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Getting Creative with Video Games: Whose Game Is It, Anyway?

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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 and here).

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At this point, **YOWZA!!** the videogame in which you try to keep as many characters walking and chewing gum at the same time, is in production. We've got the software programmers, scriptwriters, graphic artists, digital effects crew, packaging designers, and rest of the team working away. And you're paying them a lot of money to work that hard. But did you know that *they* may own what you're paying them to create for you? That's right - you may have paid for the creative work, but you might not own it.

In order to "own" the videogame **YOWZA!!** you need to own all of the copyrights in it. As a multimedia work, a videogame comprises lots of different, separately created and independently copyrightable elements - software, graphics, music, the script, and more.

If they're all your employees - i.e., they get benefits, health insurance, salaries (you take out FICA), profit sharing - then you don't need to read any further, because you're fine. The company owns all the rights to **YOWZA!!** But if any or all of your staff are not your employees - i.e., they're independent contractors, consultants, get W-9 forms, get no benefits or health insurance or profit sharing - then you need to read on. This is an increasingly complex and important issue for game companies, as states such as California seek to change the law to effectively narrow the definition of independent contractor.

Copyright Ownership & Work for Hire

As previously covered (here), copyright rights are created automatically as soon as a copyrightable work (software, graphics, music, the script) is "fixed in tangible form." In general, ownership of the copyright in that work automatically belongs to the person who first created it. So the programmer owns the code, the graphic artist owns the graphics, the composer owns the music, and the scriptwriter owns the script.

There are two exceptions, both under the rubric "work for hire," which is perhaps one of the most misunderstood (and difficult to understand) provisions of the U.S. Copyright Act. A work for hire is a copyrightable work commissioned by one person to be created by another person that is deemed to be owned by the commissioning person (or company) under two very specific circumstances:

1. The person creating the work is an actual employee of the person or company claiming ownership of the copyright and the work was created during the scope of the employee's employment.
2. The person creating the work (a) has a written agreement to produce the work; (b) the agreement specifically states it is a work for hire; <u>and</u> (c) the work is within one of nine very specific categories. If any of a, b, *or* c is missing, the work is <u>not</u> a work for hire, and the person creating the work owns it, not the commissioning party.

Number 1 is easy and obvious, so we'll just focus on number 2, which is neither easy nor intuitive.

There are only nine specific categories for which work for hire applies:

- Contribution to a collective work (i.e., collection of poems or short stories)
- **Part of a motion picture or other audiovisual work (series of related images with or without accompanying sounds)**
- Translation
- Compilation (dictionary, collected works of prior published plays or stories)
- Supplementary work (to comment on or explain a third-party work)
- Instructional text
- Test
- Answer material for a test
- Atlas

Here, the closest category that applies to videogames is "other audiovisual work." But that technically applies only to the "related images with or without sound," and even that isn't well defined.

One thing we do know for certain is that work for hire does <u>not</u> apply to software programming, to individual graphics, to the script, or to music or sounds not integrated with the "motion picture or other audiovisual work." So the question remains open as to whether software development for video games comes with the work-for-hire definition. The same goes for the contractor who designs the brilliant new logo for your game and the cover art.

Assuming work for hire applies, remember that the agreement must be in writing, specify that it is a work for hire, and be signed by both parties. If any of these elements is missing, it is not going to be considered a work for hire, and all of the rights in the work will remain with the third party.

So how do you keep it straight? How do you know when to use work for hire, and what do you do if it isn't a work for hire? Easy.

Get an Assignment and Get It in Writing.

There's a much easier way to get the same result. Rather than taking any chances with work for hire, it is always better to err on the side of caution and simply require all third-party developers and contractors, regardless of what they are creating for you and whether it can be considered a work for hire, to assign all of their copyright rights in the work to you. That assignment will cover anything that is work for hire as well as anything that isn't.

An assignment should be executed before the hiring of an independent contractor. If you already hired the independent contractor, no problem. You can still get one, and should do so now, before proceeding further with your game's development. The assignment must also be in writing and should be notarized. Your experienced IP attorney can assist you in creating the appropriate copyright assignment documents.

Before we end our discussion of copyright, we need to cover the various licenses that apply to music in video games and streams, including sync rights. We'll cover that in our next *Back to Basics* article - available here!