

Intellectual Property in Video Games, Part I: Trademarks and Characters

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Wherever innovation occurs, intellectual property follows. Intellectual property (or “IP”) refers to trademarks, copyrights, patents, and trade secrets: the legal framework that safeguards the ownership of brands, artistic works, and inventions. The term has become so synonymous with progress and novelty that in the increasingly mainstream video game industry, “IP” has also become shorthand for any game franchise. Established franchises include *Mario* and *Resident Evil* (each of which have been adapted into blockbuster films), and relatively newer games such as *The Last of Us* and *Elden Ring* have also received high praise. As a result, it’s no surprise that the game industry has been valued at nearly \$200 billion as of 2025.

Intellectual property law does not automatically provide sweeping protections to every aspect of game design, story, and mechanics, however. Depending on what game

developers create and how publishers use those new creations, they may not be protectable at all. Accordingly, understanding the differences between different types of intellectual property can be crucial to safeguarding old and new franchises.

This article is the first in a series providing an overview of intellectual property types and the protections they offer in the context of video games. First up, trademarks.

What is a Trademark?

Trademarks are source-identifiers: they inform consumers who made the product or who is offering the service you are buying. Trademarks can be almost anything, so long as they indicate the source of a product or service. Obvious examples include company names and game franchise titles, such as ACTIVISION being the publisher of the well-known CALL OF DUTY series of first-person shooters, each of which are prominently featured in the games' packaging and credits. But that is not all; characters and their designs may also be used to represent a company. Ever purchased a game or seen a movie featuring a blue hedgehog with a penchant for gold rings? Chances are they came from the video game company Sega, which owns various trademark registrations for its *Sonic the Hedgehog* character.

What are Trademark Rights?

Trademark rights provide their owner the ability to use the trademark and prevent others from using confusingly similar (or "infringing") marks. If there is a likelihood that a consumer could be confused into thinking one company's trademark is affiliated with or related to another company's mark, one of those parties may assert an infringement claim against the other. There is a reason only one red-clad mustachioed plumber prominently appears in the video game industry.

In the United States, owners automatically accrue trademark rights through use of a mark in connection with the sale of goods or services, and those rights last as long as the mark continues to be used. To make the most of those rights, owners should also file an application to register the mark(s) with the United States Patent & Trademark Office ("USPTO"). Having a trademark registration provides the owner with numerous advantages, including a presumption of ownership and validity, nationwide priority as of the registration's filing date, the ability to use the ® symbol, eligibility to enroll the mark in the Amazon Brand Registry, and many more. In some countries, registering a trademark is *required* to own any trademark rights.

Registering a Trademark

To secure trademark rights or a trademark registration, owners must actually use the mark as a source-indicator; the mark cannot function *just* as a general design element or character. For example, in 2021, Epic Games was denied a registration for the "Loot Llama" design shown below in connection with downloadable software for the video game *Fortnite*. Pointing to Epic's use of the llama as a repeated background element on the company's website and intermittent appearances in the game itself, a USPTO administrative board held that consumers would *only* view the llama as a "character or

game piece.” As a result, it did not adequately function as a source-identifier for the company’s downloadable video game software.



The USPTO’s administrative board made a similar ruling in 2023 denying registration of a video game character design, but specified there is no “bright line rule against registration of characters.” The issue is whether the character *as-used* is used to identify the source of the game, or merely “identifies [] a particular character in a creative work.” To use a character design as a trademark, just as with any potential mark, owners should instead use it in a way that “identif[ies] and distinguish[es] the source of the game itself—for example, on the game’s launch screen or more prominently on [the game’s purchase site], such as in the header of the page.”

Best Practices: Trademarks for Video Games

Intellectual property and video games go hand-in-hand, with the term “IP” becoming synonymous both with game franchises and the legal protections surrounding them. Trademarks are a crucial part of intellectual property law, generally and in the context of video games. To make the most of trademarks, video game developers and publishers should keep the following in mind:

- Trademarks can be almost anything that indicates the source of a product or service, including a company or brand name, game or franchise title, a main character’s name or design, and more.
- Trademark rights provide their owner with the ability to use a mark and prevent others from using confusingly similar marks.
- Trademark rights are accrued through use and last as long as the mark continues to

be used. For maximum protection, owning a federal registration for the mark is best.

- Although anything can be a source-identifier, make sure it is used in the right way to secure trademark rights and/or registration. Use the mark on a game's launch screen or on its purchase page, not just as a general design element of the game.