

Copyrights and Trademarks

(Almost) Everything You Need to Know

For developers and publishers to maximize the revenues they enjoy from their independent, original creative works, it is invaluable to learn how to prevent others from wholesale or piecemeal copying of those works or misleading the public by using confusingly similar brands and characters.

In my work as an intellectual property attorney I've gained some insight into the unique aspects of trademark and copyright law as they apply to casual games. So here are my thoughts on how developers and publishers can obtain rights in their games and how they can enforce those rights.

Copyrights

What is a copyright and what elements of a video game does it protect?

A copyright actually comprises a group of rights, and not one single right. These rights include the right to copy, distribute, display, and perform, as well as the right to make "derivative works" (works different from, but based on, the original work the copyright protects). Copyright protects both the source code of a video game, which is considered an original, textual work, and the audiovisual elements of the game, sometimes referred to as the "look-and-feel" of the game. Copyright can also cover game characters. Copyright will never cover "the rules of the game." Someone other than the owner of copyright in the game is free to create a new game, with the same rules, if it is based on different source code and does not copy any protectable expression from the original game (that is, the new game uses entirely different graphics, sounds, characters, etc.)

Who is the owner of copyright?

The "author" or creator of a work owns copyright. However, when the individual who creates the game does so as part of his or her employment, the employer owns copyright. That is called a "work made for hire." A work made for hire may also exist

(and the employer will own copyright) when an independent contractor creates the audiovisual elements of a game and signs a "work made for hire" agreement. Also, the original owner or creator (such as the game developer) may "assign" its entire copyright to a game publisher, in which case the publisher becomes the owner. But 30 years after the "assignment" the developer can "revoke" the grant so it has the opportunity to make money again from exploitation of the game. This right of termination is especially useful from the original developer's standpoint if it turns out the game is more famous or valuable than anyone anticipated when the developer assigned the copyright.

How long does copyright last?

Currently, the term of copyright is the author's life plus 70 years for a work that is not a work made for hire. The term of copyright in a work made for hire is the shorter of 120 years from creation of the work, or 95 years from its first publication.

Trademarks

What is a trademark and how can owners of rights in video games benefit from trademark law?

Unlike a copyright, a trademark protects a brand name, slogan, design, or anything (including sounds, shapes and characters) that denotes a single source of the video game (that is, the publisher or developer of the game, depending on who owns the brand, which in turn depends on who's selling the game).

How long do trademarks last?

As long as the video game is being sold.

What unique aspects of trademark and copyright law apply to video games?

A lot of people do not realize the complementary and sometimes overlapping protection afforded by these two very different forms of ownership. For example, the original music for a game is both

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copyrightable and can potentially function as a trademark. On the other hand, a game title will never be copyrightable but it can be a trademark. Game characters can be both trademarks and copyrights.

What can be done to protect graphics and characters, the whole of the game, and packaging?

Generally it is wise to file copyright applications for packaging and unique graphics and characters as well as for the entire game. Trademark applications can be filed for game titles and characters.

Enforcement

How can these intellectual property rights be enforced?

Most enforcement involves a game developer or publisher “policing” its own property rights. In fact, if you don’t police your rights, you can lose them. Generally, writing letters asking people to stop infringing your rights is enough to stop the violations. But sometimes a lawsuit is in order.

Are the laws governing video game copyrights and trademarks universal?

Copyright law is territorial. That is, the U.S. copyright law applies only in this country and not abroad. So sometimes what would be a copyright violation here is not considered one abroad.

What protection exists in other countries? Are rights as favorable as those of the U.S. in protecting the look-and-feel of video games?

Due to a treaty called the Berne Convention, in many countries the rights under copyright are co-extensive with those in the U.S. However, in “common law countries” (that is, those like the U.S. in which courts interpret legislation), some courts have been unwilling to recognize that the look-and-feel of games is protected. In this respect, U.S. law is generally more favorable to game publishers and developers than the law of other nations.

Process: Cost-benefit Analysis

How can developers and publishers obtain rights under trademark and copyright law in their games?

By registering those rights with the U.S. Trademark and Copyright Offices. Although in the case of trademarks registration is not required, registration gives rise to a “presumption” of nationwide rights. What this means is that the trademark owner does not have to establish

actual sales of merchandise or services bearing the mark in every state in the nation. Its rights are deemed to exist as of the date of registration. Copyright registration, although not a precondition to the existence of rights, is a prerequisite for bringing a lawsuit for copyright infringement and for certain kinds of “automatic” damages of up to \$150,000 per infringement. These damages are called “statutory” damages and one does not need to prove lost profits or the infringer’s gained profits from the infringement in order to establish them as they are set by the court. Also, although you are not required to use a copyright registration symbol (©)—which is typically followed by the year of publication and the name of the copyright claimant—it is recommended as a warning to infringers that the content is protected and should not be stolen. Use of a copyright notice can also help establish willfulness of an infringement, increasing the statutory damages available to the copyright owner.

What costs are associated with this process?

Filing an application for copyright registration generally costs less than \$100, and filing a trademark application can range in cost from several hundred dollars to more—especially if a clearance search is done.

Do video game publishers and developers need an attorney to register copyrights and trademarks?

Though it will increase the cost somewhat, most attorneys work on “flat fee” schedules for trademark and copyright application work and can ensure that you are well-positioned to enforce your rights and that you don’t make mistakes (like exposing yourself to a lawsuit by using a mark someone else already owns). That old

adage “an ounce of prevention is worth a pound of cure” really applies here.

Why should video game developers and publishers consider pursuing copyrights and trademarks?

Ownership of intangible assets like copyrights increases the value of your company by many, many times over because you essentially establish a lawful monopoly to exploit your work—and that can be very valuable to others. It also enables you to charge more in royalties because you can provide this important evidence of your rights. Additionally, ownership of these rights, especially as they are evidenced by U.S. registrations, can provide a strong disincentive to those who might otherwise try to copy your brands and copyrightable expression in your video games.

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