

Protect Your Video Game *Before* It's Finished: Copyright Preregistration is Here

By Marc S. Cooperman and Michael L. Krashin¹

The video game market in 2005 was estimated at a record \$28 billion, second only to film in the entertainment media market. At the same time, the industry believes it lost over \$2.4 billion to global piracy.² Software publishers are only too familiar with the prospect of their video games being widely distributed over the Internet before hitting the shelves. Both Doom 3 and Half-Life 2 were downloaded thousands of times before their official release, resulting in millions of dollars of lost revenue.



Screen shot from Doom 3 which was downloaded thousands of times before its official release date.

As piracy of all forms of electronic media has dramatically increased over the past decade, lawmakers have reacted by giving developers several new weapons to combat the onslaught of infringement faced in the digital age. Late last year Congress and President Bush added another weapon to the copyright holder's arsenal: Preregistration. President Bush signed the Artists' Rights and Theft Prevention Act of 2005 into law on April 27, 2005, and works became eligible for Preregistration beginning November 15, 2005.

The idea behind Preregistration is simple. Before Preregistration, if a copyright owner wanted to bring a lawsuit against someone who was infringing the owner's work in progress, the owner faced a major roadblock: the work needed to be completed before it could be registered, a lawsuit filed and relief obtained. Preregistration changes all that. Now, with Preregistration, a lawsuit for copyright infringement can be brought *for works still in progress*, and before final registration, provided a few key criteria are satisfied.

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² "2005 Estimated Trade Losses due to Copyright Piracy," International Intellectual Property Alliance (IIPA), available at <http://www.iipa.com/statistics.html>.

First, and most importantly, the Copyright Office has determined that only certain types of works are eligible for Preregistration. These include computer programs, such as video games, and advertising or marketing photographs. Also included are movies, sound recordings, musical compositions, and certain literary works. Second, the work must be prepared with the intent to distribute it to the public. Finally, the work must be “unpublished.” As understood in copyright law, unpublished works are those that have not been made available to the public, either for a charge or for free. If all three of these criteria are met, the Preregistration process itself is easily accomplished.

To secure Preregistration for a work, all an applicant must do is fill out an application and pay a \$100 filing fee. The application is straightforward, and simply requires the applicant to identify the type of work (such as a computer program) being Preregistered, the working title, the author, the copyright owner, a few key dates, such as when creation of the work began, and a description of the work being Preregistered. Once the application is filed and the fee is paid, the work is Preregistered. The entire Preregistration process can be completed at the Copyright Office’s website, <http://www.copyright.gov>.

According to officials at the Copyright Office, as of the beginning of April 2006, over 100 works had already been Preregistered. The Copyright Office is in the final stages of updating its online database to allow for searches of Preregistration records, and these will ultimately be available to the public through the Copyright Office’s web site.

The work must ultimately still be registered, for Preregistration is not a substitute for registration. An applicant who Preregisters a work must generally register it within three months of publishing the work, although this time period for registration can be shorter if an infringement suit is brought based on Preregistration. The reason the work must ultimately be registered is because the Copyright Office views Preregistration “as an indication of an intent to register a work.”

Even though registration is still required, that is no reason to ignore Preregistration. If the work meets the three criteria discussed above, the work can be Preregistered. With Preregistration, a copyright owner can now bring an infringement suit while the work is still in progress, making a whole host of remedies available to the copyright owner before registration. These remedies include obtaining an immediate injunction (for example, a temporary restraining order or preliminary injunction) to stop the infringement, monetary damages to compensate the copyright owner for the losses suffered as a result of the infringement, and/or obtaining a court order to seize the infringing goods. Given all these available remedies, and the fact that the lawsuit can now be brought before the work can be registered, it is clear that Preregistration is a powerful weapon, and video game developers should not shy from using it to combat infringement of their works – even before they are released to the public.