

LEGAL GUIDE TO

ABA Section of
Intellectual Property Law
AMERICAN BAR ASSOCIATION

LEGAL GUIDE TO

Video Game Development

SECOND EDITION

Edited by Ross Dannenberg



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INTRODUCTION

One of the most important lessons I learned early on was to find a great lawyer.

—Ted Price, CEO, Insomniac Games

By 2009, video game sales had outpaced the movie industry, bringing in \$10.1 billion in revenue compared to the movie industry's then \$9 billion in U.S. box office receipts. According to the Entertainment Software Association's 2015 Sales, Demographic & Usage Data, that number rose to \$15.4 billion in 2014. In addition, most U.S. households now own a dedicated game console, and 42 percent of Americans play video games at least three hours per week. The average age of a gamer is 35, and 56 percent of players are male and 44 percent female. Most gamers are still playing games on a PC (62 percent), but they're also playing games on their dedicated game console (56 percent), smartphone (35 percent), wireless device (31 percent), and dedicated handheld systems

(21 percent). Make no mistake about it—video games are big business, and you want to be a part of it.

You're making your own game, which means you're starting your own business. Perhaps you used to be part of the Internet generation—the generation that believes that if something is on the Internet, then it should be free. But now it's your own sweat and tears invested in your company, and you want to be sure that you protect your investment. Let this book serve as one of your many advisors, and you will be well on your way to becoming a start-up millionaire . . . and a video game god.

» THE CREATIVE SPARK

In the beginning there was light . . . well, a light bulb, anyway. It's the middle of the night. You're up late coding some mundane project for someone else; or you're sleeping; or you're playing *Call of Duty*® into the wee hours of the night; you're doing anything but trying to think of the next great game idea. Whatever you're doing, it comes to you when you least expect it—that creative spark. It's the moment you will never forget—the idea for the next *Doom*®, *Grand Theft Auto*®, *Halo*®, or *World of Warcraft*®, the game that will make you millions and will make you an instant celebrity in the video game world. You just thought of a game that no one else has thought of before. It has humor, strategy, puzzles, arcade action, first-person shooter portions, and role-playing aspects, all rolled into one, and can be played on mobile, PC, console, or in virtual reality. Your head is about to explode because the ideas are coming at you so fast. You reach for a pen and paper to start writing this stuff down—or, more likely, you start typing away on your computer so you can remember all this stuff when you get home from Starbucks® or when you get up in the morning. You type for three hours straight. Having completed your brain dump into your computer, you start to ponder the work ahead as you whisper to yourself, “Where do I even start?!?”

This is a common question. Video games have many pieces and components, and you want to be sure to protect all of them as much as possible. You need to start a business, and you want to make sure you do it right. You want to maximize the return on your investment once the game is completed and published. The various pieces of a video game may be protectable under various forms of law in the United States. For example, different parts of the game may be protectable using patent, copyright, trademark, trade secret, and/or contract law, or a combination of many of them. How do you effectively protect everything? What formalities do you need to follow? How much will it cost? How are you going to pay for all this? Do you need to form a company? Can you just sell your game online? Do you need an End User License Agreement (EULA)? What considerations do you need to keep in mind if you market your game online or to children? These

are undoubtedly some of the many questions flying through your head faster than you can process them. Let's start at the beginning.

Welcome to the second edition of the *Legal Guide to Video Game Development*, intended for independent and emerging video game developers, as well as legal enthusiasts. This book has been prepared under the auspices of the American Bar Association to provide a resource for developers as they progress through the development cycle. It will help you avoid some of the typical pitfalls that can occur starting with the moment you get the idea for a new game and continuing through the planning and scripting, financing, development, and finally, distribution.

Each chapter contains a general road map for the phase of development covered by that chapter, including the relevant forms and contracts for that particular phase. The contracts come with plenty of background and some selected negotiating tips. This book is not intended as a substitute for hiring a lawyer and is not intended as legal or professional advice. However, this book is intended to make you a better consumer of legal services. The more you know, the better you and your lawyer will get along, the further your legal dollars will stretch, and the happier everyone will be.

» WHO NEEDS TO READ THIS BOOK?

The book is written as though we are talking to an independent developer of a video game. While the prime audience is the principal development team for a video game, anyone involved in video game development will certainly find various aspects of this book useful.

Business owners, software developers, and graphic designers alike will find this book helpful in understanding their contracts, their place in overall game design and development, and how others on the team fit into the picture. Distributors may also benefit from a clear understanding of all the contracts that ought to be in place in order for a game to be ready for distribution.

All too often books such as this assume that the reader already knows the fundamentals. This book does not assume that. In fact, we assume you know nothing (no offense). But it's better to make sure that everyone is starting on level 1. We discuss each step in the game design and development process. If it relates to the legal or business aspect of getting a new video game made, it's in here somewhere. If it's not, let us know and we'll be sure to include it in the next edition if we can.

One mission of this book is to help you work and negotiate from a position of strength to protect your creative assets. We want you to be able to make your video game with as little legal angst as possible. In this regard, we provide tools throughout this book to protect your IP, your business, and your bottom line so that your investment in your game will last for years to come.

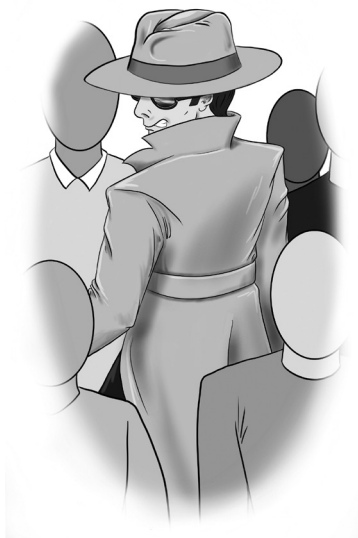
This book is for you whether you are

- Beginning a career and want to impress your employer and colleagues with your legal knowledge of video game design;
- Looking just to brush up your skills; or
- A developer, graphic artist, level designer, or producer involved in making a video game or if you work for one of those folks.

» HOW TO USE THIS BOOK

Think of this book as your friend and coach, a resource to turn to when you have a question. Every page contains information that can help you. Work at your own pace, but keep going. Even five minutes a day makes a difference.

The business of making a video game goes through distinct phases: (1) initial concept, scripting, and mechanics; (2) financing and business formation; (3) development; and (4) distribution. While most games progress through these phases in this order, sometimes things progress differently depending on the game's design, financing, and complexity, so don't fret too much if you proceed in a slightly different order than that presented in the book.



For purposes of illustration throughout this book, we refer to a fictitious game called *IncognitoVito*. The game is fictitious insofar as it doesn't exist, at least as far as we are aware. Any similarity to any existing game is purely coincidental and unintended. The central character in *IncognitoVito* is Vito (see illustration),

whose goal is to remain unrecognized by bad guys and complete missions. Missions are of varying types, genres, and difficulty. Some missions are side-scrollers, some are single-screen arcade, some are third-person role-playing games, some are first-person shooters, and some missions even include the use of electronic trading cards that Vito finds along the way.

Getting Started: Intellectual Property

A good idea is the genesis of any game. After you get your idea for the next *Halo*®, *Grand Theft Auto*®, *Guitar Hero*®, or *World of Warcraft*®, what do you do first? Unfortunately, this is the phase where many developers think they don't need a lawyer or a contract—they will just play one more hour of *World of Warcraft*, code the game in their sleep, and make millions. It's not always that easy—in fact, it rarely is that easy. The first few chapters discuss intellectual property rights, and what you need to do to protect them.

There are many ways to get a game idea—come up with your own, develop a concept with one or more partners, or perhaps adapt a video game from a book or a movie. Whether you come up with your own idea or want to use someone else's, you may need to acquire some underlying rights, most often adaptation rights of some sort.

It's important to get started on solid footing. Too many folks want to move forward on the creative side of things without taking care of the fundamental agreement between or among everyone involved. They say, "We'll take care of that stuff later," "We're all friends," or worse, "We are all working so well together now, I don't want to upset the apple cart." We've heard it all.

Our experience is loaded with problems that grow out of this attitude. If no one is clear about the roles, the ultimate control of a project, and the ultimate vision for the life of the project, people will almost certainly develop different expectations. When the visions finally clash, hurt feelings turn to anger and then lawsuits—useless, needless lawsuits that would never have happened if folks had taken care of business at the beginning. Remember, just like good fences make good neighbors, good contracts make good business partners.

Business and Finance Issues

Too often, no thought is given to the issues of business and finance until the game's script or storyboard is completed. It is a good idea to have a plan to finance your game even as you work on the initial concept. Portions of this book deal with the basic business decisions you will have to make before you develop your game—whether as a corporation, a limited partnership, or working as an individual. Most folks end up using a single-purpose game development entity in the form of a limited liability company (LLC), for example.

Employment and Development

You need to have a number of agreements in place before anyone writes even one line of code on your behalf. As you hire people to help code your game, you want to make sure that you're not giving away the family jewels to people you've just hired. Many new game designers hire developers as independent contractors, which has pros and cons, so we also discuss the types of contracts you will need to ensure that you are the owner of your own intellectual property when your game finally sees the light of day.

Distribution and Publishing

Is your game self-published? Do you have a website with forums? Do you have social media marketing? Do you market to children under 13 years old? This book discusses various avenues of getting your game published and distributed to the consuming public, as well as key issues you need to be aware of while doing so. The publishing agreement is a key component of getting your game onto user's computers. We will examine various business models that publishers often use, and discuss alternative and self-publication avenues, as well as some miscellaneous issues. We also address the Children's Online Privacy Protection Act (COPPA), social media policies, virtual goods, and microtransactions.

» WHERE TO GO FROM HERE

Look through the book to get an overview of the process of taking a game from an idea in your head to the computer screen. Then find the part or chapter that is of immediate concern to you. That is the best place to begin.

Most people won't start in the area where they need the most help. They usually choose their favorite area—the area they are confident about. That's okay. Even your strongest area can get stronger. Then, as you shift your focus to your weaker areas, you'll enjoy the greatest amount of progress.

The most important point to consider right now is that you're already headed toward the winner's circle. The most successful people in life are those who continue to grow. By having this book in your hand, you are now in that realm. It's not how much you know that counts, but how much you are willing to add after you think you know it all.

Good luck, and Godspeed.