

C L I F F O R D

C H A N C E

**LEVEL UP:  
A LEGAL GUIDE TO THE  
VIDEO GAMES INDUSTRY**

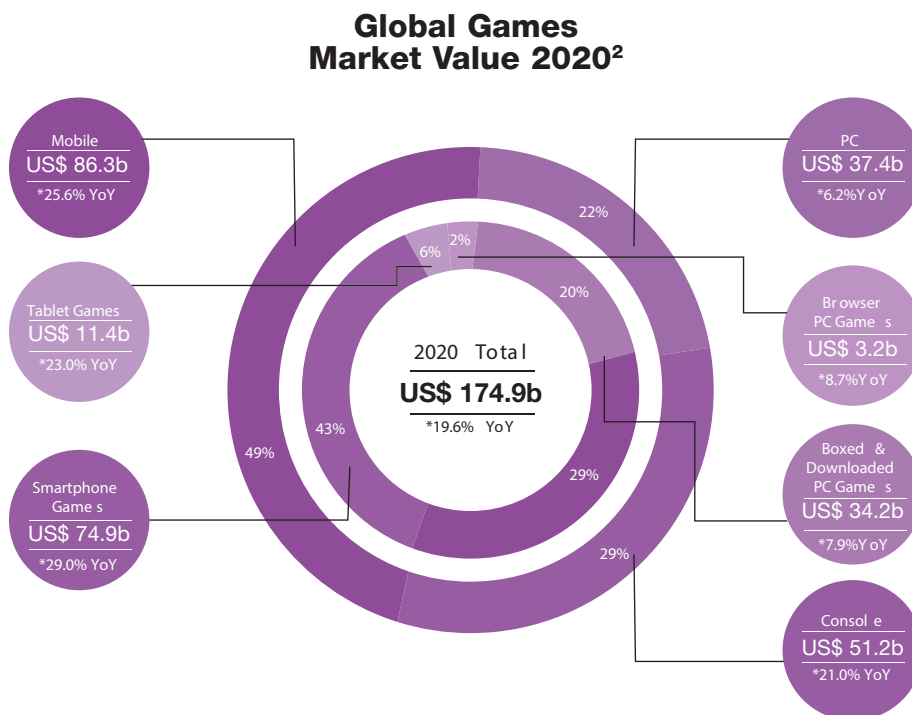
## LEVELS

<b>Foreword:</b> Greetings Weary Traveller...	3
<b>Level 1:</b> Creation and Development	6
<b>Level 2:</b> AI-Generated Content	12
<b>Level 3:</b> User-Generated Content	15
<b>Level 4:</b> Third-Party IP	18
<b>Level 5:</b> IP Licensing Arrangements	22
<b>Level 6:</b> Financing and Investment	25
<b>Level 7:</b> Marketing, Advertising and Content Ratings	31
<b>Level 8:</b> Consumers – Rights and Protections	34
<b>Level 9:</b> Monetisation	37
<b>Level 10:</b> In-Game Purchases	40
<b>Level 11:</b> Esports	44
<b>Level 12:</b> Gambling and Esports	54
<b>Level 13:</b> Data Protection and Cybersecurity	58
<b>Level 14:</b> Litigation & Dispute Resolution	62
<b>Key Players</b>	67

## FOREWORD GREETINGS WEARY TRAVELLER...

Welcome to the 1<sup>st</sup> Edition of our “Level Up” series.

Video games have been a popular form of entertainment since their creation and have played a key role in shaping pop culture across the world. In recent years, video games have dominated entertainment retail sales, with the global video games market estimated to be worth in excess of **US\$174 billion** in 2020 and predicted to exceed **US\$300 billion** by 2025.<sup>1</sup>



The explosion in sales is in part due to advances in technology and the accessibility of online gaming, which have allowed for the globalisation of video games on an unprecedented scale. Improved internet speeds, mobile gaming and free-to-play models have made video games accessible to groups of gamers that may not otherwise have had access to a gaming platform. In addition, technological advances (in particular, the emergence of major streaming platforms such as Twitch) combined with a cultural shift have facilitated the rise of the esports industry, with elite esports professionals commanding significant salaries, securing personal sponsorship deals and competing for multimillion dollar prize pools.

<sup>1</sup> <https://www.gminsights.com/industry-analysis/cloud-gaming-market>

<sup>2</sup> <https://www.gamesindustry.biz/articles/2020-12-21-gamesindustry-biz-presents-the-year-in-numbers-2020> and Newzoo

While, due to the global COVID-19 pandemic, 2020 was a challenging year for many industries, it was, however, a watershed year for the gaming industry. There are now more developers, content creators and new games coming to the market than ever before, and the new generation of gaming consoles and the advent of 5G mobile connectivity offers new opportunities for stakeholders across the industry. Moreover, reports of increased online purchases and gaming activity in the market coincided with the lockdown measures put in place by governments across the world in response to the COVID-19 pandemic.

### Physical vs. Digital Game Sales 2020<sup>3</sup>



**Total Market Revenues: 9.4% Physical Sales 90.6% Digital Sales**

With this in mind, we wanted to create an all-in-one legal guide for those that currently operate in or are considering entering the video games industry with the purpose of providing an overview of the life cycle of a video game – from the early stages of development, past the grind of regulatory compliance, through to the final stages of monetising the product.

We have had the privilege of working closely with several clients in the video games and entertainment industry, including developers, content creators and investors. This has allowed us to gain valuable insight into key legal and commercial issues that stakeholders regularly face, ranging from ownership of content, licensing of works and enforcing proprietary rights against unscrupulous third parties. We wanted to bring our specialists together to share their knowledge and expertise with the video games industry and to help those that are facing glitches that require fixing. This guide is the result.



**Alex Walker**  
Editor

<sup>3</sup> <https://www.gamesindustry.biz/articles/2020-12-21-gamesindustry-biz-presents-the-year-in-numbers-2020> and Newzoo



**LEVEL 1**  
**CREATION AND**  
**DEVELOPMENT**

## LEVEL 1 CREATION AND DEVELOPMENT

*The start of every great adventure begins with the first footstep and the video games industry is no different. The concept of the game needs to be conceived and it falls to developers, designers and artists to take the first steps in the development of a video game.*

### Key Characters

Developers come in all shapes and sizes, from the long-established titans in the industry with an army of workers at their fingertips, to the one-man band indie developers working from their home studios. Regardless of origin, developers will need to have a team of talented specialists with the skills to be able to create game content, including:

- Programmers
- Designers
- Artists
- Musicians
- Writers
- Actors.

The creation and development of certain content might be outsourced to other specialised developers or contractors. Regardless, it will be important for the developer to ensure that all IP and proprietary works subsisting in works developed are properly managed. In particular, developers will want to ensure that any underlying agreements contain appropriate provisions ensuring that any works created by an employee or contractor are transferred to the developer.

### IP and Proprietary Rights in Video Games

There are a number of different IP and proprietary rights that exist to protect different elements of a video game. These protective rights can be used by the proprietor (and potentially its licensees) to prevent infringement, misuse or misappropriation by third parties of the video game (either in part or as a whole). We list some of these rights in the table below:

*“...it will be important for the developer to ensure that all IP and proprietary works subsisting in works developed are properly managed.”*



Right of Protection	What is it?	What can it protect?
<b>Copyright</b>	<p>Copyright grants the owner the exclusive right to make copies of original creative works. Copyright protects the expression of ideas rather than ideas per se. For instance, the concept of a ‘battle royale’ game is not protectable in itself; however, the manner in which the game format is expressed (e.g., characters, weapons, gameplay, map design) can be protectable.</p> <p>In particular, under English copyright law, a video game’s code may be protected as a “literary work” provided it is original.</p> <p>Video games are made up of a large number of different copyright works, each of which will be created by different designers, artists and authors. It will be important that the developer has the right to use each copyright work, either by having each creator assign or license the copyright.</p>	<p>Computer program (e.g., source code), text (e.g., storyline and narrative), graphics (e.g., character; level designs; artwork), sound recordings (e.g., in game sounds and musical recordings), musical compositions and film (e.g., cut scenes).</p>
<b>Database Rights</b>	<p>In the EU and the UK, sui generis database rights protect the collection of independent works, data or other materials arranged in a systematic or methodical way. The database must be the author’s own intellectual creation and involve substantial investment in obtaining, verifying or presenting its contents. However, ‘obtaining’ does not include the resources used to create the materials (the data). The database right, therefore, does not protect a database comprised of data collected by a company which is simply added to the database with no additional investment.</p> <p>For example, certain online video games (e.g., huge multiplayer online games (MMOs)) use collected player data (e.g., player rankings) which has been inserted into a database. Such data is continuously updated and is used to match players of a similar calibre in order to ensure a fair game.</p>	<p>Player data (e.g., rankings; location); and sales data (e.g., retail and online sales; DLCs; add-ons; lootboxes and skins).</p>
<b>Trademarks</b>	<p>Trademarks provide protection for brand names and logos used on certain goods and services.</p> <p>Trademarks are territorial IP rights and their scope of protection will vary depending on a) which territory they are registered in; and b) the goods and services in respect of which they are registered.</p> <p>Video game developers may want to register a trademark to protect certain elements of the video game (e.g., title, logo, characters). Similarly, developers will need to consider obtaining licences to use third-party trademarks in the video game.</p>	<p>Brand names; product and service names; logos; colours; shapes; motions; and sounds.</p>

Right of Protection	What is it?	What can it protect?
<b>Patents</b>	<p>Patents provide protection for certain “inventions” and grant the patent holder the right to take enforcement action against such invention being copied or used without permission. Patents are a territorial right and often have a protective term of up to 20 years.</p> <p>In the UK, it is not usually possible to obtain a patent for a “video game” as such; however, certain elements of the video game may be patentable if a “technical effect” can be demonstrated.</p>	<p>Inventive elements of the video game and/or console (e.g., controller, semiconductors, graphics cards, virtual and augmented reality technology).</p>
<b>Designs</b>	<p>Design rights protect the aesthetic appearance of a product. The right is territorial and in the UK and EU gives the holder a protective term of up to 25 years.</p> <p>Design rights are often used by developers to protect the “look and feel” of hardware, but can also be used to protect certain elements concerning the visual appearance of the game’s user interface or characters.</p>	<p>The shape and configuration of hardware (e.g., controller, console, VR equipment), surface/decorative patterns, graphic symbols, graphic user interfaces (GUIs), product packaging and character designs.</p>
<b>Passing-Off</b>	<p>The right of “passing-off” exists to protect the goodwill attached to an individual, a business, and/or goods and services. It exists to prevent competitors from unfairly using that goodwill for their own gain.</p> <p>For instance, using a celebrity’s image without their consent to misrepresent that a video game has been endorsed by that celebrity, or a company falsely claiming that its products or services make use of technology licensed from another company.</p>	<p>Personality, image and name rights; company names, brand names; product and service names; logos; and the appearance and presentation of products and packaging.</p>
<b>Trade Secrets / Confidential Information</b>	<p>Trade secrets and obligations of confidentiality can be used to protect confidential information that has value to the business.</p> <p>Leaks in the video games industry are a regular occurrence and can have a significant adverse impact on the commercial value of a game. Developers will want to protect commercially sensitive information (e.g., gameplay, story lines, technical information) from being disclosed to third parties. Accordingly, it is not uncommon for all parties of the development process to have some form of confidentiality obligation either in their commercial contract (e.g., in an employment contract or distribution agreement) or as a stand-alone non-disclosure agreement.</p>	<p>Confidential information (e.g., character designs; gameplay; story lines; technical information).</p>



## Video Game Characters

Video game characters are some of the most important IP assets in the industry and can be the unique selling points for games, franchises or even consoles and merchandise; think of mascots such as Nintendo's Mario that may even become the 'face' of theme parks and films.<sup>4</sup> Ensuring characters are adequately protected is essential. Under English law there are various ways of protecting a character's name or likeness. Instead, they may be protected by copyright as well as registered or unregistered trade marks and design rights.

Copyright may protect a character's image as an original "graphic work". Under English copyright law, it has been established that the graphics of video games may be protected as individual frames.<sup>5</sup> This provides a base level of protection, although generic characters may be considered unprotectable ideas and characters which are sufficiently adapted by a third party may not be infringing. Traditionally, the courts have held that there is no copyright in a name under English law as names are too short to constitute "literary works" in and of themselves.<sup>6</sup> Recent case law on newspaper headlines has, though, suggested that this may now have changed and names may be protectable.<sup>7</sup> Copyright under English law has the advantage of not requiring any registration, however, it may be advisable to also rely on other rights when considering protecting your video game characters' names and images.

*“Video game characters are some of the most important IP assets in the industry...”*



Registered trademarks may also offer an avenue for protection for video game character names and images. Whilst the cost associated with such an application may not make it practicable to trade-mark every character, it may be a useful way of protecting particularly important iconic characters or mascots, especially if they will be used in other games and/or merchandise as part of a wider franchise arrangement. Trade-marks may be perpetual provided they are renewed and are used in each five-year period. Also, recent changes to trademark law have provided for a greater range of trademarks, including 3D and motion marks.

In the absence of a registered trade-mark, English law provides for some protection of unregistered trade-marks through "passing-off". A passing-off action is more difficult to establish, however, as it requires that your brand (here a video game character) has a reputation (goodwill) within the market and that the infringing party has made damaging misrepresentations deceiving/to the public regarding the origin of the goods.

<sup>4</sup> <https://www.ft.com/content/04ffe0ec-43fe-11ea-a43a-c4b328d9061c>

<sup>5</sup> *Nova Productions Limited v Mazooma Games Limited* [2007] EWCA Civ 219

<sup>6</sup> E.g., see *Mirage Studios and others v Counter-Feat Clothing Co Ltd and another* [1991] FSR 145

<sup>7</sup> *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2010] EWHC 3099 (Ch) and *Infopaq International A/S v Danske Dagblades Forening (Case C-5/08)* [2009] ECR I-6569

Similarly, designs may be registered to protect the design of a character. These last for 10-15 years, depend on when the design was first sold or created. As with trade-marks, there are also unregistered design rights, which provide lesser protection.

Due to the multiple avenues for protection, it is important that if you own IP in video game characters you have an IP strategy that best suits your needs. Such a plan should consider:

- **Are any of your characters potentially infringing third-party rights?**  
E.g., other video game characters, celebrities' likenesses or characters from films, books or TV shows. This can be conducted via internal discussions with design teams and searches of relevant registers.
- **Which characters are your most important mascots and brands?**  
This should inform what avenues of protection you pursue for each character.
- **Where are your most important markets / jurisdictions?**  
This should inform in which jurisdictions you must/should register rights.
- **How your characters will (or may in the future) be used for merchandising, franchising etc.?**  
This could inform what type of protection you seek as well as what categories of protection you apply for when registering trade marks e.g., you may need protection for goods such as clothing and toys as well as for electronic games).

*“...it is important that if you own IP in video game characters you have an IP strategy that best suits your needs”*

## KEY PLAYERS



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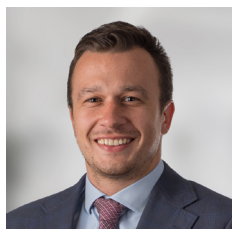
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