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In-Game Placement: Guns, Guitars and Gadgets: Think Again Before You Depict Something You Don't Own or License in Your Video Game

Matthew Syrkin
Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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If you are designing or developing a video game that depicts this planet or any other fictional world, then you need a pair of trained legal eyes to review the people, places, products and things that will be featured in the game. Go it alone, and you are traveling down a windy road that intersects with copyright, trademark, privacy law and the First Amendment, where the case law is complex, the rulings are inconsistent, and the outcome may ultimately depend on the jurisdiction. Make one mistake and you will find yourself staring down a lawsuit before your game title moves a thousand copies. Whether the lawsuit is filed by the owner of a popular destination who thinks you stole the "look and feel" of his establishment (see E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc., 2008 WL 4791705 (9th Cir. 2008)) or the lead singer of a retro-funk dance group who claims a character in your game wears the same clothing and resembles her (see Kirby v. Sega of America, Inc., 144 Cal.App.4th 47 (2006)), video game profits have caught the world's attention, and, as in all things, success leads to lawsuits. The tremendous effectiveness of video game product placement and in-game sponsorship is no surprise, with gamers maintaining high and sustained exposure to advertisements. A recent study revealed that gaming audiences are more inclined to remember and positively perceive brands featured inside video games than other advertisements and that this form of advertising is even beginning to trump the effectiveness of television advertisements. Another similar study found that, unlike advertising messages in other media, advertising in video games is seen by gamers as making the games feel more authentic and 65% of players agreed that in-game advertisements made the gaming experience feel more realistic and 55% said the advertisements "look cool". In this climate, your decision to dress your main video game character in, for example, a pair of Vans (or even kicks resembling Vans) could earn you a thank you note or possibly a temporary restraining order from Vans which may have an exclusive in-game licensing arrangement with Activision Blizzard, the publishers of the Tony Hawk series of skateboarding games. Make no mistake, the major video game developers and publishers are engaged in a well-funded war for market share, and licensing agreements with real-world content owners have become the norm. Whether you're creating a sports game, a music title or a first person shooter, there is both tremendous promotional value and legitimacy

that accompanies the in-game inclusion of popular names, products and places, and the respective owners now want their say as to the games in which they appear and how and under what conditions their content is featured. Now that content owners have skin in the game (no pun intended, of course), licensing arrangements are being struck left and right—some exclusive, some non-exclusive, some royalty bearing, some royalty free. From guitar makers to gun manufactures, content owners know that placing, for example, a "Smith & Wesson" gun in the main character's hands, as opposed to an "ACME" rifle, has the potential to sway consumers inundated with options, especially in the already crowded first person shooter genre, from one title to another. With in-game asset licensing arrangements becoming more and more common, the traditional test for assessing trademark infringement as it relates to video games—the likelihood of confusion among consumers as to whether the assets being depicted in the video game are endorsed or associated with the title—has and will continue to be an easier hurdle for trademark owners to clear as the amount of licensing agreements pertaining to inclusion of trademarked or copyrighted works in video games increases. In other words, circumventing the licensing process in favor of a "fair use" or First Amendment defense will no longer be a viable position from a risk assessment perspective, as plaintiffs will now have an easier time demonstrating and establishing that in-game licensing arrangements have become industry standard and convey substantial commercial value. This will be the first of many posts to come on the subject of video game licensing and clearances, as well as the legal principles and case law underlying the topic, including fair use and infringement (both for copyright and trademark) and the building blocks of the licensing agreements required to navigate the interactive gaming space.

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Matthew Syrkin

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