

# S1:E10 - Covering Your Digital Assets: Intellectual Property Rights and Gaming

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Steve and Nick explore intellectual property rights issues in gaming, and discuss recent cases involving alleged copyright and trademark infringement with intellectual property lawyer Gail Podolsky.

# Transcript:

**Steve:** Hello and welcome to another episode of the LAN Party Lawyers Podcast, the podcast intended for anyone interested in the e-gaming and esports industry. My name is Steven Blickensderfer and I'm joined by my co-host Nick Brown. Through debate, discussion, and interviews, we tackle issues at the intersection of video games, law, and business. Remember, nothing we say on the podcast is legal advice.

So today we are going to talk about an issue that's near and dear to the video game industry: intellectual property. We'll talk about what is intellectual property, how to protect it, and lawsuits involving IP in the video game space.

We're going to talk about these issues with a special guest, Gail Podolsky, who is a seasoned IP lawyer and chair of the Carlton Fields Technology Group in our Atlanta office. But before we get to the interview, Nick, why don't you start us off by explaining what do we mean when we talk about intellectual property?

**Nick:** So, IP kind of falls into three big buckets for the purpose of our conversation today: copyrights, trademarks, and patents. I'm putting on my law professor hat here. Copyrights really are designed to protect tangible expression and it kind of addresses the difference between what is expression and what is ideas, and so your essays might have copyright, a recording of music might have copyright, or a video recording perhaps of somebody playing a video game. Trademarks, instead, are more associated with the idea of branding. Trademarks are a big deal for content creators. They want, understandably, to have a brand or a mark that lives out in the world and that belongs to them and that doesn't get misappropriated by other people maybe operating under that name or using it for their benefit. And the third one is patents, which exist to protect useful inventions, and for our purposes today, patents do extend to protecting software and lines of code, which are, you know, generally useful inventions.

**Steve:** I'm thinking of the guy, the caveman who's chiseling the wheel, right? I know we've all seen that TV commercial. Those are patents, alright? 1-800-Invent-A-Something.

**Nick:** I don't think the caveman had patent protection, but.

**Steve:** Well, the caveman picture I think, and that would be a copyrighted work, right? The trademark would be like...

**Nick:** Well, it's fixed and original.

**Steve:** Yeah and then the trademark would be, you know, 1-800-Call-Me-To-Patent-This, whatever the slogan would be, and then they...

**Nick:** I don't think that's going to take off.

**Steve:** But then they protect patents. Interesting, huh? Has all of it wrapped in one little example right there. Anyway, protecting IP is a huge part of gaming. It affects everything from the games themselves to the people who are playing it. So, why is intellectual property a big deal for the video game industry and content creators generally? Well, the failure to protect it can create legal exposure. It's like one of the most obvious areas where video games and the law collide in big ways. And so...

**Nick:** Because naturally, if you're spending time and effort and resources and thought and hard work to create a product, you want there to be some kind of protection for that.

**Steve:** Right.

**Nick:** So that someone else can't just run off and take your completed work without having done any of the work themselves, claims it's theirs, and get the benefit that should've gone to you.

**Steve:** Exactly, so I'll give you an example. I've worked very hard on this dance move. I've been practicing in my closet for months, okay? And I...

**Nick:** I heard that about you.

**Steve:** ...and I unveiled it at a dance competition, you know, at my local, I don't know, dance competition scene, and I found myself playing a game, and lo and behold, the dance move is in the game. It's one of the emotes. It's one of the character moves when, you know, for those that don't know you could, in today's games, many of the games, you could get or buy or obtain somehow different moves for your character, kind of gives them personality where you would do dance moves at the end of the game or maybe when you're waiting you hit a button and all of the sudden your character starts to dance, and so...

**Nick:** Or to trash talk at the other players.

**Steve:** Right. There's audio, there's, you know, different things, but the dancing in particular and as it relates to one of the more popular games out there, Fortnite, included some iconic dance moves. I can't say included my dance move, Nick, in my example, but include things like the Floss, you know, arguably included some other dance moves including, what is it, Rapper 2 Milly's Swipe It. It included one of the moves I liked, which is the Scrubs Dance, which was really cool.

**Nick:** Right.

**Steve:** The Carlton, another good one.

**Nick:** And there was, so, there was a lawsuit about this recently, right? Epic was sued by, or a few lawsuits, brought by individuals that claimed to have the rights in those dance moves and claimed that Fortnite was, you know, violating their copyright by using them and selling them for money. You know, it's interesting the way it turned out. There was a Supreme Court of the United States decision that actually said that in order to bring the copyright claim on the dance that the plaintiff, the party bringing the claim, had to actually own the copyright to the dance first. And so the lawsuits were dismissed, but we may see the lawsuits refiled if and when the plaintiffs are able to receive protected copyrights on the dances from the U.S. Copyright Office.

**Steve:** Alright, so we're going to talk to Gail in a little bit about whether or not you could copyright a dance move, because I think that there's, the whole debate is whether you can even do that.

**Nick:** But Steve is very, very interested in this.

**Steve:** I am because I just feel like that my dance move that I never announced, but if you could see me, you could see me dance it...

**Nick:** How convenient.

**Steve:** ...is going to be found in a game sometime because it's just too good. And so the next example we have is, actually, this one's fun. This is Booker T, the wrestler from days of yore, he was in the WCW with the New World Order, Sting, and Hulk Hogan when he was wearing the black and white. He actually had a character in the 90s as a pro wrestler and he also created a comic book based on that character in 2015 called G.I. Bro, and so the, he sued Activision Blizzard, for its game Black Ops 4. In particular for, you know, allegedly adopting his character and creating this one in the game called David "Prophet" Wilkes.

**Nick:** Do they look the same? I didn't watch wrestling so...

**Steve:** Right, so yeah if you looked a picture of Booker T's character, you looked at this guy in the game or you played this game you would see a, you know, resemblance. The characters aren't the same but the question is could you be confused about it? Could a consumer be confused that instead of playing Prophet, they are actually playing G.I. Bro and Activision's game?

**Nick:** Which is interesting given the context that G.I. Bro seems pretty clearly to be based off of G.I. Joe, right? Different protected intellectual property.

**Steve:** The law doesn't appreciate ironies, Nick, so it's completely gone over their head.

**Nick:** Bird law in this country is just not governed by reason.

**Steve:** No, exactly.

**Nick:** So, there's also trademark issues that are presented with respect to games, and we're just going to touch on a couple of them. The big recent news is actually earlier this week, the band, or more accurately the holding company that owns the band, Iron Maiden—epic, legendary metal band filed a two million dollar trademark lawsuit over a video game slated to come out later this year called Ion Maiden.

**Steve:** That's really similar.

**Nick:** Well, it's one letter different, but...

**Steve:** We've said in the past podcasts, letters make the difference, Nick. Just one or two letters.

**Nick:** They do. Sometimes they can, that's true. The complaint alleges that the makers of Ion Maiden misappropriated the Iron Maiden trademark and it resulted in customer confusion, so that people probably are under the mistaken belief that this is licensed or produced somehow by Iron Maiden. They also allege that the name and the merchandise that Ion Maiden uses is graphically similar to Iron Maiden, in particular their Eddie character. They seek over two million dollars in statutory damages but they also demand that the company cancel the registration of the domain for the game or actually transfer and give it over to the band Iron Maiden.

**Steve:** We are going to ask Gail this in a second, but I just imagine this, that it's shocking to us in terms of, you know, not always working with IP litigation, you know, perhaps, but for someone that lives in the IP world all the time, this is probably not a shocking thing, but it is pretty incredible, you know. Stop doing this and then give it to me, in a sense.

**Nick:** Right, and so the game is supposed to come out later this year. The lawsuit was only just filed so we're going to have to watch to see what happens there, but it's pretty interesting dispute, nonetheless. The other interesting example we wanted to bring to your attention involves Rockstar's game Red Dead Redemption 2, which came out last year, I think October 2018. It takes place, I think, at the late 1800s in America, and it involves as characters these Pinkerton agents who are, you know, involved in the storyline, and after the game came out...

**Steve:** They're like bounty hunters, right?

**Nick:** Yeah, they're, in the game, they're treated kind of like investigators, bounty hunters, it's not entirely clear. But, they're kind of antagonists to the main characters that you get to play.

**Steve:** Who are antagonists themselves.

**Nick:** Maybe.

**Steve:** I don't know because they haven't ported it to the PC yet, so I haven't...

**Nick:** I was going to say I guess it depends on your perspective.

**Steve:** I haven't played all these exclusives yet, because I'm just, you know, sticking with my principles.

**Nick:** Well, you're missing out. It's a lot of fun. Anyways, so the Pinkerton Agency, it turns out, is a real agency that existed back then and exists now. It's like 150-something-year-old entity, from what I understand, and they sent Rockstar and Take-Two, the creators of the game, a cease and desist letter, and when Rockstar got that, Rockstar and Take-Two filed a lawsuit, a declaratory action, claiming that the way that their game portrayed the Pinkerton name was actually fair use, despite some of the negative characterizations. We will unfortunately never know how that suit comes out because it was ultimately dropped in April of 2019, but it raises interesting questions about what, in a game that's semi-historically accurate, what type of representations are protected with respect to competing trademarks.

**Steve:** That's interesting. You know, there's also IP rights to the games themselves. As you're developing the game and you're creating, sometimes they call it, like Blizzard recently announced, we're creating new IP, which is just another way of saying we got this other new game out that's unrelated to an older game that we're working on. So, these large game publishers such as Blizzard, like I just mentioned, they own these rights to these games, and around the leagues which form around them. So, Overwatch is a great example where the person who who's basically given the license to play or to the teams to organize these teams and create these business entities around the games, they have to buy the licenses from Activision Blizzard. So, we're increasingly seeing the monetization of those rights. That's really what you see in this recent boom in investment into eSports.

**Nick:** How much does it cost to buy an esports team like that?

**Steve:** Yeah, so in 2017, the price was \$20 million to buy...

**Nick:** Oh boy.



**Steve:** ...an Overwatch team, and it doubled in 2018. So, you know, Blizzard Activision is making some good money from selling the rights in these particular games, and so you can imagine you're going to have values like that going forward. Maybe, when Rocket League starts to form into something, with now having gone over to Epic, maybe you'll see something like this going from one of the Rocket League teams.

**Nick:** It also comes up when they want to put on esports events, right? Because if you want to put on an event, like a big competition for Rocket League or Fortnite or whatever, you need to get the rights to do that from the owners of that IP.

**Steve:** Yes, Nick, you're right actually. Epic recently sued organizers of an unofficial Fortnite event in Norwich. So you, you know, run it at your own risk, but these game publishers are going to enforce their rights to this IP, and that's something to consider when you're putting on events, particularly events you want them to be official so that you don't run into those problems. So another way that this works in esports, which is pretty fascinating, is more in the traditional sense where you got sports games and that's where the script is kind of flipped. So you have, take a league like the NFL licensing their IP to Electronic Arts for Madden, for instance.

**Nick:** The annual Madden football franchise.

**Steve:** Right, but, so you can see the rights basically originating from the National Football League and then, you know, trickling down from there. So it's just another way of who's, where's the source of the intellectual property, is really the starting point, and then from there you can kind of figure out, alright well, if you have to get rights to do something with respect to that IP, who would you be going and asking those questions, and getting that permission?

**Nick:** And media rights come into play too, right?

**Steve:** Yeah.

**Nick:** In just displaying the content, having distribution deals, any kind of licensing issues for marketing or merchandise or things.

**Steve:** I think that media rights is going to be the next big thing, and I'm not alone in my estimation there. Because, take Twitch, which just recently announced they're exploring plans to do a pay-per-view-style viewing of certain competitions. If that succeeds...

**Nick:** Subscriber only.

**Steve:** Right, think about it. Right now, everything's free. You go on any Mixer, you go on Twitch, whatever you're using. You can access and watch any competition or event.

**Nick:** You can pay extra to get additional features. Like, you know, emotes and chat privileges and things.

**Steve:** Right.

**Nick:** But the basic functionality is like, you know, standard-band TV.

**Steve:** Right. So, basically, media rights boils down to the right to display content, and at some point we're, you can expect that companies are going to monetize that as people would pay to see a certain event. And Goldman Sachs' relying on their report from a couple of months ago, they expect that figure to climb, I'm sorry, so currently in this Goldman Sachs' report, media rights account for 14% of revenue. They expect that figure to climb up to 40% by 2022, so...

**Nick:** That's almost triple, that's huge.

**Steve:** So the last thing, Nick, I think we should go into is patents real quick because, you know, in this industry you don't have to go into details, but esports and video games, I think the potential for patents protection, the need for patent protection's real...

**Nick:** Yeah.

**Steve:** ...and the potential for using new and innovative technology is unlike almost any other industry.

**Nick:** Yeah and, with emerging industries within the tech industry, right? You're, it's just, you're going to see more and more new technology as people come up with modern solutions in these technologically advanced areas with a bunch of technologically savvy users. We're not going to go into great deal about this in the podcast today, but we just want to note that we're seeing a bunch of significant patents be applied for and granted with respect to esports and gaming in general. You know, from things you might expect like video data management, like for game streams, like how they get the video from the competitor's computer all the way to your Twitch screen or perhaps your mobile phone. There's also cross platform patent opportunities involving, you know, what if you want to hold a tournament and you've got 10 people playing on Xbox and 10 people playing on PlayStation and they're really comfortable with their own little ecosystem, but you want to be able to play them together? It takes a technological solution to actually have a fair competition. Esports event platforms are another example, and even something surprised me which was fairness algorithms.



Algorithms designed to make sure that the games are being played fairly, which would really impress me, which is probably why they got a patent for it.

**Steve:** Isn't that like PunkBuster? It kind of reminds me of that, the old school, you know, take the cheaters offline kind of...

**Nick:** I do, and I remember I had more, I was never a cheater but I had more trouble with that than any of the actual software. They always seemed to think that I was cheating. I assume because, you know, I was just doing such a good job...

**Steve:** I assume they were right, so I think it's time to bring Gail in here and to talk to her a little bit about some of these things. So Gail, thank you again for joining us on the podcast. We really appreciate your time and for kind of cracking an egg of knowledge on this situation here. So, first let's do a little warm-up question. Why don't you tell us whether you're a console or PC player and the last game you've invested any significant time in?

**Gail:** Well, first of all, I want to thank you again for bringing me on, and for two non-IP lawyers, you guys did a great job at explaining IP and kind of the issues going on in the gaming industry.

**Steve:** Yay!

**Gail:** As for me personally, I'm a console player, and you know, I think it comes back to, and I'm going to date myself here...

**Steve:** Boo.

**Gail:** ...playing the Commodore and...

**Steve:** There you go...

**Gail:** ...Atari followed by Nintendo...

**Nick:** Street cred.

**Gail:** ...grew up playing Tecmo Bowl, so now I've moved on and matured. So, you know, Madden is certainly one of my favorite go-tos, but if it's not going to be a sports game, then my heart will always be with Resident Evil.

**Steve:** Nice, very nice.

**Nick:** Nice, they had a recent remake come out. I never really got into the Resident Evil series but I know the fans of it were really happy with the recent one. You may want to check that out.

**Steve:** I was always too scared. It's too scary for me.

**Gail:** If you ever find me at a Dave & Buster's, you're going to know where I am.

**Nick:** Okay, Gail, so maybe a good place to start would be to kind of talk about some of your feedback on some of these cool cases we were talking about earlier. The first one I know is near and dear to Steve's heart, which is the Fortnite dance copyright case. I mean, do you think that is a reasonable way for that to turn out? Should they have to get the copyright before they can bring this suit? And, what do you think is going to happen there?

**Gail:** Well, unfortunately, Steve, I have to say that your secret super fantastic dance moves are probably not protectable.

**Steve:** Aww.

**Gail:** But, I would like to see them some day. In terms of...

**Nick:** Be careful of what you wish for.

**Steve:** Yeah, it's like the, it's like the Napoleon dance, so...

**Gail:** Excellent.

**Steve:** Napoleon Dynamite dance.

**Gail:** So, you know, in terms of the Supreme Court and the decision that basically says you have to register your copyright before you can go into court, I think that's the right decision. They're similar to patents; you have to have an issued patent before you can sue for patent infringement. Someone shouldn't be able to just go into court claiming copyright infringement without having the registration. But, even if we take that prerequisite out, you know, looking at the 50,000-foot level, do they actually have copyright protection in these dance moves? And, I think at the end of the day, it's going to be difficult, you know, since they filed suit, the Copyright Office, the United States Copyright Office actually rejected the applications.

**Steve:** What if my move is, my dance move is really technical? I mean, I'd be hard-pressed to see you guys be able to copy my moves. Does that increase the chances that I'll get some copyright protection?

**Gail:** So, the technical aspects of your dance is typically not what is looked at, it's mostly the length. So, if you, for example, an entire ballet...

**Steve:** It's also very long, my dance move is, like, minutes.

**Nick:** Steve's move clocks in at about 90 minutes.

**Steve:** How am I doing...

**Gail:** Well, now we are getting more into a performance rights...

**Steve:** Okay.

**Gail:** ...so have you publically performed it?

**Nick:** Now we are getting somewhere.

**Steve:** Has it been recorded?

**Nick:** Alright.

**Gail:** And if you have met those things and again, it's your original creation. You didn't take it from other people, and...

**Steve:** Scout's honor.

**Gail:** ...you've actually performed it in front of people, then it's a closer call. But, you know, what we're dealing with here, for example, with the Carlton dance. It's a very short move and, you know...

**Nick:** But it's fierce.

**Gail:** Yep, I do love the Carlton dance. I'm not going to lie.

**Steve:** Yep.

**Gail:** I'm a Fresh Prince of Bel-Air fan.

**Steve:** Yep.

**Gail:** Born in West Philadelphia...

**Nick:** Which is funny. I'm not sure a lot of the current Fortnite demographic would know specifically the character that that dance derives from.

**Steve:** But they could Floss up and down, Nick, and I've tried it. My wife hates it when I try it but, you know, it is what it is. So, let's move on to a different lawsuit, if I may, the G.I. Bro lawsuit. So again, this is the, you know, African-American character in a game with the combat gear, kind of looking like another artist's work. Putting away his name, G.I. Bro. But, what do you think of that one?

**Gail:** Well, first, I want to start off with I am really disappointed you didn't mention Ric Flair in your list of wrestlers.

**Steve:** Wool!

**Gail:** I was actually on a plane recently where he was sitting in first class and I kind of geeked out.

**Steve:** Oh man.

**Gail:** But, you know, in terms of the lawsuit, I think he's going to have a hard time. The idea of someone dressed up in military garb, carrying a gun, that is not really an original work of authorship. And, you know, there's going to be a really strong First Amendment defense there that basically says, you know, you have some artistic freedoms, and how else can you articulate or show someone in the military without having them in military garb carrying a gun?

**Nick:** So, one thing that strikes me a little bit different about this from the Fortnite one is, you know, a dance is a dance. Does this guy have a better claim by virtue of the fact that he had a comic book, like an actual fixed piece of media containing his character, that he's claiming is copyright? Does he have a better position than someone who just says those moves are mine?

**Gail:** If there was more unique criteria to his character, I think the fact that he would have a comic book would certainly help. But again, we're talking about a real general character, similar to how they don't protect magicians or knights in video games. I mean, could you imagine if someone owned...

**Nick:** That's Steve's other side hustle down the drain, too.

**Steve:** Seriously, shooting them down one by one.

**Gail:** So, yeah, I have to say, I understand he's probably angry about this, but I'm not sure that his claim is, at the end of the day, is a very strong one.

**Steve:** So, is that, you mentioned the defense there, is that like a fair use defense and what would that look like?

**Gail:** So, the First Amendment defense is slightly different than the fair use defense. The First Amendment defense is, basically, there's artistic relevance to the underlying work and you're not misleading anyone. So, the video game is not saying or referring to the wrestler. And if the users of the game do not believe that this is the wrestler, they don't, there's not what we call instances of confusion, then it's going to be really hard to convince a court or a jury that there's some sort of infringement.

**Steve:** Right, so maybe the analysis would change if this character in the comic book had a distinct move that this guy in the video game also did. Maybe that would change things up. I'm just trying to give Booker T a chance here. You're shooting them all down.

Let's move on to Iron Maiden, Eddie. Great band, but did they make the right move here?

**Gail:** Absolutely.

**Steve:** And by the way, there are no opinions here. We know that we're not, you know, opining us anything. We're just, you know, talking about these cases, but yeah. So what'd you think of this one?

**Gail:** So as a brand owner, that is the right strategic move to make. You know, they have, Iron Maiden has trademark registrations that cover Iron's goods and services that they are currently doing, the names are visually similar. I think someone could be confused. I believe in the pleadings they indicated that there were already instances of actual consumer confusion, where they were affiliating or associating the game and Iron with Iron Maiden, and that's what trademark law is all about.

**Nick:** Can't imagine why. You know, what's interesting here to me, one piece among all the other parts of the case, is Iron Maiden actually had a video game previously. It was called Legacy of the Beast. So it makes it a little bit easier for them to argue that there's possible confusion because it's not like a completely new space or a completely new expression of the band, right, because actually having made a video game, someone might think that this, you know, is just another one.

**Gail:** Absolutely.

**Steve:** What kind of tips would you give, and I know that we're going to do our takeaways later, but, like, if you were going to create a game, how close would you get to something like this? Where's the line, I guess, where you've got this general, you know, I don't know. I guess, what would be your, you know, rule of thumb when it comes to building IP around something that might touch other IP? Like

run for the hills? Like you want to stay as far away as it is possible, or do you have any takeaways? Is it just too grey? I don't know.

**Gail:** So, I'm going to give you the typical lawyer advice that I'm sure you have given before, is it depends. It depends on what we're talking about here. Is it trademark law, copyrights, or patents that are being implicated? You know, so that's one thing that we look at. You know, most of what we've been talking about today is either in the copyright and the trademark context. With trademark, you know, you don't want to pick a name, a domain, or, you know, characters that are similar to something that's already out there, especially something that's famous, especially like Iron Maiden.

**Steve:** Right.

**Nick:** Maybe don't take a 40-year brand and change one letter.

**Gail:** That's good advice, Nick.

**Steve:** Good take-away for this one.

**Nick:** We're not taking sides. I was just using that as a hypothetical.

**Gail:** Total hypothetical.

**Steve:** What about if you're approached by a client who is been around, you know, the landscape for 140 years, and they're saying, listen, I found my great-great-great grandfather's company's name referenced in this game.

**Nick:** And he was dancing.

**Steve:** And he was dancing the Floss in the hills of Montana. I don't know where Red Dead is because, again, until they port it to PC I won't know, but Red Dead trademark lawsuit, how does that look?

**Gail:** So you're combining all of the cases we discussed into one. Sounds like a law school exam.

**Nick:** Yes or no, Gail!

**Gail:** Did the helicopter explode, too, and fall on my grandmother? So, you know, with the Pinkerton case, it's, I can see why the lawsuit went the way it did, in the sense that there was a declaratory judgment action filed, and that the Pinkerton was upset. They sent the cease-and-desist letter, and



in response, the folks at the gaming company, they filed a declaratory judgment action basically saying, court, please declare our rights, that we are not infringing. And they had...

**Nick:** So the suit was brought by the people claimed to have done the wrong...

**Gail:** Correct.

**Nick:** ...instead of the typical way where someone sues and the defendant is the one...

**Gail:** Correct.

**Nick:** ...alleged to have done the wrongdoing?

**Gail:** Yeah, it's a nice little nuance in the IP world that you can do that. When someone sends a cease and desist letter there, it creates, the buzzwords are actual case or controversy. And once that happens, then someone can file. There's a statute that allows you to go into court first, so, you know, you could pick where you want to sue, and ask the court to make the decision.

And in this case, I think that Pinkerton has a tough, or had a tough row to hoe, and maybe that's why the case resolved itself. And the reason for it, you know, I mentioned before the First Amendment defense. That's a really great defense for, to attack Pinkerton's claim of infringement. I mean, here they're trying to be historically accurate, and how else can you be historically accurate but to refer to, you know, the actual company that was going out and catching the bad guys?

**Nick:** But on the other hand, if you're presenting it as historically accurate and you make them seem, you know, very distasteful or have them doing inappropriate acts that might lead to a type of defamation claim, where's the line on that? You know, can you at the same time, take protection in the fact that you're saying, oh well, it's historically accurate, we weren't going to make up a new entity? But then at the same time also say, oh well it's just fiction, right, they didn't really do all this bad stuff, but you know, that's just part of our story?

**Steve:** This is your second question on the law school exam, Gail.

**Gail:** So, you know, I think in that case it's going to be a fact-intensive inquiry into, you know, what is really, quote-unquote, defamatory, if it even is defamatory. You know, I would argue that it's lessening or devaluing the Pinkerton brand, which would potentially rise to what's called a trademark dilution claim, so their trademark becomes less, it's devalued because, you know, arguably they're potentially making fun of Pinkerton.

On the other side, the other, you know, flip the coin, the argument in response is well, it's parody.

**Steve:** Parody.

**Gail:** And, you know, that gets into the whole 2 Live Crew analysis on, you know, what is a parody? Is there a social commentary aspect to it, and, you know, is it clearly poking fun? Is it a social critique? So that would all need to be, you know, fleshed out in the litigation, which, you know again, the case was dismissed so unfortunately we don't get to see how the court would decide that. But it's certainly, it was an interesting set of facts, and I would have liked to have seen how it would have ended up.

**Steve:** So I want to switch gears real quick to talk about some hot button topics in IP in video games today, and I'm really looking at like the Marshmello concert that, for those who that know, Marshmello's a, you know, rising star in the EDM, the electronic dance music arena, and he had a concert earlier this year in Fortnite that was attended by ten million, ten million spectators, which is...

**Nick:** The concert was completely contained and held and presented within the game of Fortnite.

**Steve:** Right, it was...

**Nick:** To our knowledge, it's the first time something like this has ever happened, certainly not to this scale.

**Steve:** It was the biggest event online and it was three times, I love this stat, it was three times bigger than the most, the best well-attended event, concert in the world. So, thinking, I mean to me that just screams, like, a bunch of new IP issues and new thought, fact patterns that we haven't conceived of before. But I would imagine, you know, maybe it's simpler.

Maybe I'm overthinking it, because if you were Marshmello, before you started that concert, I'd imagine there'd be a contract in place where you'd say, okay, this, you know, music that I'm about to play, these are the rights to it that you may or may not have to play it, and then, you know, if we do a live, I can imagine, like, a Live From Fortnite CD, you know, that Marshmello has of what he played. I don't know, do you have, like, digital crowds screaming in the background?

It's kind of crazy, but I imagine stuff like that's going to happen where IPs going to create with an IP and there's going to be so many stakeholders to that IP that you're going to have to have a contract, right, Gail, to set out the rules with respect to who can do what with it.

**Gail:** Well, if I was Marshmello's counsel, I would certainly tell him that yes, it does make sense and I highly recommend that you have a contract. But another interesting issue to this is, you know, you have so many viewers that are experiencing Marshmello's music that he would have never had except for him being on Fortnite, is who should be paying for who's services? You know, should

Fortnite be paying for Marshmello? Or in turn, you know, I could argue that Marshmello should be paying Fortnite for the exposure.

**Steve:** Who are you representing here, Gail?

**Nick:** That's a great point. I mean, it's mutually beneficial, right? And the question is who's getting more out of it, and I imagine both sides would say, you are.

**Gail:** I would imagine, you know, Fortnite could get any artist it probably wanted after this, and people would be lining out the door.

**Nick:** In that regard, the famous, you know, well-known band Weezer released an album in Fortnite around the same time, I think it was a little after the Marshmello concert, but I could be wrong about that. But they actually had a whole island in the game dedicated to their new album that they released for free, at least at the time, through jukeboxes in the game. And I understand that was pretty well-attended, too, and so that supports what you were just saying, Gail. Sorry to interrupt, but I wanted to throw that out there.

**Gail:** Yeah, and then think, you take it another step further and, you know, you have Coachella where there's, you know, they're doing live feeds with drones and now you have artists that are performing live in video games like Fortnite, you know, what is going to be the future of concerts?

**Steve:** Right.

**Gail:** You know, are people really going to go to venues and spend all this money or are they just going to turn on their console?

**Nick:** You can't mosh on a PlayStation, though.

**Steve:** That's true.

**Nick:** I want to throw that out there.

**Steve:** That's true.

**Gail:** I feel like you could in your living room.

**Nick:** I like your attitude.

**Steve:** Gail, that's going to start looking like my dance, unfortunately, so you can't do that.

**Nick:** Be careful.

**Steve:** Yeah, be careful. I'm going to...

**Gail:** I'll show you my mash.

**Steve:** I'm going to send a takedown request. I want to switch, before we leave Fortnite altogether, I wanted to mention things that we're seeing in games, and from what I understand to be pretty common, fan content policies. So when you sign up to create an account to go and play Fortnite, you have to agree to certain things, their terms of service, privacy policy, and a fan content policy, among other things. And that policy will say, you know, we appreciate all of our excited fans that want to, you know, make a Fortnite T-shirt or banners or digital, you know, IP, but you can't monetize it. You can't commercialize it. I just wanted to get your take on stuff like that. Is that something common to or maybe unique to video games, or are they in other industries as well?

**Gail:** Yeah, we've actually been seeing this for a really long time. You know, with the birth of the Internet, and now I'm really dating myself, we have terms of use policies and you have folks that have message boards, you have contests that are conducted solely online where people are putting up videos or, you know, they're making T-shirts. And the contest rules or even the terms of use of the website will say, we own everything you send to us, you have to abide by all these rules, you can't bully people, you can't put up defamatory conduct. And, you know, even if the court finds that we didn't own this stuff and you didn't give it to us, then we have an assignment in perpetuity to use it however we want. We don't have to pay you a dime. So you're basically, any time you give up something, you know, through the game or online, you are, for the most part, generally speaking, if they're drafted properly, are assigning and giving away all of your rights to whatever you've posted or content you've created. So, it's a little scary for the, you know, gamer. Something you certainly need to be aware of.

**Nick:** That means that Steve can't sell all of his finely crafted Battletoads crafts that he's been putting together over the last 20 years.

**Steve:** Cat's out of the bag now, Nick. Thanks, appreciate it. And what's also neat about Fortnite's fan policy is they have a disclaimer in there that says if you send us your content we will destroy it, so don't bother. I love that. So but I mean like where's the line, Gail, if I wanted to take the Little Llama in Fortnite and create an art out of it, right, like I wanted to paint something, is that considered fan content? What if I'm an artist and I actually, you know, I have people who pay for my art? Can I do that? Can I paint the llama in abstract expressionist painting?

**Gail:** So the artist would say that this is what's called a derivative use, so you are creating new copyrighted content by adding your original authorship to it so that you wouldn't be infringing.

However, Fortnite and the owners of that content may take a different approach, especially with these fan content rules. You know, they could construe, you know, fan content rules are arguably a binding, enforceable contract. So as, you know, being allowed to pay the game you are agreeing to these terms. And so if the terms prevent you from commercializing anything with the game and selling it then, you know, you might have some liability there.

**Steve:** Geeze Gail, you know, Nick and I are very fortunate that you're part of the team because not very many people have...

**Nick:** Yes.

**Steve:** ...the resource to be able to ask you these challenging questions. I don't know how many types of law school exam questions we've asked you today, but I tried to stump you more than once.

**Nick:** I thought can you paint the llama was going to do it, but.

**Steve:** Right? It was my, you know...

**Nick:** She had the answer to that too.

**Steve:** ...last ditch effort. But, you know, for those that don't have Gail on speed dial, what are some of the takeaways or things, resources that are available for, I don't know, there's many players involved, you have the game developers, you have the content creators who I think may be the most vulnerable because they might not know where the lines are and they don't want to get a takedown request on YouTube or wherever else they're putting their content. So, do you have any tips as we wrap up?

**Gail:** Yeah, I do have a few. So, first a little shameless plug for our firm. We do have some great free content that, you know, would be very beneficial I think for both gamers as well as content creators, developers. We have a website, it's called [launchtothrive.com](http://launchtothrive.com), and it provides free legal resources. You can get an IP assignment, trademark assignment, a model release, so if you're, you know, using peoples' images or photographs, as well as some other, you know, basic incorporation documents, so if you're going to start a company or a joint venture with some developers or content creators. And so that's a really good reference. Also, I have to say the U.S. Government does a really good job at explaining some of these issues that we've talked about today. So for copyright, the website's [copyright.gov](http://copyright.gov), and then for trademark and patent it's [uspto.com](http://uspto.com), and that stands for United States Patent and Trademark Office. So those are two free resources that also provide some great content.

**Nick:** Great, that's great. Thank you. Alright, well I think that wraps up our show for today, but we do want to take a moment and extend a sincere thank you to Gail Podolsky for coming and helping us

out here.

**Steve:** Yes. Thank you Gail.

**Nick:** Not only are you sharing your time with us, but your very helpful expertise, even though it might end up now in more of Steve's dance maneuvers, but we will weather the storm over here.

**Steve:** I'm dancing right now, Nick.

**Gail:** And I love it.

**Steve:** Well you viewers, listeners can connect with us on social media, on Instagram, or through our webpage [lanpartylawyers.com](http://lanpartylawyers.com). Be sure to check out other episodes from Season 1 of the podcast. And unless you have anything else Nick, I think we're done here.

**Nick:** That's all I've got. Game on.

**Steve:** Game on.

## Presented By



Gail Podolsky

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