require any advance permission from the Copyright Office, nor is registration required before its use. The form of the notice used for visually perceptible copies, which means works that can be seen or read, either directly or with the aid of a machine, will have three elements. These should appear together and include first the symbol that is the letter C in a circle (©). Alternatively, the word "Copyright" or the abbreviation "Copr." can be used. The second element is the year of first publication of the work. This element raises the question, "What is publication?" The law defines publication as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending." What does not constitute publication is the printing or other reproduction of copies, performing or displaying the work publicly or sending copies to the Copyright Office. The third element for a proper notice is the name of the owner of the copyright, or an abbreviation by which the name can be recognized, or further, a generally-known alternative designation of the owner.

The words "All rights reserved" may appear with the notice, as they provide some protection in countries that are not signatories to any of the worldwide copyright conventions. The notice should be positioned on the copies in a way that it gives reasonable notice of the copyright claim. It should be permanently legible and not concealed from view.

An example of a proper notice form is © 2010 John W. Boger, or © 2010 Acme Corp.

To ensure that you are placing the notice in the correct position for your type of work, check the Copyright Office website, specifically Circular #3.

Term, Ownership and Transfer of Ownership

The length of time for copyright protection for work created on or after January 1, 1978 is automatic from the moment that it is created and generally endures for the life of the author, plus an additional 70 years after the author's death. Several factors play a role in determining the length of copyright protection for works created before 1978. For those works made for hire, anonymous works and pseudonymous works, the term of protection is 95 years from the date of publication ***or*** 120 years from creation, whichever time period is shorter.

As discussed above, ownership rests with the author immediately upon creation and fixation of the work, unless

the work falls under the "work-made-for-hire" doctrine, is a compilation/collective work or a joint work. The most common scenario in the corporate world is the "work-made-for-hire." For this, the copyright rests with the employer or person for whom the work was prepared. The Copyright Law states that a work-made-for-hire is a one prepared by an employee within the scope of his employment, or works specially ordered or commissioned pursuant to an executed, written agreement in certain categories, including motion pictures, audiovisual works and collective work and compilations. Two key elements for determining whether the work-made-for-hire doctrine applies are determining the employment status of the creator or determining whether there was a written and signed agreement in place before the work was created. A best practice for companies is to have all new employees sign an agreement that states that any copyright created during their employment will be the property of the company. For existing employees, companies should audit employee records to ensure that such an agreement is in place and if not, get one signed immediately.

For compilations (i.e., a collection and assembling of pre-existing materials or data arranged in a way that meets the creative standard), collective works (i.e., a work, like an encyclopedia, in which a number of contributions constituting separate and independent copyrightable works themselves) and a derivative work (i.e., a work based on one or more pre-existing works that has been recast, transformed or adapted), the ownership rights of the copyright ***only*** extend to the material ***contributed*** by the author of the work.

For a joint work, meaning one prepared by two or more authors with the intention that their contribution be merged into an inseparable or interdependent work, the authors are co-owners of the copyright in the work. Each author has the right to use or license the use of the work as long as they provide an accounting of any profits to the other co-owner. The touchstone of joint authorship in joint works is the intent of the authors at the time of creation (i.e., did they intend their work to be merged into a united, inseparable work). An interesting twist to joint works is that one of the author's contributions may also be deemed a "work-made-for-hire," hence a company could be a co-owner with another author.

A copyright owner may transfer any or all exclusive rights or any subdivision of those rights. A copyright may also be conveyed by a will or pass as personal property. Importantly, the transfer of any exclusive rights of a copyright is only valid if it is in writing and the writing is signed by the owner of the rights. The transfer of non-exclusive rights (for example, a non-exclusive license) does not have to be in writing. A best practice is to record in the Copyright Office any documents pertaining to the transfer of copyright ownership rights. In fact, any documents that pertain to agreements regarding copyrights may be recorded in the Copyright Office. These agreements include licenses, mortgages, liens, wills and powers of attorney. Advantages to recording these types of documents include providing constructive notice of the transfer to the public and establishing a priority between any conflicting ownership or rights transfers.

Infringement, Fair Use and Damages

For a copyright owner to show that his work has been infringed upon, he must first show that the work is protected and that the infringer violated any one of the exclusive rights described above (i.e., reproduction, creation of derivative works, distribution of copies, public performance, public display and performance of sound recordings publicly). Essentially, violating any of these six rights involves copying the protected work. To prove that one has actually copied the work and that it was not created by pure coincidence and therefore would fall within the independent creation defense, it must be shown that the infringer had access to the work and that the work was substantially similar to the copyrighted work at issue.

Typically, the accused infringer will claim as a defense that their actions fall within the "fair use exemption." This carve-out allows, under limited circumstances, for a person to reproduce copyrighted work. The Copyright Law states that

copies of works can be made for several purposes, such as criticism, comment, news reporting, teaching, scholarship or research, and not be an infringement of the copyright. The law further sets out four factors to be considered when determining whether or not a particular copyrighted use is "fair." All four of these factors are looked at when the determination is made.

1. The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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
4. The effect of the use upon the potential market for, or value of, the copyrighted work

It is the best practice to always ask permission from the copyright owner before using the protected material. If one does this, she can avoid being sued for infringement and any relief that may be granted against them.

Relief in infringement actions comes in two forms: temporary and permanent injunctions or seizure orders, and monetary damages. These two forms of relief are not mutually exclusive.

Two types of damages can be pursued, actual damages and profits ***or*** statutory damages. These two types of damages are mutually exclusive. Actual damages and the infringers profits can sometimes be difficult to prove; therefore, statutory damages may be elected.

Statutory damages are not available if the work is unpublished and the infringement began before the effective date of its registration. Statutory damages are also not available if the work is published, but infringement began after the first publication and before the effective date of its registration, unless registration is made within three months of the date of first publication. Always register your copyright so you are eligible for statutory damages, as well as reimbursement of your attorney's fees, if you win.

Statutory damages can be significant, ranging from $200 per work to $300,000 per work, depending on the facts on the case and the behavior of the infringer.

For cases of innocent infringement, damages will range between $200 to $150,000 per infringed work. For willful infringement cases, award amounts increase significantly, ranging from a minimum of $750 per work to a maximum of $300,000 per work. By calculating damages on a per work basis, the amounts awarded in an infringement action can be millions of dollars.

Conclusion

We all encounter copyrights every single day, both at home and at work. Just because you see © everyday, though, don't allow that to make you take copyrights for granted. You may, in fact, have produced copyrightable works and not have realized it, and consequently, not understood their potential value. Understand your rights in your creative work and take the appropriate steps, now, to protect and profit from your creativity.

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