How to Use This Book

This book is intended for those in the legal field (e.g., practitioners, law students, and legal scholars), placing a heavy emphasis on statutes, case law, and established legal resources. If you are not a legal practitioner of some sort, and are instead looking for a higher level introduction to legal issues one may encounter during video game development, we recommend you read the American Bar Association’s Legal Guide to Video Game Development (2d ed. 2016), edited by Ross Dannenberg.

In this book, the chapters address, in order, contracts, copyright, patents, trademarks, trade secrets, and right of publicity as addressed by U.S. law, and we conclude with a commentary on international issues stemming from the multinational user base and foreign operation of games and immersive entertainment. One need not read the entire book—unless of course you are interested in doing so—but rather we recommend that you read each chapter as needed, perhaps as a starting point for research, or as a primer on a particular area of the law.

If you find any errors or omissions that you believe should be fixed or topics that should be included in the next edition of this book, please reach out to us. The editors’ contact information and biographies may be found in the Contributors section of this book.
Introduction

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Entertainment media encompassed by video games and immersive entertainment has continued to grow and prosper since the publication of the first edition of this treatise. At the time of our first edition (2010), the games industry had a total combined dollar sales of $15.9 billion, with $9.4 billion from video game sales, $0.7 billion in computer game sales, and $5.8 billion from sales in other game delivery formats. Nearly 11 years later, U.S. video game industry revenue has continued to grow to a total of $36 billion, with $6.9 billion in hardware sales and $29.1 billion in software. The impact of the industry on the U.S. gross domestic product is $11.7 billion in value, and the industry now employs more than 220,000 Americans. Immersive entertainment media such as augmented and

1. Ross Dannenberg is a senior partner with Banner & Witcoff, Ltd. Chrissie Scelsi is U.S. general counsel for Wargaming (USA), Inc. For full biographies, see the Contributors section of this book. The editors would also like to thank Andrew Thomas, a rising 3L at American University Washington College of Law, for his invaluable research assistance, bluebooking, and cite checking during final preparation of this book.


virtual reality are also on the cusp of mainstream adoption, with the global market for these technologies estimated to reach $215 billion by 2021.⁴

Gaming and immersive entertainment have also grown in terms of widespread adoption. The 2018 Entertainment Software Association (ESA) report *Essential Facts about the Computer and Video Game Industry* illuminated a number of interesting statistics about the growth of the gaming audience, as well as significant indicators about how the face of gaming is changing. First, the ESA found that 65 percent of American households are home to someone who plays video games regularly, and that 64 percent of them own at least one device on which video games can be played.⁵ The report also noted that 70 percent of the video game playing population is over the age of 18, and that the average video game player is 34 years old.⁶ It further illuminated a significant demographic change in the gaming audience, with adult women representing a greater portion of the game playing population (33 percent) than boys under the age of 18 (17 percent).⁷ This finding runs counter to the traditional gamer stereotype that is typically portrayed in the media. The report also notes that more than half of the most frequent gamers in a typical household play multiplayer video games with others at least once a week, and more than two-thirds of American parents play video games with their children at least once a week.⁸

Much as the demographics of the gaming audience have changed and expanded, the report’s editors noted how the changes and advances in technology in gaming and immersive entertainment have changed the vernacular of the space as well. An interesting example that emerged was the question of how to address

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⁶ *Id.*
⁷ *Id.*
⁸ *Id.*
the topic of virtual worlds. At the time of this book’s first publica-
tion, virtual worlds such as *Second Life* were gaining in popularity
and grabbing headlines. Since then, the concept of a virtual world
has changed and become even more immersive with the advent
of virtual reality rigs like the *Oculus Rift, PlayStation VR, HTC Vive,*
and more recently the *Oculus Go.* The technology has also caught
the imagination of the mainstream audience with the release of the
movie version of *Ready Player One,* with audiences buzzing about
whether and how soon people will be able to immerse themselves
in the Oasis. Similarly, we recognized the need to update the title
to include the term “immersive entertainment” to encompass the
advent of augmented reality. This technology went mainstream
with the launch of *Pokémon GO,* which at its peak had more than
28.5 million people playing, and became a global phenomenon with
crowds of players swarming parks and other locations to catch
rare Pokémon. The popularity of the game also prompted legal
precedent, as some states and municipalities proposed new laws
to prevent large groups of players from damaging parks and other
public places while playing games, though the ordinance put in
place by Milwaukee County requiring that publishers get consent
before releasing similar games in county parks was eventually
struck down by a court on First Amendment grounds.9

The platforms on which games are played have also greatly
expanded since the first edition of this book was published. The
ESA study found that 41 percent of U.S. households play games on
personal computers, 36 percent play on smartphones, 36 percent
play on a dedicated game console, 24 percent play on a wireless
device such as a tablet, 14 percent play on a dedicated handheld
gaming system, and 8 percent play on virtual reality devices.10
The formats have also evolved, as the split between digital and
physical sales of games has shifted from 31 percent digital and 69
percent physical in 2010 to 79 percent digital and 21 percent physi-
cal in 2017.11 Popular genres of games have in some ways stayed
the same, with shooter, sports, action, and role-playing games still

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10. *Id.*
11. *Id.*
the top sellers in 2017, but have also evolved to include the wildly popular genre of battle royale games like PUBG and Fortnite attracting millions of users.\textsuperscript{12}

Another interesting trend that we have noted in the preparation of this second edition of the treatise is the change in how legal aspects of games and immersive entertainment are viewed by players. While end-user license agreements (EULAs), terms of service (TOS), game rules, and privacy policies may have seemed somewhat arcane to players at one time, the advent of smartphones and the widespread usage of applications and games have now put such documents and updates to them on the regular radar of users.

Intellectual property law has continued to play a prominent role in the gaming and immersive entertainment space, which is not surprising given the interesting issues that often emerge as technologies race well beyond the reaches of established case law and force lawyers working in the space to find creative solutions to protect companies while still engaging players. U.S. patent law has changed significantly since the first edition of this book with the passage of the Leahy-Smith America Invents Act in 2011, which saw the United States shifting in 2013 from a “first to invent” system to a “first to file” system. Copyright continues to play an important role in the gaming space, particularly with the explosion in popularity of mobile games that has resulted in a number of lawsuits over alleged game clones. The same is true for trademark law, as game developers continue to grapple with the question of how to depict or simulate reality without running afoul of the trademark and brand rights of real-world companies and people. This challenge not only applies to the realm of trademark law, as right of publicity issues have been increasingly litigated in recent years, particularly with respect to sports games. The Internet’s ability to make a game available globally also presents interesting matters of international law, as Chapter 7 illuminates.

Video games and immersive entertainment continue to evolve at a staggering pace, and we can only imagine what this landscape will look like in another eight years. Will augmented reality technology simply be an add-on when you buy your next set of prescription glasses? Will contact lenses be augmented-reality ready? Will top-of-the-line virtual and augmented reality headsets reach sub-$50 levels, or even be given away using a freemium model? Perhaps augmented reality bionic lenses will be included as an option when you get Lasik eye surgery. Whether future technological advances look more like something from Minority Report or The Expanse remains to be seen, but the legal issues these new technologies present will certainly be complex and require considerable thought. We can’t wait to see what’s next!