



CHAPTER

1

COPYRIGHTS AND IMMEDIATE PROTECTION FOR YOUR IDEAS

By Ross Dannenberg

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

— United Nations, Universal Declaration of Human Rights

» CHAPTER HIGHLIGHTS

- Immediate protection before you do *anything* else
- Basic introduction to copyrights

- Discussion of what copyrights *do* and *do not* protect
- Registering your copyright to obtain enhanced protection

» DOCUMENTS ON WEBSITE

- Copyright Information Form

What makes a business valuable? Well, there are lots of answers to that. Your employees? Your artists, designers, and developers? Your users? Your ideas? Your brand? The answer is yes, to all of these questions. But as a video game company, all of these assets revolve around one thing: your intellectual property. If you can't protect your intellectual property, then there really is no way to stop someone else from coming along, copying your idea, and competing with you.

Whether you realize it or not, intellectual property is the single most valuable asset of almost every successful company. U.S. intellectual property laws provide the incentives for individuals to take risks, for companies to invest in research and development, and for the Davids of the world to continue to believe that they can (and often do) conquer the Goliaths.

Software, including video games, is protectable using at least five forms of intellectual property: patents, copyrights, trademarks, trade secrets, and contracts, each is discussed in this book. Different situations often demand different plans for protecting your software, so consider each form of intellectual property and make an informed decision regarding which form or forms of protection best suit your needs. Chances are you already rely on copyrights, trademarks, trade secrets, and contracts. Some of you might even already rely on patents.

As a software developer, you probably already have some familiarity with copyrights, so let's start there. And if you're reading this book, it's likely because you have something worth protecting, or you need immediate help. The first half of this chapter contains some immediate self-help, followed by more information about copyrights generally. The rest of this book then provides a lot of additional information that you will find useful, including information on the other forms of intellectual property, business issues, and publishing.

» IMMEDIATE PROTECTION

You've just come up with a new idea for a video game (or TV, movie, etc.): *IncognitoVito*. *IncognitoVito* is not just an idea, but a whole concept, including story, theme, genre, gameplay, points system, multiplayer angles, in-game add-ons, bonus features, and even secret levels and Easter eggs. You spent all weekend writing up a description of *IncognitoVito*. The question is, what is the best way to protect it—and fast? The only way to raise capital is to share your

idea with others, but the only way to truly protect an idea is to keep it secret—it is a catch-22. This dilemma is not new, and it is not unique to video games. The document you created is often referred to as a treatment, and it is commonly used for TV and movie proposals, too.¹ The same principles of protection apply regardless of whether your treatment is for a television show, a movie, or a video game. This chapter addresses steps you can take to protect your idea while raising capital and garnering interest, but before you begin production or development in earnest.

First, the good news. U.S. copyright laws protect your creation automatically the instant you fix your work in a tangible medium of expression, namely, when you save the treatment to your computer's memory or print (write?) it on paper (napkin?). To discourage others from copying your work, always include a copyright notice. Copyright notice includes the © symbol followed by the year of creation/publication, followed by the copyright claimant's name (i.e., your name or company), and it might look like this: © 2016 American Bar Association. Now, the bad news. Copyright law is not as strong as you think. Keep reading.

You are probably proud of your ideas for *IncognitoVito*, and your natural instinct is to want to discuss your ideas with a few close friends, perhaps some business contacts or a “friend of a friend” in the industry, to see what they think. *Resist this urge.* Above all, trust your own instincts in developing your treatment, because there will be time to get feedback from others *after* you take some simple steps to protect your idea in the first place. If you discuss your idea without taking necessary precautions, your idea may become public domain, or at least publicly known, and it is not easy to put the genie back in the bottle.

Copyright law is intended to promote the progress of creative endeavors and provide incentives for development of creative works. However, copyright law does not protect an idea in the abstract—copyrights only protect the *expression* of an idea, namely, your treatment. This is referred to in copyright law as the *idea-expression dichotomy*. Ideas, general concepts, and vague notions are not protectable—only the *expression* of the idea is protectable. That expression is your treatment that you spent time, energy, and passion developing into a well-rounded pitch for a video game (or movie, or TV show). If you protect the treatment, and if you can prove someone copied expression from it, then you just might be able to succeed in protecting yourself. The reason we say “might” is that you will face a lot of hurdles, pitfalls, and obstacles along the way. Among these is the possibility that your idea could be “stolen” by a very large bad corporation, leaving you as just an individual with a great idea. Bad Corp. has money for lawyers—you don't. We'll get to that later.

Okay, so what do you do to protect your idea? Two things. First, include in your treatment as much detail as possible—the longer, the better—to demonstrate

1. Similarly, you may have created a “sizzle reel,” a short compilation or video demonstrating what your game might actually look like. Throughout this document, when we refer to a treatment, we're including the sizzle reel as well.

your expression of the underlying idea. Everyone knows the three rules of real estate: location, location, location. Similarly, there are three rules to making sure that a treatment is protectable: details, details, and more details—include them all. Second, register your treatment with the United States Copyright Office. It's easy to do online by creating your own U.S. Copyright Office user account at www.Copyright.gov/eco/. After creating an account, select the option to "Start a new claim." The system will then walk you through the necessary form. You don't have to fill out anything marked "optional." Required items are marked with a red asterisk. Once you've completed the forms, you can pay the \$45 filing fee using a credit card and then upload a copy of your work in PDF or other acceptable format.² The process is fairly simple and straightforward, and registration certificates are typically mailed out within 4 to 8 months (retroactive to your date of submission). In appropriate circumstances, for example, if someone is already infringing your copyright, you can pay to expedite the process and obtain a registration certificate within one week (for about \$750). A copyright registration provides proof that your idea contains protectable expression, and that you had created it at least as early as the date that you registered it, which is ideally long before you discuss the idea or show the treatment to anyone else. A copyright registration is also necessary before you can sue anyone for copyright infringement, as we discuss later.

If your treatment is just one or two pages and contains only a high-level overview of your game or concept, then courts might view it as not detailed enough to enforce against someone else. This can happen even though you've documented your treatment, and even though you registered the copyright, so again, be sure to include lots of details. If your treatment is short, then even a copyright registration might not save the day, because certain elements or aspects of an idea may be necessary to use in *any* expression of that idea (e.g., all stories about Camelot include Knights of the Round Table, right?). However, because registering a copyright is affordable and simple, it is worth pursuing as inexpensive insurance. By timely registering your copyright, you also avail yourself of some special remedies under copyright law, such as the ability to recover attorney's fees and statutory damages if you have to sue someone to protect your work.

You also may have heard that registering your treatment with the Writers Guild of America is the right way to go. That's sort of true, but not entirely. You certainly can register your work with the WGA. It's easy to do online at <https://wgawregistry.org/> or <https://www.wgaeast.org/>, depending on your geographic location, for no more than \$25. However, registration with WGA does not provide the same benefits as a U.S. copyright registration. WGA registration merely serves as evidence of a date when you created your treatment. There is no presumption of validity of the copyright in the treatment as there is with a copyright registration, and a WGA registration is valid for only five years. A copyright registration provides the same evidence of creation as a WGA registration, and it is valid for your lifetime plus

2. You can download a free PDF printer from online sites such as www.CutePDF.com, www.FreePDF.com, and others.

70 more years for your heirs to benefit from your work. So for the extra \$20, you're better served by registering the copyright with the U.S. Copyright Office and then also registering with the WGA if you are so inclined.

After registering your treatment you can freely discuss the game with others, right? Wrong. Even though you have registered your treatment, keep in mind that the treatment might ultimately be determined to be too vague to protect your game idea when a competitor creates a similar game. In one famous case, a treatment for a TV show about a well-to-do African American family with a comical doctor patriarch and an intelligent lawyer matriarch was determined not to be detailed enough when the treatment's creator sued the producers of *The Cosby Show* in the mid-1980s. The treatment's creator lost, even though there was proof that the television network had received the treatment before the creation of *The Cosby Show*, because the treatment was determined to express a mere idea. This is not uncommon. Remember: details, details, details.

Because registering your treatment might not be enough, what else can you do? Of course you want to send your treatment to all the major studios to see who is interested, but how do you ensure that you are protected before sending your baby out into the wild? Current best practices include relying on contracts to protect yourself and to protect your idea. What does this mean in practice? This means that you discuss your game only with someone under an obligation of confidentiality or secrecy, and that you have a record of such obligation. This also means that you take the time to confirm, when sending your treatment to someone, that the recipient understands that in exchange for sharing your treatment, he is agreeing to compensate you in some form (e.g., financially, giving credit as a writer/producer, etc.) if he uses your idea. Never tell your ideas to anyone who has not promised, preferably in writing (such as in an e-mail that you have saved and printed), to compensate you if they use your idea. If there is no preexisting agreement, ask permission in writing before sending your treatment to someone. The reason for asking permission is that, absent a denial of permission, a court may (but is not required to) consider the recipient to have agreed to the terms and conditions in your request for permission. Do not pitch your treatment if the other person refuses, because then you may lose control over your idea once it leaves your hands.

Sometimes studios will request that you sign a release before they agree to receive a treatment. Every release this author has ever seen, when read carefully, actually gives the studio the right to use the treatment and any ideas therein in any way they want—without compensation! If you sign the release, you are highly unlikely to ever see a dime or ever be recognized in any project they develop from your treatment. Thus, never sign a release if you are unsure about the legal ramifications of doing so. Alternatively, hire an attorney or agent to make the submission for you.

After providing a treatment and/or pitch to someone, always take the time to send a follow-up letter. This is not just a thoughtful gesture; it also serves to protect your own interests. In the follow-up letter, thank the person for her time. Remind her that the purpose of your pitch was to sell the idea, that the treatment

is confidential, that the treatment should not be disclosed without permission, and that she has agreed to compensate you in some manner if she decides to use your idea. Include the agreed compensation, if known, in the follow-up letter. The letter is a reminder to the recipient of your treatment that an agreement is in place, and it further serves as proof of an agreement should that person subsequently abscond with your idea and try to pass it off as her own. Remember, *ideas* are not protectable by copyright, so the letter and agreement are ways of protecting your ideas using contracts in situations where copyrights may be insufficient.

Hopefully it won't happen, but despite your best efforts, someone may still steal your idea. Is it worth suing them to defend your honor and to receive just compensation? It depends. Remember, copyrights protect only the *expression* of an idea, not the underlying idea itself. So you need to ask yourself: Did the infringer copy my actual expression, or did he just copy the underlying idea? In the entertainment industries in particular, sly fox producers know the boundaries of copyright law (or think they do), and make efforts just to copy an idea, and not the expression of that idea. This is where the advice of an experienced attorney will be helpful.

Because attorneys can be expensive, there are a few things you can do to expedite the vetting process and save yourself some money at the same time. First, get a referral for an attorney from someone you know. You likely know at least one attorney, or someone who knows an attorney. Perhaps one of your parents or colleagues knows an attorney. Ask that attorney for a referral to a copyright litigator, because a referral is generally a better way of finding an experienced attorney than just looking at the back page of the phone book or looking for the website with the most meta-tags.

Next, create a folder containing all your evidence. It is good to have everything saved in one place on a flash memory drive or similar storage, but it also doesn't hurt to print out each piece of evidence—physical evidence—and create a file of physical evidence. Print all e-mail correspondence and letters to/from the bad actor, correspondence to/from the U.S. Copyright Office regarding your copyright registration (you did register the copyright, right?), correspondence with the WGA (where applicable), copies of communications with anyone you believe may have passed information to the bad actor, and anything else you can think of that is in writing or otherwise tangible in some form. Memories fade, so take the time to write down on a notepad, using a separate sheet of paper for each person, everyone you can remember talking to regarding the treatment or the game idea. For each person, include the date, time, location, and substance of the conversation, as best as you can recall. After organizing the evidence in chronological order, you are ready to meet with your attorney, and he will advise regarding options and next steps.

As noted earlier, the only way to truly protect an idea is to keep it secret. But that strategy is not very practical if you want to have a career in video games. An ounce of prevention is a pound of cure. It is much easier and more cost effective to protect yourself during the pitch process using copyright registrations and

contracts than to try to scramble to find a solution after someone copies your idea. By taking the time to complete these entirely doable precautions, you demonstrate to others that you are serious about business (and thus more likely to be taken seriously), and you also put yourself in a strong position to enforce your rights if the need ever arises.

The principles just described provide general guidelines for protecting your video game, TV, or movie idea. They are by no means exhaustive. For example, unlike TV shows and movies, aspects of video games may also be protectable using patents, which must be pursued within certain time frames or are lost forever. Patents are discussed further in Chapter 3. If you develop and release your own game, your name or brand may be protected under trademark law. Trademarks are discussed in Chapter 2. For more information on these issues, you can also review the Patent Arcade (www.PatentArcade.com), a blog dedicated to the cross section of intellectual property and video games.

» COPYRIGHT BASICS

What is a copyright? What does it protect? Copyrights are perhaps the most common form of intellectual property (IP) protection for software because you get them automatically, and copyrights are often mistakenly regarded as the only form of IP protection for software.

Copyrights date back to old England, before the United States was even born, when the king (or queen) would grant a single person the *right* to print *copies* of a particular book in exchange for a payment of royalties to the king. Today, a copyright protects *creative works fixed in a tangible medium of expression*. Copyrights are commonly used to protect artwork, literary works and books (such as this one), music, plays, movies, software, and architecture. As discussed earlier, a copyright does not protect an idea—copyright protects only the *expression* of an idea. This is known as the *idea/expression dichotomy*, and it is a key limitation of copyright protection, so we will be repeating it often. Copyrights protect only your particular expression—the actual words used in a book, the specific picture or artwork drawn, the particular combination of musical notes that form a song—not the *idea* represented by that *expression*. Similarly, copyrights do not protect functional aspects of anything. Copyrights are meant to protect creative expression. You can protect functional creations only by using other forms of intellectual property (e.g., patents, contracts, trade secrets; discussed later). There is often a subtle distinction between function and aesthetics, however, so distinguishing the functional from the aesthetic is not as simple as it may seem. For example, a graphical user interface has elements of both functionality and aesthetics. A graphical user interface provides functionality to a user while having a distinct appearance. If someone “re-skins” the user interface, the functionality remains the same even though the aesthetics may have changed dramatically.

The requirements for obtaining a copyright are generally easily met. Any creative work fixed in a tangible medium of expression receives federal copyright protection in the United States from the moment of fixation—automatically. You do not need to do anything further to get the basic level of protection, but it is often worthwhile to go that extra mile, as discussed later. By treaty, most other countries also recognize copyright protection. Very little originality is required in order for a work to be copyrightable. A simple smiling face (☺), even if you were the first person who ever drew one, probably is not original enough to receive copyright protection. However, you don't have to venture far before you get copyright protection for your originally modified face—for example, add a custom mustache, ears, and/or hair of some sort, and the smiling face is now original to you and deserving of copyright protection.

How does this protection apply to video games? Well, copyrights can be used to protect video game artwork (e.g., depictions of video game characters or avatars), but others are free to draw their own versions of other video game characters, so long as they do not copy from you. Copyrights protect your source code, but not the functionality performed by your source code. If someone else, without ever viewing your source code, wrote new software that, when executed, provided the exact same functionality, user interface, and game play as your own game, that person would likely not infringe your copyright in your source code, because she did not copy *your* expression of the source code (she might, however, be infringing your copyright in the game's expressive content). Source code is protected insofar as you make original decisions regarding variable names, comments, and program structure. So if someone else writes new source code to achieve the same result, there might not be any infringement of the source code. However, if that person copied your user interface, graphics, and/or artwork, then he may infringe your copyright in your video game as an audiovisual work because he copied your artistic *expression*.

How do you get a copyright? As mentioned already, a copyright protects any creative expression fixed in a tangible medium—automatically. That is one of the nice things about U.S. copyright law. Very few formalities must be met before you have copyright protection. The moment you put pen to paper, apply paint to canvas, scribe notes on sheet music, type some source code and hit save, or perform any other act that fixes your expression in a tangible medium for more than a transitory moment, you have federal copyright protection in the United States.

Keep in mind that the requirement to obtain a copyright is originality, not novelty. Suppose two people, independently of each other, have *exactly* the same thought and write *exactly* the same source code, or draw *exactly* the same picture. As unlikely as that may be, they each have a copyright in their work, and each of them does not infringe the other's copyright, because they each *independently created* their own work. Independent creation is always a defense to a charge of copyright infringement, but it can be very difficult to prove.

While you are not required to do so, you can register your copyright with the United States Copyright Office of the Library of Congress, which provides