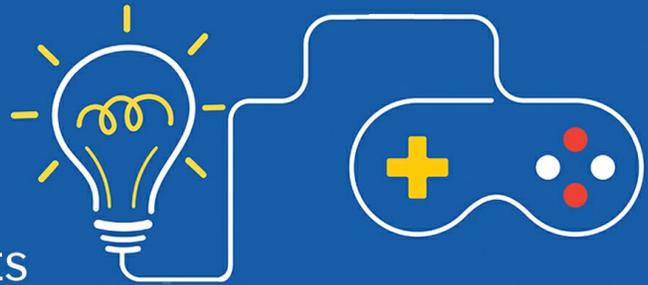


BACK TO BASICS:

A PRIMER ON INTELLECTUAL PROPERTY RIGHTS IN VIDEO GAMES



Getting Creative with Video Games: Copyright, Public Domain, and Fair Use

ESPORTS AND ELECTRONIC GAMING | INTELLECTUAL PROPERTY | SEPTEMBER 11, 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).

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Getting Creative with Video Games: Copyright, Public Domain, and Fair Use

Securing the trademark to your new video game project, **YOWZA!!**, is but one step among many in ensuring the maximum protection of intellectual property rights in your new video game. Next, you should consider protecting the game's storyline, graphic characters, artwork, and music. This is achieved by ensuring that you own all of the material in your game and getting a copyright registration (or two) to enable you to enforce it.

Copyright 101

Copyright law is anything but intuitive. To the contrary, it's a brain twister, using terms that mean something other than what they seem to mean. We're here to help you understand the basics so that you can both protect your game and respect the proprietary rights of others.

When people refer to "copyright," they are actually referring to a bundle of exclusive proprietary ownership rights in a work of art fixed in a tangible medium of expression. As relevant to the video game industry, a "work of art" includes audiovisual works; computer programs; literary works (e.g., the instructions, written script, etc.); artwork (all scenery, graphic characters, animation); and third-party prerecorded music.

In general, copyright provides the owner with the exclusive right to reproduce, distribute copies of, display, perform the work, and create derivative works. This means that no one can use your game - or any copyrightable elements of it - in their game or for any other purpose without first getting your permission (by, for example, buying a copy and playing it in its intended manner).

Copyright in your game, **YOWZA!!**, exists as soon as at least some of the creative expression of the game has been fixed in some tangible media - on paper, in software, on film, etc. Copyright in your game will extend to the story, graphic characters, artwork, original music, original code, the rules, as well as the entirety of the video game as a single copyrighted unit. What that means is that you can protect the entirety of the video game as well as the elements of the game, such as the individual graphic characters.

As the game develops, the copyright only extends to what is already in existence. If you create the first half of the game on

Monday, the copyright is in that half only, not in the second half. When you finish creating the game on Tuesday, you now have a copyright in the entire game.

This also means that owners of other works of art also own the copyrights in them, and they, too, are the only ones who can use their works unless they have granted permission for others to use it. Streamers who have been asked to take down a video game that has third-party music playing in the background may be all too familiar with this concept without knowing it. That's because the third-party owner of the music also owns the copyright in it, and using it without permission violates the owner's exclusive proprietary rights. Think of copyright as giving its owner the legal right to tell others what they can and cannot do with the work.

An important point to remember is that copyright exists in your work of art, whether or not you register it. A copyright registration is merely a *claim* of copyright that already exists. However, registration of your copyright is *required* to be able to bring a lawsuit for copyright infringement. And if you have your registration prior to the start of the infringement, you'll be eligible for certain additional benefits, including statutory damages and attorneys' fees, which you can't get if you register the copyright after the infringement starts. You don't have to wait until the game is finished to register the copyright. At any point before the game is actually sold, you can obtain an "unpublished" registration. Once the game is commercially available, you can then obtain a "published" registration.

Another important point is to be sure to own all of the rights in your creative work. If you personally create all of the elements of the game - the code, story, artwork, characters, rules, etc. - then you're fine. Likewise, if you own or are a part of a company with actual employees to whom you pay salary, FICA, health benefits, or who are otherwise considered employees by the IRS (and only the employees create all of the elements of the game), the company will own the copyright to the game. The trouble can start when you bring in outside developers, contractors, and artists to work on the game. We'll cover more about that in a future article.

How Do I Know If It's Copyrighted?

There's so much great stuff on the internet - music, artwork, photos - to name just a few. Just as you created your game and have a copyright in it, someone else created that music, artwork, or photo and very likely has a copyright in it. The fact that a work you want to use is available on the internet doesn't mean that it's available for others to use. In all likelihood, someone owns it and it's protected by copyright.

Copyrighted material is typically identified with the copyright symbol: ©. There is no requirement, however, that the copyright owner use the symbol or put any identifying information on the work. And the lack of a copyright notice does not mean that the work is not protected by copyright. And remember, a copyright exists whether or not it's registered. So how can you tell if it's protected or not?

Here's a quick way to determine if a work has a valid copyright. If it was created 95 or more years ago, it's no longer protected by copyright and is free for use by anyone. If it was created between January 1, 1925, and December 31, 1963, *and* (i) it was registered and (ii) its copyright registration was renewed (there was a renewal period back then), then it is copyrighted for 95 years from the date of its creation. You can find out if the copyright registration was renewed by searching the records of the U.S. Copyright Office or, better yet, asking your experienced IP attorney to do that for you. If the work was created after January 1, 1964, then it is copyrighted for 95 years from the date of its creation. If it was created on or after 1978 by an individual, then the copyright is valid for the lifetime of the individual plus 70 years, otherwise for a period of 95 years from publication or 120 years from creation, whichever comes first.

But here's where it gets tricky. Beethoven's "Fifth Symphony" is long out of copyright, but a new London Philharmonic recording of it is copyrighted. Jane Austen's "Pride and Prejudice" is out of copyright, but the movie starring Colin Firth as Mr. Darcy is copyrighted, as are recent new published versions that are edited and annotated.

In other words, pretty much anything contemporary is covered by copyright and owned by someone, even if the subject matter itself may be out of copyright. If in doubt, assume that it is copyrighted, especially if it's something famous. Or check with your experienced IP attorney, who will know how to find the answer for you.

The Myth of the Public Domain

A concept one hears often when discussing the use of copyrighted work is public domain. But what does it mean for something to be "in the public domain"? Probably not what you think. A work that is "in the public domain" is no longer protected under the Copyright Act, either because the copyright term expired, as discussed above, or the owner specifically renounced the copyright (think UNIX, open-source software). At that point, it is available for anyone to use however they want. But as long as a work is still within the copyright term and the protection has not been renounced, it is the proprietary property of the owner of the work and protected under the Copyright Act.

A work is *not* in the public domain simply because it is posted on Reddit or shared on Twitter, Instagram, etc. Unless the owner placed it there with express permission for others to use for any reason, you can assume that someone placed it there without the authority to do so.

A perfect example can be found using Google images to look up "Deadpool." You'll see myriad posters and graphics of Ryan Reynolds in full Deadpool gear. Are they in the public domain because they are on Google? No. To the contrary, they are all copyrighted and owned by Twentieth Century Fox, which in turn is now owned by The Walt Disney Co. Of course, most of

the images do not reference Twentieth Century Fox or Disney and, in fact, may even reference someone or something else. Google "picked" them off the internet through its search engine algorithms, without regard for any copyright disclaimers.

The ease of access on the internet to characters, video clips, stills, and music from the likes of "Star Wars," "Game of Thrones," and Queen does not mean that any part of these works are in the public domain. Unless they are on the obvious owner's website (Disney, HBO, Sony Music, etc.), you can assume that they are on the internet without authorization from the copyright owner.

What does this mean for game developers and those playing the games? It means that most of the stuff that's accessible on the internet (and that you probably want to use in your game) actually is copyrighted and belongs to someone, is not in the public domain, and thus is not available for anyone else to use without permission.

So no, you probably shouldn't use the material you found online in your game, at least not if you want to avoid running a substantial - and potentially very expensive - risk of being sued for copyright infringement. Such a risk includes the copyright holder hindering you from being able to sell or use your game as long as you have the unauthorized copyrighted content in it.

It's Really Not Fair Use

Another oft-misunderstood copyright topic is "fair use." At first blush, one would think that fair use gives anyone the right to use another person's copyrighted work as long as the person uses it in a "fair" way. Well, that's partly true. But it's not an affirmative right. It's actually an affirmative *defense*, and this is a significant distinction.

Fair use is a very specific statutory defense to a claim of copyright infringement, and it only works after copyright infringement has been proven in litigation. It doesn't give someone the right to use a copyrighted work with impunity.

So, what is fair use? It's the use of a copyrighted work, without the permission of its owner, only for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research." In other words, it's the use of the work for something about the work: to critique a work, review it, report on it, teach it, use it in educational materials as part of course work or in a thesis, or use it in research (with quotes and credit references).

There are a number of factors the courts consider in determining if there has been a fair use of a copyrighted work. These include things such as whether the use was for commercial purposes (a big factor that torpedoed most "fair use" arguments), how much of the copyrighted work was used, and the effect of the use on the value of the copyrighted work. Parody, entertainment, and transformative purposes have rarely been found to be fair use.

Bottom line: Fair use is likely not going to be a good defense for a video game that incorporates someone else's copyrighted work into the game.

Copyright (Not Copywrong)!

As we said, copyright law, with its various ins and outs, is not intuitive. Terms such as "public domain" and "fair use" don't necessarily mean what you'd think they should mean. Trying to determine if something is copyrighted, to whom it belongs, and how to get a license to use it, can make one's head spin.

As the developer of **YOWZA!!**, copyright is one you want to get right because you obviously want to own, protect, and enforce your valuable proprietary IP rights. At the same time, you need to be careful not to inadvertently step on anyone else's rights and wind up on the wrong side of a copyright infringement suit.

Now that we've covered the basics of copyright, it's time to dive into DMCA takedowns. We'll cover that in our next *Back to Basics* article - available here!

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