

MORE ON **RISK MANAGEMENT** **COPYRIGHT/TRADEMARKS** **PATENTS**

BY **AMANDA CICCATELLI**

How Trade Dress Can Help Game Developers Level Up

It's important for video game developers to understand how the law protects their investment against copycat game developers.

AS GAME DEVELOPERS CONTINUE TO FACE THE THREAT of having their games cloned and accusations that they too are cloning games, it is becoming more and more important for developers to understand the safeguards that intellectual property law can provide.

Knowing far in advance what protections IP law provides can ensure wise design decisions that can strengthen a brand and stop clones. In addition, this knowledge can help game developers steer away from costly lawsuits that can easily be avoided, or even defend against aggressive plaintiffs alleging infringement.

David Singer, partner at Jenner & Block, chatted with Inside Counsel recently to discuss why it's important for developers to understand the safeguards of IP law. Like any IP owner, it's important for video game developers to understand how the law protects their investment against copycat game developers. But

it's even more important for game developers to understand the limits of those protections, according to Singer.

"It's a lot harder to protect video games from cloning than you might expect," he said. "Are there steps game developers can take to better defend their games from being ripped off? Absolutely. Will that stop copycats from trying? Probably not."

Many game developers just don't have the resources to pursue litigation against infringers. And, for those who can afford to sue an infringer, the outcome is far from certain. The tests for copyright and trade dress infringement are not exactly "bright lines."



So, what are the safeguards that IP law can provide to game developers? According to Singer, in many ways, video games enjoy the same protections as television programs and movies – they are audio-visual works of art. But, the two main tools for protecting video games – copyrights and trade dress – come with strict limitations. A game's underlying source code or object code is a literary work and protected from unauthorized copying. And, the sights and sounds we see on screen are also protected as audiovisual works under the Copyright Act.

"Here's the catch," Singer said. "Copyright law does not protect

ideas, procedures, or methods of operation, including the concepts and rules of a particular video game.”

Instead, copyright law protects only the developer’s creative choices of which shapes, colors, and sounds are used to express the underlying game ideas. A game’s trade dress is protected under statutes like the Lanham Act, but only if the developer can prove the trade dress is non-functional. These limitations make simple games of skill (i.e. Tetris, Candy Crush Saga) harder to protect. On the other hand, immersive games that tell a more detailed story with unique characters are easier to protect.

Today, in order to prove trade dress infringement, a game developer must also show its trade dress has acquired secondary meaning among consumers, plus a substantial likelihood that consumers will be confused between the developer’s original game and the alleged clone. Singer explained, “This means developers need to achieve some level of success with market recognition before they can stop copycats. It also means conducting investigations, surveys or even hiring an expert witness to prove your case in court. None of this comes cheap.”

Further, in the early phases of game development, developers should consider the practical limits of IP law. To be sure, there are cases where developers have successfully used litigation—or the threat of litigation—to stop copycats. However, relying only on the belief that courts will protect your game is risky business. In addition to developing unique, expressive games, developers should try to out-compete the

copycats by developing “sticky” games.

So, ask how you can get users invested in your game, such that a copycat loses its appeal. Making games “social” is one way, said Singer. If a consumer’s friends are using QuizUp, he or she is less likely to buy the copycat version and risk the insufferable FOMO (fear of missing out). Also, if you can generate enough social buzz around your game (like Pokémon Go), copycat versions may become less appealing. In-app purchases and merits-based rewards may also increase loyalty and discourage users from even trying a copycat version.

According to Singer, if you want to design a game that is well-protected under the law, you need to think beyond the rules of your game. Ask yourself what design elements and enhancements you can add to the game that are not dictated by the rules. Adding distinctive characters (like birds and pigs in Angry Birds) is one example.

“The basic idea of using a slingshot to launch objects at other objects to destroy them is not protectable,” he said. “But using a slingshot to launch a plump, red bird with a unique face and special powers into distinctive looking green pigs becomes highly expressive.”

If your game is simple, consider using original color schemes, creative sounds, or a storyline between levels that makes the game unique and expressive. For example, Candy Crush Saga is a simple matching game, but the sights and sounds of the special candies when they combine reflect genuine artistic choices that make the game more enjoyable.

Also, if you develop more than one game, consider using a unified look and feel across games so that users associate them with you, according to Singer. If you can afford to advertise your games, do so in a way that associates the game’s look and feel with your brand.

He said, “Taking these steps may help to prevent would-be copycats, and by distinguishing your games from the competition, you can help defend them against claims of theft by other developers.”

CONTRIBUTING AUTHOR AMANDA G. CICCATELLI

is a Contributing Writer for InsideCounsel, where she covers intellectual property, patent litigation, cybersecurity, innovation, and more. She earned a B.A. in Communications and Journalism from Central Connecticut State University in 2010. Amanda is also currently a content marketing and social media strategist at Informa, a leading global business intelligence, academic publishing, knowledge and events business, where she leads the digital content strategy for the Insights, Marketing & Innovation Division of the company. Amanda was formerly a Web Editor at Technology Marketing Corp. Follow her at @AmandaCicc.