ZACHARY STREBECK

ATTORNEY AT LAW

Disclaimer:

The information contained in this eBook and supplemental material is **for informational purposes only.**

Downloading and reading of this material **does not establish an attorney-client relationship.**

This information is not a substitute for a private, independent consultation with an attorney selected to advise you after a full investigation of the facts and law relevant to your matter.

I advise readers of this eBook and supplemental information to do their own due diligence when it comes to making business decisions. All information provided **should be independently verified** by your own qualified professionals.

About the Author:

I'm Zachary Strebeck, game lawyer.

I help game developers and other creative tech companies get the legal protection they need. If you're a:

- video game company (big or small)
- board game designer or publisher
- website owner
- software or mobile app startup
- any kind of tech business

I can help you solve the legal problems you face, so you can concentrate on **making your game, building your business, and kicking ass**.

Introduction

Making games is fun!

That's probably what you thought when you started your journey as a first-time indie game developer. The unfortunate reality is that developing games to sell to the public is a business, first and foremost.

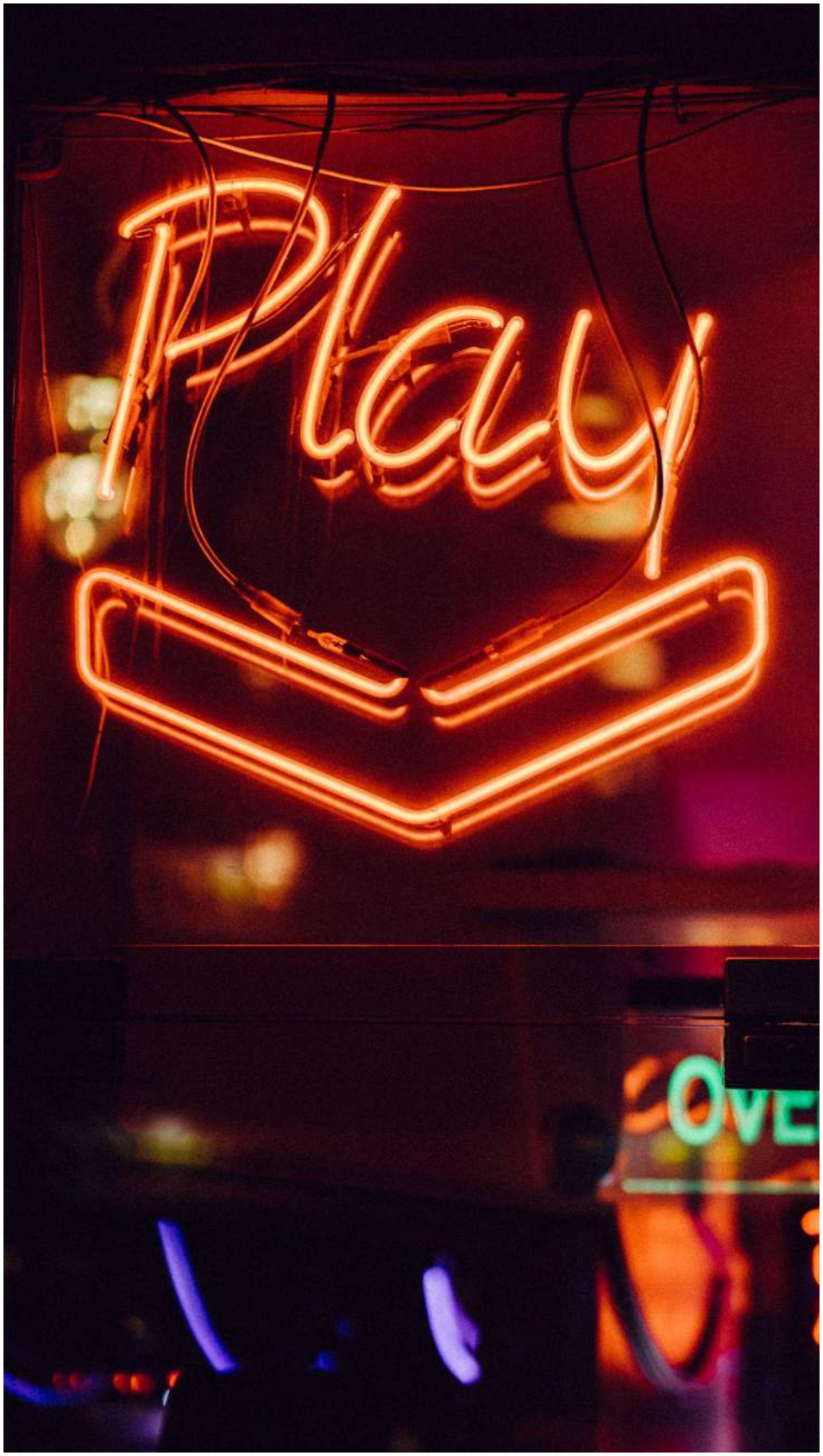
That's not to say that it can't be fun – lots of devs have a lot of fun making their games. However, it's important to keep in mind that business issues are a key part of getting your new indie game studio off the ground and sustaining the business.

As a game lawyer, I work with **a lot** of first-time developers on a number of legal and business issues that they commonly face. This eBook will outline the major areas where your new business (better get used to calling it that) needs legal coverage.

We'll discuss:

- Forming a business entity (an LLC or corporation)
- Owning the intellectual property in your game (and **what is** intellectual property?)
- A crash course in trademark law for indie devs
- Copyright law for game developers, and
- Other important agreements, like your Terms of Use/EULA and Privacy Policy.

Keep reading to find out more about starting your own indie game company! If you ever have any questions, shoot me an email at zstrebeck@strebecklaw.com.


Play

Part 1: Why form a business entity?

Forming a legal entity separate from yourself is one of the most important things you can do as a new indie studio. There are a number of reasons for this, including:

- Limiting your personal liability and shielding your personal assets from the company's debts
- Creating a transferable business that you can potentially sell for a profit in the future
- Allowing investors to easily invest capital in exchange for equity in the business
- Giving a professional appearance to customers, investors and potential partners
- Having a legal entity is necessary in order to get your game on some publishing platforms (Xbox One, for example)

These are all great things for your new game development business. **In some cases, like getting your game on certain platforms, they are required**.

Let's dig down into some of the details.

What kind of business entity should you form?

There are four main types of legal entities:

1. Sole proprietorships
2. Partnerships
3. Corporations
4. Limited Liability Companies (LLCs)

The first two are the default entity types that kick in as soon as you go into business for profit.

If you're by yourself, you're a **sole proprietorship**. If you're with others, you're a **partnership**. These entities **don't offer any limited liability** for your personal assets.

That means that you are personally liable (or liable for your ownership percentage, in the case of a partnership) for any business debts. If you own anything of value in your name, this can turn out to be a real problem.

The better way to go about it is to **use a limited-liability entity**. This is usually either a **corporation** or a **limited liability company**. These provide a shield against creditors who will try to reach through to your personal assets.

These entities also create a structure that allows others to invest money in exchange for equity and other rights.

Choosing between a Corporation and an LLC

The choice between Corporation and LLC usually has to do with what your plans for the company's future.

Many game devs just want to keep making games by themselves, earning money from the games, and distributing it to the developers. In that case, an LLC is often the best choice. It is much simpler to run and you have a lot of flexibility in how it is structured.

On the other hand, if your goal is to have your game dev startup receive angel, venture capital, or other types of investment, a Delaware corporation is your best bet.

How do you actually form the entity?

Many first-time businesses with little startup money try to take the cheap and easy way out, by using LegalZoom or another self-help business entity site.

I would never recommend either of those, though.

Personally, I recommend working with both an attorney and a tax advisor through the whole process. The attorney can do a number of things that a self-help site like LegalZoom can't:

- Discuss your particular situation and goals for the company and decide on the appropriate type of company and equity structure
- File the correct forms that are both correctly filled out and tailored to your company
- Create the various documents for the company, from corporate bylaws to intellectual property assignment agreements (we'll get to those in the next article), **specific to your particular situation** and needs

I've worked with more than a few clients to fix mistakes that were made in trying to do this kind of thing by themselves. Either they formed the wrong type of business entity for their particular goals, or they simply made mistakes during the process.

If you're going to be spending time and money on starting your business, it pays to do it right.

Part 2: The danger of not owning your game content

Many indie developers have a casual attitude about content ownership.

If you're developing everything yourself, that's not really a problem (though you still want the content owned by your business entity, rather than yourself).

On the other hand, if you are using artists, programmers, musicians, and other content creators to develop materials that go into your game, you should be taking this seriously.

Why?

Imagine that you've released your game and it is selling well. Money starts coming in. The problems start:

- You want to port the game to a different platform, but your artist says that you can't use their artwork for the ported version;
- Your musician starts selling and streaming the soundtrack (that you paid for) without your permission and without giving you a cut of revenue; or
- Your UI designer is re-using unique parts of your game's UI in other projects without asking you.

Most indie devs' first thought is "But I paid them! They can't use that work for other things, and they can't stop me from using it, right?"

Wrong, actually.

Unless they are your employees (we'll get to that in a second), all they're giving you in exchange for that payment is a **license** to use it. A "license" is simply the creator giving you permission to use that intellectual property.

Usually, a written license will define things like the length of time, the scope, and the places where the materials can be used.

However, if you don't get the terms of that license in writing, it's unclear exactly what can be done with those materials. You're relying on an implied license to release your game, the scope of which is unknown. Additionally, they can potentially revoke that license whenever they want.

This could be disastrous for your ability to sell the game.

Get it in writing - the best way to ensure ownership

I can't think of a situation where it's not better for you as a developer to own the rights to the work that's in your game, rather than just license them. This is because licenses are rarely as broad as the rights you can gain from owning the work outright.

Licenses, as I mentioned before, generally have limitations as far as time, scope, and other aspects of the agreement go. Each one of these limitations is a potential stumbling block in your exploitation of the game.

This may not seem like a big deal when you're first releasing the game, but if your game is a big success, these limitations can come back to haunt you.

US Copyright law requires that work performed by a contractor must be under a written work-for-hire agreement in order for the rights in the work to be passed onto the one hiring that contractor. You can also get an assignment of the rights after the fact, but having a work-for-hire agreement streamlines the copyright process a bit (we'll discuss that in the next post in this series).

Work performed by employees, however, is automatically a work-for-hire and you own those rights.

A quick aside - employees versus independent contractors

Before we continue, you should understand the basics of employees versus independent contractors.

As I stated before, work performed by an employee is automatically a work-for-hire. You own that work that is done by your employees, and as far as copyright law is concerned, you are the author. However, there are a number of legal and tax hurdles you have to deal with if you're hiring employees.

That's why most indie developers use contractors instead.

In general, it comes down to the degree of control you have over how, where, and when the work is performed.

If you're dictating their hours, the place where they work, providing the equipment they're using, and keeping them on long-term, they are probably an employee. On the other hand, if you are just telling them what the end result of the assignment should be, and letting them handle the logistics of it (hours, place, equipment, etc.), then they are probably a contractor.

California is a special case, as they passed the AB5 law in 2020. This law basically made anyone that's performing work for you that's in the scope of your main business (game development) an employee.

This is horrible, as you can imagine. Luckily, there are several exemptions from this classification, which allow you to use an older test that's more about balancing how much control you have over the worker. This is in line with most other contractor versus employee tests.

For the purposes of game development, the two main AB5 exemptions for California workers are for "fine artists," "graphic designers," and for "business to business" relationships.

This gets complex, but basically you want to be sure that your contractor is operating their own separate business offering their services. And you want your agreement to say that (along with a ton of other things).

These are just the basics of employee/contractor distinctions, and I would definitely recommend that you run your situation past an attorney to be sure.

The main takeaway is that it doesn't matter what you call them, but rather the actual work relationship that dictates whether they are a contractor or employee.

Part 3: A crash course in trademark law

In this part, I'm going to discuss one of the most important assets of your new game company: **your brand**.

Whether it's a game title, a company name, a logo, or a slogan, all of these things have one thing in common: they tell potential customers that it's YOU who are making and selling these things. These things are also known as "trademarks."

A trademark's main function is as a "source identifier," which means that the trademark serves to help consumers identify where certain goods and services come from.

Let's imagine that you walk into a store and want to buy some McDonald's hamburgers. You drive through town, and see 30 different restaurants with the McDonald's logo and name on them. One is selling tacos, another selling pasta, and some are selling burgers and chicken nuggets.

How do you know which is the real McDonald's and which are knock-offs (besides the presence of tacos)?

This is where trademark protection comes in. When you use a brand name, logo, or slogan in commerce (meaning you're selling a product or service under that trademark), you have exclusive rights to use that name in connection with your goods.

Distinctiveness is key

The strength of a trademark comes from how distinctive it is. By being distinctive, your trademark is really set apart from others in the eyes of customers.

Usually, trademarks fall somewhere on a spectrum of distinctiveness that goes like this:

- **Fanciful trademarks** (think *Zaxxon* or *Metroid*) are made up words that are totally unique to that product
- **Arbitrary trademarks** (like *Halo* for video games or the board game *Eminent Domain*) are totally arbitrary names divorced from the actual goods that are being sold
- **Suggestive trademarks** (*Final Fantasy* or *Need for Speed*, for instance) don't quite describe what the product is, but they suggest it
- **Descriptive trademarks** (*Karate Champ* or *Baseball*) merely describe the product – these aren't eligible for trademark protection without evidence that the public connects the trademark with the actual product. You should avoid these.
- **Generic trademarks** ("*Video Game*" for video games or "*email*" for electronic mail) are merely marks that are indistinguishable from the product being offered. Avoid at all costs!

Some of the categories, particularly Suggestive and Descriptive, get a bit muddy and the distinction is a bit subjective. But with this framework in mind, we can get to work on naming your game or company.

Registering your trademark

Once you've decided on a name, the next step is to register your trademark. A US federal trademark registration provides a number of benefits, including:

- Discourages others who do a trademark search from using your mark
- Puts everyone on notice that you're doing business using that trademark
- Makes it easier to claim a priority date and get infringers taken off of the app stores and digital games platforms
- Gives you access to federal courts to sue for trademark infringement and can stop importing of counterfeit goods
- The USPTO's refusal to register any confusingly-similar trademarks
- If you sell on Amazon, you can control your brand better with Amazon Brand Registry

Trademark registration isn't necessarily difficult to do, but there are a lot of procedural and legal nuances that non-lawyers (and even may non-trademark lawyers) can miss.

This can lead to costly mistakes and invalidation of your trademark, so I would obviously recommend having an attorney file your trademark application.

As with any moderately-complex subject, I say it's worth the money to pay a professional to just take care of it for you, rather than spending your own valuable time figuring it out (which you could have spent programming your game) and potentially screwing up the entire thing.

Policing your trademark

There are a number of ways that you can police your trademark against potential infringers. The basic ones are:

- Sending cease and desist letters to infringers (this can be pretty scary for the infringer and often solves the issue without further legal action)
- Filing takedown notices with the various digital game and social media platforms
- Entering into co-existence agreements with those using confusingly-similar trademarks, where you agree not to cross into each others' business areas
- Filing trademark infringement lawsuits, if necessary

If you don't do this, you may actually lose your trademark rights. For that reason, it's extremely important that you put in the work to stop infringement of your brand name.

For an example of a trademark that wasn't properly policed, look no further than the infamous Flappy Bird. The app stores are filled with infinite numbers of clones, using the word "*Flappy*" in their name.

While the creator of Flappy Bird doesn't seem to care, it's a good lesson in what happens when you're not curating your brand. There's almost no value there, because it's been diluted so much.

So rather than creating a lucrative franchise out of Flappy Bird, it's been relegated to just one game in a sea of a million clones.

Part 4: Video game copyright law

In this part, we're going to discuss how to protect the content of your game through another type of intellectual property law called "copyright."

Copyright law protects "original works of authorship" that have been "fixed in a tangible medium of expression."

That word soup basically means that copyright protects creative works that have been written down, recorded, or saved as digital files in some way.

What copyright **doesn't** protect:

- Ideas
- Functional things like game rules and mechanics
- Facts (like a phone book listed in alphabetical order)
- Short phrases or slogans
- Titles

So your game title and tagline needs to rely on trademark law (see the previous chapter), your game mechanics need to rely on patent law (so expensive that most indie devs don't bother), and you need to realize that your ideas are a dime a dozen.

The cool thing about copyright is that you have rights as soon as you "fix" the copyrighted work (write it down, record it, save the file, etc.). However, there isn't really much you can do with it, legally. That's where registration comes in.

Registering your copyright

Once you have actually published your game, one of your first steps should be to register the copyright with the US Copyright Office.

This gives you a few benefits that an unregistered copyright doesn't have, like access to federal courts to sue any infringers. Without a registered copyright, **you can't actually sue anyone who is infringing on those rights**.

In addition, if you register your copyright within 90 days of publication of your game (and before anyone infringes), you get the ability to sue for "statutory damages." You see, normally you would have to prove how much you were actually damaged by someone's copyright infringement. With statutory damages invoked, you could avoid this difficult burden of proof and get a set amount of damages, up to $150,000 per incident.

In addition, the infringers could be on the hook for your attorneys' fees, as well. This actually makes is easier to find a competent attorney who will take your case on contingency (meaning that you don't pay anything if they don't recover for you), because the attorney knows that their fees will be paid if they win.

Registering is easy, for the most part. If you have the proper work-for-hire contracts in place (which I discussed in the second chapter of this eBook), you are the "author" for copyright purposes. The US Copyright Office has an online registration form, and the fee is pretty small at $65. You then upload some screenshots, example software code, and even a video file of your game as a "specimen" to show what, exactly, you're protecting. However, as with all of these things, I recommend having an attorney file these on your behalf. You don't want to get it wrong.

Going after copyright infringement

Once you have a product out there that's worth copying, there are a few ways that you can go after infringers. These are:

- Cease and Desist Letters
- DMCA Takedown Notices
- Platform-specific takedown procedures
- Filing a lawsuit

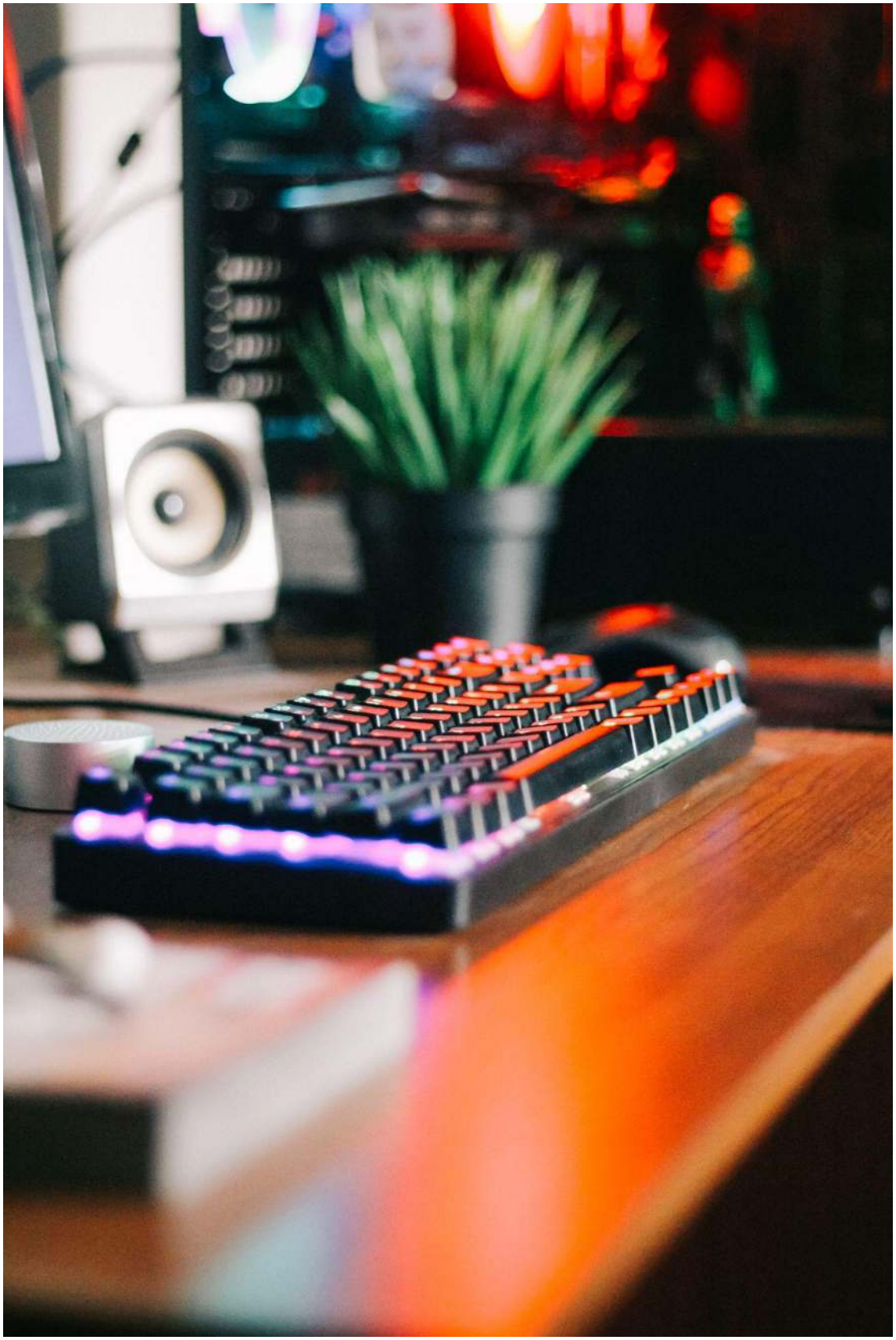
Typically, the first three are your first line of defense against copyright infringement.

Cease and Desist letters are the least powerful, legally, but they usually include a threat of a lawsuit or other legal actions. Usually the letter explains your rights, then basically says "stop infringing or we'll sue you."

Additionally, DMCA notices and platform-specific takedown procedures can often get infringing content taken down from a website, app store, or other online service if you send a compliant notice.

Some platforms, like YouTube, have their own copyright infringement procedures (such as putting "copyright strikes" on infringing uploaders) and their own systems for reporting infringement.

A lawsuit is often your last resort if the easier methods don't work. If you have a good case and the infringer has money, there will often be an attorney willing to take the case on contingency. The attorney will take a percentage of whatever they recover for you, either by winning the lawsuit or by settling out of court. This can range from 30 to 50%, but depends on the attorney.



Part 5: Your Terms of Use, EULA, and Privacy Policy

In this last chapter, we will discuss some of the most important documents that you need when you actually release your game. These are the Terms of Use (or EULA) and the Privacy Policy.

What should be included in your Terms of Use?

The Terms of Use (sometimes called a "Terms of Service"), is an agreement between you and your user. In order for it to be effective, the user must agree to this prior to playing your game. It is sometimes referred to as an End User License Agreement (EULA), which covers essentially the same things.

A comprehensive Terms of Use is a complete agreement that covers your butt in a number of ways. Some of the issues dealt with in these agreements are:

- Minimum age requirements (this comes in handy when avoiding COPPA and ensuring the user can legally enter into a contract)
- The terms of your software license. For instance, they can't use your software commercially and can't resell it
- An "acceptable use policy," laying out what is and is not acceptable conduct within the game
- Limitations on liability and warranties, so you can't be held liable if your game doesn't function properly, etc.

One vital part of a properly-drafted Terms of Use agreement is **a class action waiver and arbitration agreement**. This does two things:

1. it limits any disputes to one-on-one, and

2. forces those disputes to be handled in arbitration, rather than in the courts.

As the developer, these are **extremely important**. A class action lawsuit against you could be extremely costly. So if your users are able to band together and sue you as one class of plaintiffs, this is bad news.

Then there's arbitration, which is a dispute resolution process which takes place outside of the court system and has a third party make a decision on your case (much like a judge), but much more streamlined.

How do you show that they've agreed?

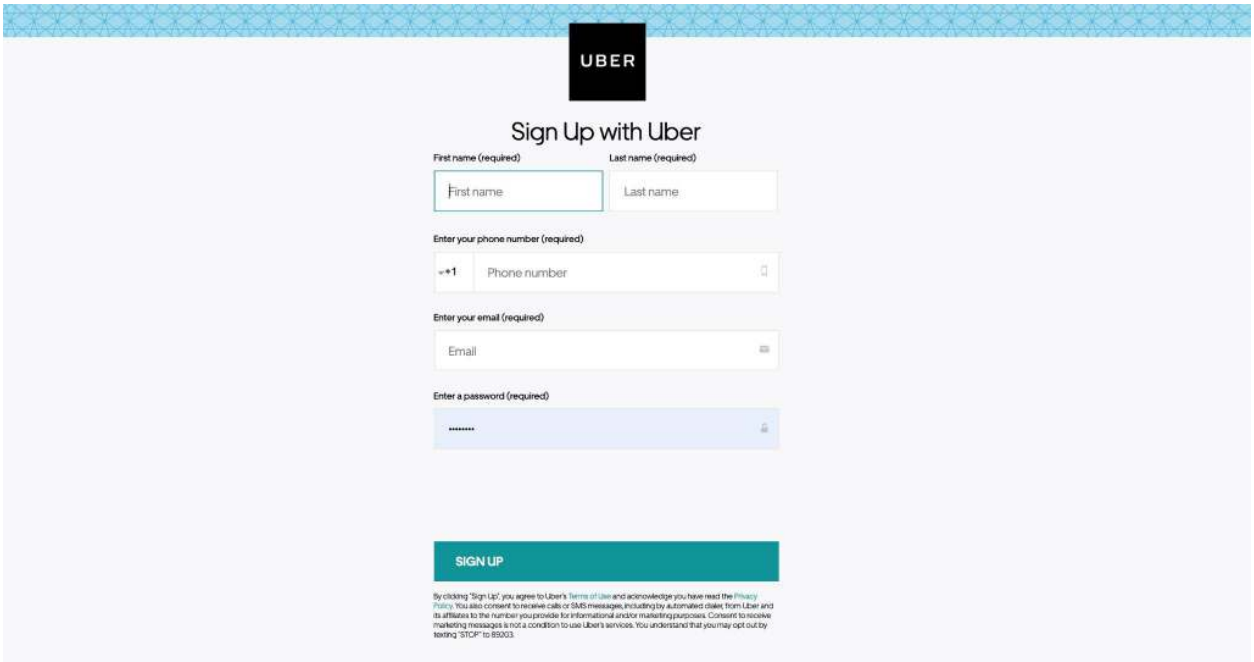
Your Terms of Use is a contract. That means that each side must take some affirmative action to agree to it, if you want it to be legally binding. It's not enough to just stick the agreement up on your website or bury it somewhere within your game's menu system.

The usual "best practices" for getting users to agree to your Terms of Use include the following:

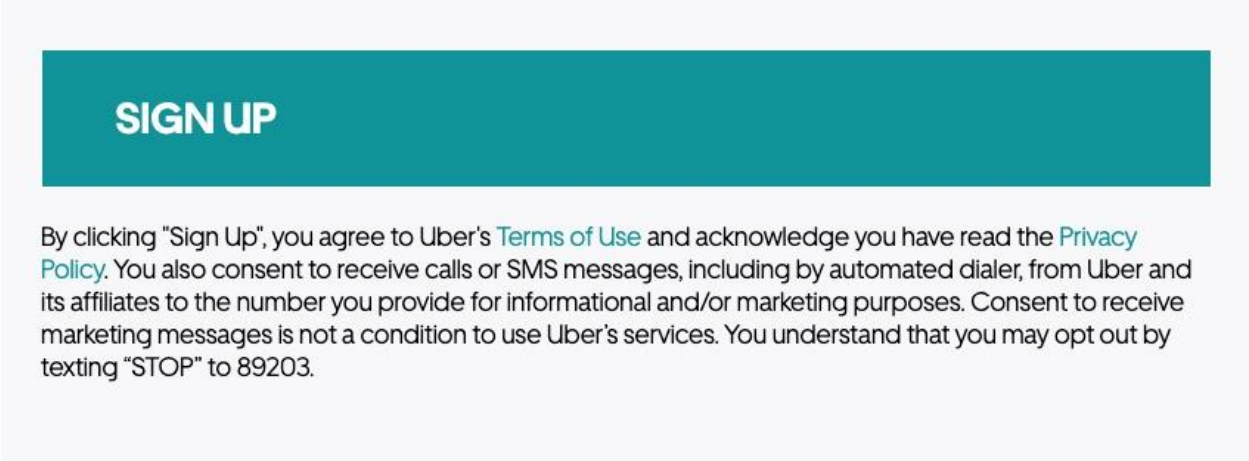
- A pop-up that either has the entirety of the Terms in it, or has a prominent link to your Terms (and the Privacy Policy)
- A check box labeled "I have read the Terms of Use and Privacy Policy"
- A button labeled "I agree" or something to that effect
- Keep the latest Terms of Use and Privacy Policy available on your website and linked from somewhere within the game.

You can even do things like forcing a scroll through the entire Terms before the checkbox and button become active, but that may be going a bit far and could turn off users. It's usually not required, according to recent case law.

As an example of this in action, look at Uber's driver signup page:



See that part at the bottom below the "Sign Up" button?



That's exactly what I'm talking about. It's also got a consent to receive marketing messages in there for good measure, but for most games this isn't necessary.

Your game's privacy policy

Governments of the world take data privacy and people's personal information very seriously, and so should you.

When your game takes personal information from users (whether it's their name, email address, location, IP address, or photograph), you need to disclose what you're taking and how you're using it.

In some cases, such as in the EU, you need to disclose your "legal basis" for collecting their information, as well.

This document usually includes:

- what you collect,
- how you collect it,
- how you use it,
- who you share it with, and
- what security measures you take with the users' data.

You should also discuss how to resolve disputes over your use of personal information, how they can see what information you've collected, and what they can do about it.

Lastly, many privacy laws passed in recent years require that you give the user notice of their rights with regard to their personal information, and give them the right to make certain requests, like deleting their data, updating it, and more.

The Children's Online Privacy Protection Act

The Children's Online Privacy Protection Act, usually abbreviated to COPPA, deals with the collection and protection of personal information

from US users under 13 years old. You will most likely have to comply with COPPA if you:

- Target and advertise to children under 13
- Have a product that could reasonably be targeting children under 13, even if you don't do it explicitly (if you have cartoon characters, for instance), or
- Know that you have a number of users under 13

You can read this document from the FTC to get an idea of what your responsibilities are. There are also third-party services that assist developers and publishers with COPPA compliance, such as getting parental consent for information collection.

Conclusion – ready to start your indie game company?

You went through the trouble to develop an awesome game. Protecting that game, including all of the content inside of it, and protecting you from liability shouldn't be an afterthought. For help getting your indie game studio up and running, feel free to contact me to get started.

Ready to talk? Use this link to set up a free consultation call to discuss your new game company!

You can also send me an email at zstrebeck@strebecklaw.com.

Game dev legal resources

If you've signed up for my mailing list, you may have received an email with these other free resources. If not, check them all out by clicking the links below!

- The 5 Legal Moves Every Game Dev Should Make eBook
- The California CCPA Privacy Compliance Guide eBook
- Fair Use for Game Developers eBook
- My Copyright Protection Checklist
- You can grab your free Trademark clearance search checklist by clicking this link here
- You can access the pdf version of my Video Game Trademark Ultimate Guide by clicking this link here.

You can also check out the Game Lawyer Blog, as well as subscribe to the Legal Moves podcast.