When it comes to protecting their valuable assets, ophthalmology groups often focus mainly on buying personal property insurance to cover the loss of major equipment, furniture, and other hard assets. But one of the most valuable assets any business has, and often the one that is most overlooked when it comes to protection against loss, is its “intellectual property” (i.e., intangible items that are the result of creativity, such as inventions, literary and artistic works, and symbols, names, images, and designs used in commerce). Intellectual property includes things like Web sites, promotional and advertising materials, peer-reviewed journal articles, textbooks, and the intellectual work product of employees and contractors. Ophthalmology groups must also be careful about making sure they respect the property rights of other parties when posting content (including text, photos, and videos) on their Web sites, preparing patient educational materials, and drafting articles or textbooks.

Who Owns a Business’ Intellectual Property?
As a general rule of copyright law, the intellectual work product of employees of a business entity is considered to be a “work made for hire” and belongs to the employer. So in theory, the parties do not need to memorialize that fact. Nevertheless, to avoid any possible misunderstanding, it is always prudent to include a provision in physician employment contracts and staff personnel manuals empha-
Special IP Concerns Regarding Social Networking Sites

Many businesses have created Facebook pages, blogs, internet chat rooms, or other forms of interactive online communities. In addition, many employees use social networking sites during business hours for personal and official business purposes. Consequently, organizations should develop social networking policies similar to those that would apply to the practice’s Web site.

Organizations that have created Facebook pages, blogs, or chat rooms should create a policy statement that users of the site must accept as a condition of participation. Such policies normally cover a broad range of issues, including the sponsoring business’s ownership of all intellectual property contributed to the site, its right to censor or remove objectionable materials, a disclaimer that the site is not intended to provide or be relied upon for medical advice, and a general “code of conduct” for those posting materials to the site.

Organizations that allow their employees to use social networking sites during working hours should include, in their personnel manual, a detailed social networking policy that specifies when and how employees can communicate to the public in their official capacity on such sites. Employees communicating on such sites represent their employer, and their statements can reflect well or poorly on the employer. Therefore, such activity should only occur under well-understood parameters. An internal policy would normally cover issues such as whether and how employees may use the company’s intellectual property and confidential proprietary information on social networking sites, how to identify an employee’s position and title on such sites, and a general code of conduct that requires employees to avoid inappropriate, harassing, or defamatory comments.

Sizing that creative works produced by an employee during the employment relationship (including all copyrights on written materials, all trademarks created, and all patents on any inventions) belong to the employer and may not be taken or used by the employee, either during employment or after termination of employment.

Unlike employees, if an independent contractor is hired by an ophthalmology practice to create intellectual property, such as advertising materials, Web site content or design, patient brochures, or the like, the general “work-made-for-hire” rule described above would normally not apply. Instead, the independent contractor will own the creative work unless the agreement with the vendor specifically states that such intellectual property will be owned by the practice and constitutes a “work made for hire” and that the vendor will assign any rights it has in the intellectual property to the practice.

Ongoing Measures to Protect Intellectual Property

Once a practice has developed or acquired an item of intellectual property, how does it protect its rights? There is a common misconception that intellectual property rights are contingent upon registra-

tion of the creative work or trademark with the Federal Copyright Office or Patent and Trademark Office and that the federal copyright symbol or trademark symbol must accompany the intellectual property. In reality, copyright and trademark rights attach automatically the moment that intellectual property is created, regardless of whether the property is registered or the copyright or trademark symbol is attached.

Nevertheless, there are significant benefits to registration, and using the copyright and trademark symbols is a prudent means of putting the world on notice that a particular work is owned by a particular entity. Thus, Web sites, advertising materials, and other important written work products should have a copyright warning indicating the name of the owner and the year of creation, such as “Copyright 2010 by the XYZ Corporation. All Rights Reserved.” (In lieu of the word “Copyright,” it is permissible to substitute the copyright symbol “©”.) A written work does not need to be filed with the United States Copyright Office in order for a business to use the copyright warning. However, filing the item for a federal copyright is relatively inexpensive and should be considered for all important creative works. Registering a copyrighted work is also a prerequisite to filing an infringement action and obtaining statutory damages in court. The damages specified in the Copyright Act can be a much more rewarding alternative than actual damage where actual damages are hard to prove.

When it comes to trademarks (such as the name, logo, or tag line of a business), the rule is a bit different. Here, the federal trademark symbol (“®”) may not be used unless and until the trademark has been
registered and approved by the United States Patent and Trademark Office. However, in the absence of such registration, it is permissible to put superscript “TM” (which stands for “trademark” for companies that produce products) or “SM” (which stands for “service mark” for companies that provide services) to indicate that the words are considered “common law” (unregistered) protected trademarks of the company. Again, filing a federal trademark is a prudent way to earn higher statutory damages if the trademark owner ever needs to file a lawsuit for trademark infringement.

Respecting the IP Rights of Others

Intellectual property protection is a two-way street, and ophthalmology practices would be well-advised to establish policies for their employees about respecting the intellectual property rights of others. For example, the logos of medical specialty societies or other organizations should never be used without the owner’s consent. Likewise, practices cannot reprint journal or newspaper articles or other copyrighted materials on their Web sites or social networking sites without permission of the publisher and/or author. There are complex “fair use” rules that do allow very limited portions of another’s work to be used without permission. But many physician practices assume that materials posted on the internet are fair game to be used in their entirety. That is not the case. Therefore, when in doubt, the consent of the copyright holder of written material (including material posted on the internet) should be obtained before significant portions of that material are used for any purpose.

Special care should also be used before posting patient photos on the practice’s Web site or including them in journal articles. The practice must get written consent from the patient that not only meets general contract rules but also follows HIPAA guidelines, including possibly de-identifying the photo through shading or other masking techniques.

Where to Get Started on IP Issues

Intellectual property is a complex area of law, and most organizations should seek the assistance of competent legal counsel to help them navigate these rough waters. Ophthalmology practices should conduct an internal intellectual property “audit” to identify and fill gaps in their IP protection and policies. Doing so will provide some of the most valuable property “insurance” a practice can obtain.

Robert M. Portman, JD, MPP
(202-872-6756; rob.portman@ppsv.com), and Ben Tesdahl, JD, LLM (202-872-6743; ben.tesdahl@ppsv.com), are attorneys with Powers Pyles Sutter & Verville PC in Washington, D.C. Mr. Portman is also legal counsel for the American Society of Cataract and Refractive Surgery and the American Society of Ophthalmic Administrators. This article is for informational and educational purposes only. It is not intended to provide legal advice and should not be treated as such.