CARLTON FIELDS

Getting Creative with Video Games: DMCA Takedowns and You

September 18, 2019

Back to Basics: A Primer on Intellectual Property Rights in Video Games In this series, we discuss some of the fundamental concepts of intellectual property law as they relate specifically to video game companies and other unique players in the space, including esports teams and content creators. The intention of these articles is to provide a basic understanding of the various intellectual property rights important to the industry - from the differences between a trademark and a copyright, to what's behind a DMCA takedown notice. These articles are not legal advice, nor should they be relied upon as such, as the particular facts of each unique circumstance determine how the legal issues will play out. If you have any questions concerning the content of any article, or want to know more about any of the topics we discuss, we encourage you to contact the authors. We promise, we don't bite. Before proceeding, be sure to read up on the basics of trademarks (which we covered here and here) and copyrights (covered here).

* * *

Getting Creative With Video Games: DMCA Takedowns and You

In our last discussion, we covered the basics of copyright, including what rights are afforded in a copyright, what it means for a work to be in the public domain, and the concept of fair use. In addition to the usual prohibitions against unauthorized copyright use, the Digital Millennium Copyright Act (DMCA), a subsection of the Copyright Act, prohibits two additional actions that apply with some frequency to the video game industry, including the competitive esports scene and the intrepid content creators who stream their game sessions live and on-demand. First, the DMCA prohibits circumventing protected access (i.e., the anti-copying safeguards) to hardware, software, or firmware that contain copyright material. 17 U.S.C. § 1201(a)(1)(A). In this situation, it is the act of circumvention that is prohibited, regardless of whether the copyright material is obtained. Second, the DMCA prohibits the use of copyright material in which any copyright management information

(CMI) has been removed, altered, or to which false CMI has been added. 17 U.S.C. § 1202. CMI is defined as:

1. The title and other information identifying the work, including the information set forth on a copyright notice;
2. The name of, and other identifying information about, the author of a work;
3. The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright;
4. With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work;
5. With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work;
6. Terms and conditions for use of the work;
7. Identifying numbers or symbols referring to such information or links to such information.

17 U.S.C. § 1202(c). Going back to the Deadpool images on Google that we searched in our copyright article, you can see that in many, if not most, of the images, the CMI identifying Twentieth Century Fox as the copyright owner has been removed. Those are likely violations of the DMCA. And if someone else (you?) uses those images knowing that the rightful CMI has been removed, or false CMI has replaced it, then that's a DMCA violation as well. It is also important to understand that a DMCA violation is treated separately from copyright infringement. And remedies for DMCA violations are *in addition* to the remedies available for copyright infringement.

DMCA Takedown Notices

Most individuals find out that the material they thought was in the public domain is actually protected by copyright when they receive a "takedown notice" from the website selling their game or streaming their content. All content hosts and providers - ISPs, search engines, and websites that host third-party content, such as YouTube and Twitch - are required by the Copyright Act to provide copyright owners with the ability to notify the content host that their copyright material is being used on their website without permission, and to request that the unauthorized use be taken down. 17 U.S.C. § 512. When it receives such a request, the content host must review it, but is not required to determine whether the copyright owner's infringement claim is valid or whether the objected content is an actual copyright violation. If the content host determines that the request comes from a legitimate source, such as the copyright owner's attorney, then the entire content containing the unauthorized copyright material will be taken off the content host's site. A takedown notice is exactly

what it sounds like. The copyright owner complained to the content host, and the content host took down your stuff and sent you a notice telling you when, what, and why your content was "taken down." Because the copyright exists as soon as at least some of the creative expression of the work is fixed in a tangible medium (as we previously covered), the copyright owner does not need to register his or her copyright in order to issue a DMCA takedown notice. Think of a takedown notice as the first "shot across the bow." Oftentimes it will be followed by a rather nasty letter from the copyright owner; sometimes it will be followed by a copyright infringement lawsuit. None of which you want or need. Receive too many takedown notices, and you run the risk of violating the terms and conditions of the content hosts' services, resulting in an account suspension or termination.

How to Avoid a Takedown Notice

As a general rule, if you didn't create it yourself or have it created specifically for you, then assume that anything already in existence (and especially on the internet) is someone else's copyright work. If it doesn't have any identifying information, don't assume it's in the public domain (unless it's obviously old - see our prior copyright article to find out "how old is old"). And fair use probably won't save you either. As we previously discussed, fair use is an affirmative *defense* to copyright infringement, which a trier of fact (i.e., a judge or jury) would determine after a lawsuit is filed. In other words, relying on fair use is an expensive and time-consuming gamble. If you want to use someone else's copyright material in your game, the very best thing to do is to get a license. Hopefully the material will have the proper identifying information so you know who the owner is. Common, obvious copyright owners - Disney, Fox, Warner Bros., etc. - all have standardized licensing programs. Music rights are a bit more problematic, since there's no "one-stop shopping." Sync licenses are actually a bundle of licenses from the owners of the copyrights in the lyrics, the music, and the recordings. The first two are usually the artist or the publisher, and the label generally owns the recordings. Big-name musical artists usually have management companies or their publishers handling the licensing rights to the songs themselves (but not the recordings); smaller artists may have their licensing info on their websites. In almost all cases, the record labels have the licensing rights for the actual recordings (but not for the music that is recorded). Sports figures are generally licensed through their respective leagues or their licensing agents. Celebrities can be contacted through their studios or management agencies (again, check their websites).

What to Do If You Receive a Takedown Notice

Let's say that despite your best efforts you received a takedown notice - what do you do then? If you used material that is not in the public domain and is protected by copyright, then that is likely infringement and there is little you can do other than immediately stop using that content anywhere, not just on the site that sent you the notice (even if it means taking it out of your game), and take steps to avoid receiving another notice going forward. If you doubt whether copyright protection exists (it likely does), or think you have a valid defense like fair use (you probably don't), then you should seriously consider discussing the matter with an experienced IP attorney before moving forward. If you believe the takedown notice was issued in error, you can reply through what is

referred to as a "counter notice." Many content hosts like YouTube and Instagram have automated this process by mechanisms that allow recipients of takedown notices to respond to claimants electronically through their respective platforms. Because the counter notice will be sent to the claimant, and since takedown notices are usually the first step toward an infringement lawsuit, it's advisable to consult an experienced IP attorney to determine if it's in your best interest to file one and, if so, how to best word it to mitigate the risk that it would be used against you in future litigation. Another option is to have your experienced IP counsel communicate directly with the copyright holder. Your counsel will know better what to say and what not to say so that you don't inadvertently put yourself at greater risk. Remember, contrary to the popular phrase, here it's always better to ask permission than to beg forgiveness. And permission is always cheaper than being on the wrong side of a copyright infringement lawsuit. **Next, we need to cover the basics about owning the copyrights and using contractors or employees to develop the work. We'll cover that in our next *Back to Basics* article - available here!**]]> ~/Libraries/CarltonFields/Media/Banners/Headers/back-to-basics-bn.jpg]]>

Related Practices

Esports and Electronic Gaming
Intellectual Property