

Intellectual Property Primer

Intellectual Property Rights: What You Need to Know

What is intellectual property?

The term “intellectual property rights” refers generally to the ownership rights over a creative work. The most common types of intellectual property are trademarks, patents and copyrights. Owning intellectual property rights means you control how the material you create is copied, distributed or otherwise used by third parties. Generally, any time you assist AAOS by preparing information or educational materials, you will automatically have copyright protections in the work created. AAOS, therefore, will usually ask you, as the creator of a work, to sign a license or an assignment agreement so that AAOS can copy and distribute your work, along with that of your colleagues.

What is the source of copyright law in the United States?

The primary source of copyright law in the United States is the federal Copyright Act (17 U.S.C. § 101 et. seq.) which was enacted under the United States Constitution (Article I, Section 8).

When is a copyright created?

There are two basic requirements to create a copyright. First, the work must be original. Originality only requires that you, the author, faculty or creator of the work, contributed something more than trivial variation. Second, the work must be tangible so that it can be perceived, reproduced or communicated. Copyright protection exists the moment a work is fixed in a tangible medium, even if the work is not registered with the US Copyright Office.

Who owns the copyright?

The person who creates the work is the copyright owner. The owner, however, can assign (i.e. transfer) the rights of ownership to a third party. AAOS will typically ask authors, faculty and other contributors for an assignment of rights for enduring materials such as original articles, papers, chapters and photographs. In addition, volunteers who serve on the Board of Directors, committees, cabinets, and work groups, are required to annually sign an attestation form which assigns to AAOS all intellectual property interests in materials developed on behalf of AAOS.

What rights does the copyright owner have?

The copyright owner has the exclusive right to use and give others permission to use the work. 17 U.S.C. §106. For example, AAOS’s standard “Non-Exclusive License” gives AAOS permission to use copyrighted material for educational purposes. For instance, course faculty members are typically asked to grant AAOS a Non-Exclusive License to use the work (e.g., a PowerPoint presentation) they have developed for the course. Because the license is nonexclusive and limited in scope, the creator still retains ownership rights over the work, including how it can be used in other circumstances.

What is an Exclusive License?

An Exclusive License is permission granted by the creator for use of a work for a particular purpose. The creator still owns the copyright and is merely giving limited authorization for a particular use. It is “exclusive” because, until it expires, the creator does not have the authority to license or assign the work to anyone else. AAOS typically does not use exclusive licenses.

What is a Non-Exclusive License for copyrighted material?

A Non-Exclusive License is similar to an Exclusive License except that the creator is free to license the work to multiple parties. For example, when a faculty member signs AAOS’s standard Non-Exclusive License, they give AAOS permission to use the copyrighted material for educational purposes through print or electronic distribution. Additionally, AAOS may grant an academic medical center (AMC) or publisher a Non-Exclusive License to use an illustration or figure contained within an existing AAOS copyrighted publication, and that work would be used by that AMC or publisher solely for that stated purpose.

What is a warranty?

A warranty is a promise that certain things are true. Warranties are common in an assignment or license to protect the user from third parties who claim their rights have been violated by the content of the work. For example, in AAOS’s Non-Exclusive License, the creator warrants that the work is original and does not infringe on the rights of another.

Can an idea be copyrighted?

No, a copyright protects the expression of an idea, but not the idea itself. Copyright protections also do not extend to any procedure, process, system, method of operation, concept, principle, or discovery. 17 U.S.C. §102(b). For example, ideas and facts expressed in an article about an orthopedic procedure are copyright protected. The copyright, however, does not cover the ideas or facts themselves, no matter how creative they may be.

Are works of the United States Government protected by copyright?

No, copyright protections do not extend to works of the U.S. Government. 17 U.S.C. § 105. Therefore, nearly all works of the U.S. Government may be reproduced and disseminated without violating a copyright.

How is copyrighted material identified?

Most publications contain the word “copyright” or the symbol © followed by the date of the first publication and the name of the copyright owner. The term “all rights reserved” may also be used. Copyrighted material, however, is not required to be marked. A violation of copyright can take place even if the material is not marked or otherwise identified as belonging to the owner. It is not a defense to a copyright violation that the material was not marked.

Who is liable for violating a copyright?

Anyone who uses information protected by the copyright without permission is liable even if the use is by mistake or accident. Courts may, however, lower the amount of liability depending on culpability. Consequently, AAOS will usually ask a creator to sign the Assignment of Rights or the Non-Exclusive License to avoid potential liability.

What is the “Fair Use” doctrine?

The concept of Fair Use of copyrighted materials is frequently misunderstood. Fair Use is a statutory defense to copyright infringement that permits the use of other’s copyrighted work

under certain circumstances, without being liable for copyright infringement. It is not a safe harbor.

How is the Fair Use defense determined by a court?

The court will analyze four factors in determining Fair Use: The purpose of use; the nature of the copyrighted work; the amount of the work used; and the economic impact it has on the copyright holder. Fair Use determination is very subjective and can be difficult to determine. Examples of activities that may qualify as Fair Use include teaching, news reporting, criticism, commentary, scholarship and research. However, one should proceed cautiously and preferably with the advice of counsel in making decisions to rely upon Fair Use instead of obtaining permission from the copyright owner. Courts have placed recent emphasis on whether the use is “transformative” adding new meaning or purpose. AI generated content is now a key area of legal debate regarding fair use.

Who owns the copyright of materials created using artificial intelligence?

The copyright of content created using artificial intelligence (AI) is owned by the human who provides creative input, operates, or uses the AI tool, as long as the work meets the requirement of human authorship. U.S. copyright law mandates that copyrightable works must be created by a human being, and works produced solely by a machine or through a mechanical process without human intervention are not eligible for copyright protection. Faculty and presenters submitting AI-generated content for AAOS educational events or programs must notify the appropriate AAOS staff in advance and disclose the use and role of AI within the presentation.

EXCEPTION: JAAOS does not permit content generated by artificial intelligence (see Rose P, Fischgrund J. [Artificial intelligence and JAAOS](#). J Am Acad Orthop Surg. 2023;31:529-30.)

See also JAAOS Instructions for Authors: <https://edmgr.ovid.com/jaaos/accounts/ifaauth.htm>

Can I use a work if I give credit to the author?

No. Simply giving “credit” to the source does not render the use of another’s copyrighted material as legal.

I want to add a few notes from a song to my educational video presentation and a photo of a famous athlete I found on the internet. Do I need permission?

Yes. Music and movies have copyright protection. Photographs are generally owned by the photographer. An additional factor to consider is the privacy rights of the person in the photograph – does the famous athlete want to have his or her image or likeness used in this way? Use of these items without permission is considered an infringement of intellectual property rights and/or an invasion of privacy rights, regardless of whether your presentation is for an “educational” purpose.

Is it a copyright violation to sell an authorized copy?

No. A copyright owner who sells a copy cannot prevent subsequent transfers of that copy. This is known as the “first sale” doctrine. 17 U.S.C. § 109(a). For example, AAOS could resell books purchased from a publisher without violating the copyright interest of the copyright owner.

Have questions? Contact the AAOS Office of General Counsel at legal@aaos.org.

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Revised: September 22, 2025