

Table of Contents

Introduction *xiii*

Disclaimer *xix*

Chapter 1

Copyrights and Immediate Protection for Your Ideas 1

Chapter Highlights 1

Documents on Website 2

Immediate Protection 2

Copyright Basics 7

Case Study 10

Chapter 2

Trademarks: Choosing Your Brand 13

Chapter Highlights 13

Documents on Website 14

Choosing a Distinctive Trademark 14

Trademark Searches 16

Trademark Applications 16

Intent to Use Applications 17

Expected Costs 18

Recommendations for Properly Using a Trademark	19
Identification and Marking	19
Play on Words	20
Design Consistency	20
Use as an Adjective	21
Singular, Plural, and Possessive Forms	21
Usage by Others	21
Frequency of Use	21
Conclusion	22

Chapter 3

Protecting Ideas: Patents, Trade Secrets, and Contracts 23

Chapter Highlights	23
Documents on Website	24
Patents	24
Requirements to Obtain a Patent	25
When Should I Apply for a Patent?	26
Foreign Patent Rights	30
Establishing Ownership of Inventions	30
Takeaways	31
What Is Patentable in a Video Game?	32
Designs and User Interfaces	36
Patent FAQs	38
Trade Secrets	43
Information Protectable under Trade Secret Law	44
Recommended Procedures to Protect Your Trade Secrets	45
Recommended Procedures to Protect against Claims of Trade Secret Misappropriation	47
Contracts	47
Elements of a Contract	48
Enforceability of a Contract	49
Summary	50

Chapter 4

Business and Finance Issues 53

- Chapter Highlights 53
- Documents on Website 54
- Choosing a Business Entity 54
 - Sole Proprietorship 56
 - Partnership 56
 - Corporation 58
- Sample Non-compete Clause* 62
- Sample Non-solicitation Clause* 63
- Limited Liability Company 64
- Funding 66
 - Family and Friends 66
 - Angel Investors 67
 - Venture Capital 67
 - Publisher Financing 68
 - Crowdfunding 69
 - Developing a Plan and Pitch 73

Chapter 5

Business Risk and Insurance 75

- Chapter Highlights 75
- Documents on Website 76
- Avoidance of Risk 78
- Reduction of Risk 78
- Insuring of Risk 80
- Actual Claims Situations 84
- Acceptance of Risk 86

Chapter 6

Intellectual Property Agreements 89

- Chapter Highlights 89
- Documents on Website 90

The Sooner the Better	91
No Developer Is an Island	92
Nondisclosure Agreements	92
Friends and Family—Not Just for Calling Plans	93
One Size Does Not Fit All	94
Confidential, Proprietary, or Both	97
Don't Get Left in the Dark	98
Employment Agreements	99
Define Your Culture	99
Protecting Third-Party Rights	100
Protecting Your Intellectual Property	100
Continued Assistance from Employees	102
Is It Too Late?	103
Don't Throw Away the Rights	104
The Employee's Own IP	107
Testing Agreements	108
Contribution Agreements	109
Assignments	110
What Rights?	111
Timing Is Everything	112
Going, Going, Gone	113
Filing, Filing, Filed	113
Final Word	116

Chapter 7

Content-Related Issues 119

Chapter Highlights	119
Documents on Website	120
Five Questions to Ask Your Lawyer	120
1. Do You Need a License at All?	121
2. What Permission Do You Need?	121
3. What Laws Govern Your Transaction?	122
4. What Happens if There Is a Dispute?	123
5. How Will It End?	124
Other Common License Terms	124
Parties	125

Dates and Times	125
Recitals	125
Definitions	125
Grant of Permission	126
Payment	126
Warranties, Representations, and Disclaimers	126
Indemnification	127
Affirmative Duties	127
Limitations on Liability and/or Damages	128
Restraints on Transfer	128
Bankruptcies and Change in Ownership	128
Claims to Your Intellectual Property	128
Negotiation	128
There Are No Guarantees	129
Specific Properties	129
Copyrights	129
Trademarks	130
Rights of Publicity and Model Releases	131
Trade Secrets	132
Patents	133
Licensing Databases	134
Advertising and Product Placement	135
Open Source Licensing	136
The First Amendment and Fair Use	138
User-Generated Content	140

Chapter 8

Taking Virtual Candy from an Actual Baby: Virtual Goods, Microtransactions, and User-Generated Content 143

Chapter Highlights	144
Documents on Website	144
Virtual Goods	144
What Are Virtual Goods?	144
Legal Aspects of Business Models	144

- Components of Virtual Goods 146
- Life Cycles of Virtual Goods 147
- Legal Issues Related to Virtual Goods 148
- Microtransactions 148
 - What Are Microtransactions? 148
 - What Is Virtual Currency? 149
 - Legal Issues Related to Microtransactions 149
- User-Generated Content 154
 - What Is User-Generated Content? 154

Chapter 9

License Agreements, Privacy Policies, and Other Legal Considerations 157

- Chapter Highlights 157
- Documents on Website 158
- End User License Agreements 158
- Privacy Policies 165
- Terms of Use Agreements 171
 - Planning Ahead for Future Changes to the TOU 178
 - Including Use Limitations 178
 - Protecting Yourself with Disclaimers 179
 - Addressing Some Remaining Issues Involving
Copyrights and Trademarks 180

Chapter 10

Social Media Considerations 185

- Chapter Highlights 185
- Documents on Disc 186
- Drafting an Employee Social
Media Policy 186
 - Federal Labor Law 186
 - FTC Endorsement Guidelines 187
 - Potential Conflict? 187
 - Additional Suggestions Based on Federal
Labor Law 188
- Social Media Privacy 191

Using Moderators and Volunteers
on Forum Websites 192

Chapter 11

Advertising and Promoting Your Game 195

Chapter Highlights 195

Documents on Website 196

Sweepstakes, Contests, and Lotteries 196

Marketing Online 199

IncognitoVito Trademark 199

Third-Party Trademarks/Rights
of Publicity 200

Third-Party Copyrights 201

Comparative Advertising 202

Advertising to Children 204

Does COPPA Apply to My Website? 204

Personal Information 205

COPPA Requirements 206

Parental Consent 207

Age Screening 208

Recent Enforcements of COPPA and CalOPPA 208

Recent FTC Enforcements 210

Final Thoughts about COPPA 213

Chapter 12

Publishing and Development Agreements 215

Chapter Highlights 216

Documents on Website 216

What Is the Development Agreement? 216

Evolution of the Development Agreement 216

When the Publisher Leads the Process 217

When Can the Developer Lead the Process? 217

The Publisher Generally Finances

Game Development 218

Special Circumstances of Massively Multiplayer
Online Games 218

Key Elements of a Development Agreement	218
Sustaining the Development Team Throughout the Process	219
The Publisher's Perspective	219
The Developer's Perspective	220
The Development Agreement Should Strike a Fair Balance	221
Sample Agreements	221
The Whereas Clauses	222
The Parties	222
The Grant of Rights	222
Definition of the Game to Be Developed	223
Game Design Documents	223
The Milestone Schedule	223
Milestone Approvals or Rejections	224
The Most Crucial Milestones	224
Quality Assurance	224
Managing the Cash Flow Process	225
Developer Profits and the Definition of Net Revenues	225
When Royalties Are Paid	226
Accounting Provisions	226
Who Owns Intellectual Property Created when Developing a Game?	227
Governing Law and Dispute Resolution	227

Chapter 13

Legal Disputes 229

Chapter Highlights	229
Documents on Website	230
Cease-and-Desist Letters vs. Patent Infringement Lawsuits—and More	233
Cease-and-Desist or Demand Letters	234
Patent Infringement Lawsuits	236
Other Types of Actions: Declaratory Judgment Actions, Ex Parte Reexaminations, Inter Partes Reviews, and Post-Grant Reviews	240

Reviewing the Letter or Complaint	241
Who Sued Me? Patent Trolls vs. Competitors	242
What Patents and Technologies Are Asserted?	244
They Think I'm Infringing—Am I?	248
Who Else Was Sued?	249
What Do They Want?	250
Where Was I Sued? Federal Courts and the International Trade Commission	252
Putting It All Together	253
Considering Your Options and Taking Action	254
Noninfringement Positions	255
Invalidity Positions	256
Indemnification Agreements and Insurance	257
Negotiate or Respond to the Patentee	258
Post-Grant Proceedings: Ex Parte Reexaminations, Inter Partes Reviews, and Post-Grant Reviews	259
Litigation	260
Take Action	261
What to Expect in a Patent Infringement Lawsuit	261
Stage One—Pleadings and Initial Filings	262
Stage Two—Discovery	263
Stage Three—Claim Construction	264
Stage Four—Experts	264
Stage Five—Summary Judgment and Trial	264
Stage Six—Post-trial and Appeal	265
Copyright and Trademark Matters	265
Copyrights	266
Trademarks	270
Conclusion—What Should I Do?	274
About the Authors	275
Index	285