

Video Game Law

Second Edition

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VIDEO GAME LAW

SECOND EDITION

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Dedicated to the memory of Tim Luck...

JB

FOREWORD TO THE SECOND EDITION

The questions don't often change, but the answers do.

I have had the opportunity to participate in and observe the video game industry for almost 30 years. Constant change has been the theme — how to make “it” better, faster, more entertaining. The 1970s brought the Atari and cartridge games, then in the 1980s came computer-based gaming. From there, we saw video consoles like Nintendo's NES take off. The 3D era followed with the Sega Saturn, the Sony PlayStation and the Nintendo 64. In the late 1990s came the 128 bit era, which gave birth to famous consoles such as the Sony PlayStation 2, Nintendo GameCube and Microsoft Xbox. Then, in this century, we saw unparalleled change with the Wii and the Kinect Sensor, pushing what we've called gaming into a much broader interactive entertainment experience for consumers.

With each turn in the industry's evolution has come new capabilities, new ways to delight gamers and consumers all over the world. So many talented and passionate people across so many companies have worked to translate incredibly complex technologies into the simplest and most intuitive experiences. On some level, the video game industry has been the forerunner in bringing cutting-edge technology to the masses, on-boarding consumers with the latest technologies, tools and experiences.

Today, we are on the cusp of even greater change than we have ever seen before with the evolution of machine learning and natural user interfaces, ubiquitous network access and cloud services, the advancement and use of sensors in everyday objects and the convergence of hardware and software. The lines between traditional media, gaming, telecommunications and technology companies are rapidly becoming blurred.

As change continues to happen rapidly, in some cases, it is outstripping our own social processes. There is a sort of “future shock” within our legal and policy arenas. While industry moves quickly to brainstorm, prototype, experiment and take new products and services to market at a rapid scale, the legal and policy establishment progresses at a much slower pace. The system is not set up for the new and unexpected, which is almost directly at odds with the spirit of the video game industry.

This is why this book, especially as a second edition, is so important. It provides a baseline reference to help understand past, present and emerging future legal issues that will help the industry as a whole take creative and technological steps to facilitate the future. I commend Jon and his co-authors for their vision, foresight and hard work in collaborating with so many different stakeholders to drive this practical book forward.

Don A. Mattrick
President, Interactive Entertainment Business
Microsoft Corporation

FOREWORD TO THE FIRST EDITION

For those who have not yet realized it, we stand at the edge of an important precipice. The entertainment industry is undergoing a transformative shift from passive viewership of content presented in a largely outdated manner (television and film) to a world of interactive high definition video and audio presentation. Video games, which as recently as 30 years ago appeared to many to be nothing more than a white dot which would bounce around the screen, have evolved into today's most exciting cutting edge technology. In fact, video gaming is not about only gaming, it is about simulating real life and fantasy environments and immersing the user into these virtual worlds. Video game development is driving simulation technology development across industries from aviation to construction to architecture to defence. In terms of entertainment, the convergence of the film and video game industries is inevitable (and imminent) and while much has been written about the legal dimensions of the film industry, little, to-date, has been done to study the legal environment of video gaming.

Jon Festinger has written a wonderful historical and contemporary account of video gaming seen through the eyes of the law. This account is not simply a superficial survey of the many legal areas that currently affect video gaming, but rather is an in-depth study from the earliest video games to the latest in the evolution of video gaming. The book is easily accessible to lawyers and legal scholars as well as to those who are new to the law but have a love and passion for gaming. For those who know neither, I nonetheless suggest that this would be an important start into a world which we will soon all be part of.

Jon and I first met in 1995 when I was giving a paper on privacy law in Vancouver. I am not sure Jon remembers the meeting, but he invited me for lunch at the Vancouver Club and we hit it off. Our next contact did not, unfortunately, take place until 2004 when we had to deal by telephone with one another in respect of a client matter. We had lunch in Vancouver soon after and were discussing the IT Law book series which I had proposed to my publisher LexisNexis Canada. Over lunch, Jon mentioned that he was pitching the UBC Law Faculty a course, perhaps the first of its kind in the world, on video game law. It seemed like a natural fit to invite Jon to pen the video game law book that I had originally wanted to write myself. From the text that follows, you will see that he has done a masterful job. The course is currently being jointly offered by the University of British Columbia and the University of Victoria law schools.

Originally, this was to be the third book in the series as LexisNexis Canada did not know what sort of signal a "video game" book might send to perspective consumers so soon in the life of the series. This decision was soon reversed after I edited the first draft of Jon's manuscript; as you will

see by reading the subsequent pages, the breadth of the book's reach, its quality of writing and legal research is of the highest calibre. I have edited a number of books over the years and I can safely say that this is the first book that I have edited which continually caused me to lose myself as a mere reader of as opposed to as its editor — not an easy feat! Working with Jon was equally enjoyable. I cannot recall a simple disagreement on content changes or tweaks. We approached this project from exactly the same mindset.

I congratulate Jon on putting together this wonderful work and am sure that as you read through the following pages, you will also agree with my assessment that this is a very important work in the area of IT law.

Sunny Handa
February 28, 2005

ACKNOWLEDGMENTS TO THE SECOND EDITION

The creation of this book was truly a multi-player experience.

First and foremost, we wish to acknowledge the support and indulgence of our respective spouses, Corinne Zimmerman, Saskia Battersby and Ellen Ripley. We are inspired by our children Jeremy, Dara and Avrel Festinger; Rylan and Gavin Metcalfe; and the little twinkle in Roch's eye — gamers and future gamers all.

We express our deep appreciation to Gowlings for the resources and patronage needed to create this edition. In particular, we wish to acknowledge Rob Fashler for suggesting the writing team and always being there for us, Sarah Kuchka and Catherine Tsang for marketing and other support, and the always inspirational Eric Gross. We also wish to thank Matthias Besenthal, Philipp Bovensiepen, Stephane Caron, Scott Ferguson, Felix Hilgert, David Jiang, Brian Lee, David Lee, Julianna Mah, Bryan Millman, Chris Munroe, Rick Nowak, Kevin Sartorio, Johanna Sigurdson, Ryan Welsh, Julia Winters and Annie Yu.

The following individuals have had significant impacts on the content of this edition: Barb Adamsky, Adam Bullied, Dale Clarry, Fran Cudlipp, Anoop Desai (Electronic Arts), Bruno Godin, Joel Guralnick, Mike Hall, Kevin Kinghorn, Don Mattrick (Microsoft Corporation), Kristin Peterson, Carolyn Pinsky, John Sanderson, Q.C., Richard Smith and Allan Switzer. We are most grateful to all of you.

Others who have influenced or contributed to this volume are Jim Alam, Bill Allman, Professor Joel Bakan, Shannon Baker, Frank Borowicz, Q.C., Perry Bahniwal, Jeremy Costin, Rob Cunningham, Mark Findlay, Len Glickman, Art Green, Sunny Handa, Jason Kee, Gary Maavara, Mark Raham, Don Rose, Ian Macnaughton, Steve Rechtschaffner, Sheridan Scott, John Stroppa, Cathy Walters, Professor Joe Weiler and Mel Wheaton.

Jon would also like to acknowledge and thank the many students he has had the privilege of teaching and learning with over the years, as well as acknowledge his colleagues at the Centre for Digital Media and UBC Law School.

While this book would not have been possible without the contributions of those listed, all its content solely reflects the opinions of the authors.

As noted in 1787 on the cover page of the subsequent version of Immanuel Kant's *Critique of Pure Reason*: "Second edition, improved here and there".

Jon Festinger, Q.C.

Chris Metcalfe

Roch Ripley

December 9, 2011

PREFACE AND ACKNOWLEDGMENTS

TO THE FIRST EDITION

When my curious (then) eight year old, Jeremy, asked me what this book was about, I answered innocently that it was about video gaming. He was immediately perplexed and more than a little concerned. “YOU’RE NOT going to tell people HOW to play games... ARE YOU?” he demanded to know. Wounded by the vote of non-confidence in my gaming abilities, I nonetheless pressed on, explaining that the book was about the legal aspects of video gaming. Jeremy’s face relaxed into an eloquent look of obvious relief. In no small part, I fear, because he had been concerned about whether I could ever bring my video game skills up to the level of a worthy teacher — or even an average eight year old.

It probably would have been a lot of fun to try.

Suggesting a framework in law for video gaming is not as simple as pouring old legal wine into new conceptual bottles. Knowledge of the law applying to each of electronic gaming’s antecedent media is of limited assistance. A lawyer who understands copyrights and trademarks in relation to some other industry does not necessarily know them in a game context. A freedom of expression lawyer who acts for newspapers does not automatically comprehend how cherished notions of protecting speech apply to a “first person shooter.” The regulatory infrastructure governing storytelling on television does not easily transfer to interactive mediums. One purpose of this book is to make these differences understandable, while another is to illustrate that video game law is both unique and fascinating.

It became clear writing this book that court decisions involving video games tend to have more in common with other video gaming cases, than with the domestic legal systems where judgments originate. This is evidence that video gaming law is legitimately its own legal area, while also reinforcing the fact that the industry is international in its very makeup. Games are generally intended for worldwide audiences, and production teams, even on the same project, can be spread around the globe. Given the subject’s international context, it would not prove helpful to limit analyses to any one national perspective. Accordingly, I have endeavoured to incorporate worldwide materials wherever possible.

One of the greater challenges was fitting new hardware and software developments into traditional legal typologies, a task made all the more difficult because video gaming represents an unprecedented convergence between technology and content. Lines become blurred. For example, the concepts of “reverse engineering” and “enhancements and mods” seem much related in legal terms. Yet, they are presented in different chapters of this book, mostly because reverse engineering deals with technological

devices, while enhancements and mods tend to revolve around content. The spirit of innovation (and subversiveness) represents the common thread underlying both, even more than any consistency of legal perspectives.

An equally difficult conundrum was how to deal with End User Licensing Agreements (“EULAs”), surely the dominant contractual document in video gaming. Given the disparate sources of law affecting EULAs, there could not be one single section on the topic. Accordingly, the legal foundations around which many EULA provisions revolve effectively comprise almost all of the third chapter of this book, and large parts of the first two chapters.

Ultimately, this book contains many questions that are not yet capable of being definitively answered. It is my hope that the synthesis of materials and sources provided might be of some assistance towards further academic and legal analysis. Video gaming is a relatively new medium that is both growing and changing. Given the evolutions and revolutions regularly occurring in many areas of the law, most especially copyright policy, it seems probable that we are closer to the beginning of this jurisprudential journey than its end.

There are a great number of people whose contributions to this book must be acknowledged. My first thanks go to my family for their support and forbearance. My wife Corinne, and children Jeremy, Dara and Avrel are a constant source of love, joy, surprise, meaning, and inspiration to me. My nephew Ari Kelman also deserves to be mentioned for helping me take my first steps into PC gaming many years ago.

Tim Luck was there at the very beginning of this project. He both helped conceptualize this book and facilitate my efforts to write it. He gladly took on the massive task of locating source materials when there seemed to be very little available in any organized form. Tim’s enthusiasm and knowledgeable commentary greatly influenced the present form and substance of this work.

I am truly privileged to work with Jim Alam who practises law with integrity, supreme talent and genuine humility. His passion for video game law and thoughtful contributions to the genesis of this volume, its development, and its editing are gratefully appreciated.

Many wonderful opportunities to teach over the years have all in some way contributed to this text. I am indebted to Brian Antonson, Joel Bakan, Joost Blom, Cheryl Crane, Laura Davie, Robert Howell, Donna Logan, Andrew Petter, Madam Justice Lynn Smith and Joe Weiler for their kindness in affording me that privilege, and to all my students for the resulting challenges.

Adam Bullied, Rob Edgar, Joel Linzner, Danielle Michael, Mark Netter and Rusty Rueff read and made valuable comments on various drafts or parts from an industry perspective. Cameron Bell provided peerless editorial

perspectives and assistance. Steven Robinson did much to improve various versions, and especially the footnotes. Ken Cavalier, Joel Schuster and David Spratley each reviewed the entire manuscript and prepared excellent draft contributions. Scott Dunlop generously went through several versions of this book, and provided wise editing suggestions on subjects great and small. Joel Guralnick made many incisive and practical observations. Others who assisted on some parts of the book included Chris Bennett, Dean Dalke, Craig McTaggart, Carolyn Pinsky, Marguerite Vogel, Ted Woodhead and Kevin Wright. I am also most thankful for many useful conversations over the years on diverse media and legal subjects with Frank Borowicz, Ron Bremmer, Dan Burnett, Gowan Guest, Melissa Lebo, Mr. Justice Wallace Oppal, Jeff Thiessen and Janet Yale.

I must express my appreciation to the staff and members of Davis & Company and Koffman Kalef for their understanding and logistical support as this book was being written and published. In particular, thanks to Daisy Chun and Flordeliz Mercado for their patient efforts in preparing this text, and Wendy Holmes, Betty Rexin and Joanna Spurling for providing me with requested research materials in such a timely way.

Sunny Handa, my editor and valued colleague, gave me the twin gifts of opportunity and confidence. Sunny's comments and encouragement have made this work much better than it otherwise would have been. In addition, I want to thank Dannan Hawes of LexisNexis Canada for his support and enthusiasm. Connected to these particular thanks, I should note that there are many technical computer programming and networking related concepts in these pages. The reader may wish to refer to the text "Fundamentals of Information Technology" by Dr. Sunny Handa, which precedes this volume in the LexisNexis Canada's Information Technology Series.

As might be expected, much of this book was written at strange times and in odd places. Thanks to Mario's and The Elbow Room Café for their unique space rental arrangements.

Finally, there are many people in my life whose continuing encouragement and faith make the impossible not seem that way. I appreciate and thank all of them for their belief and support, especially Susanne Boyce, Rob Fashler, Ivan Fecan, Ian Macnaughton, John Sanderson and Cathy Walters.

Naturally, the comments in this book reflect my own opinions, and all errors and omissions are solely my responsibility.

Jon Festinger
March 18, 2005

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Jon Festinger is a Vancouver, British Columbia based lawyer whose passion for video game law grew from his experience as both a lawyer and executive across the spectrum of media, communications, sports and entertainment. As a graduate of McGill University's Faculty of Law, Jon began his legal career in private practice, in turn becoming General Counsel of WIC Western International Communications, Senior Vice President of the CTV Television Network and Executive Vice President, Business & General Counsel of the Vancouver Canucks and GM Place. Jon practises with his own firm Festinger Law & Strategy LLP. He is an Adjunct Professor at the Centre for Digital Media in Vancouver and at the Faculty of Law of the University of British Columbia. Jon was appointed Queen's Counsel ("Q.C.") by the Province of British Columbia in 2009 and is a director of Ronald McDonald House British Columbia, City Opera Vancouver and the Simon Fraser University Foundation. Jon is the original author of the first edition of *Video Game Law* published by LexisNexis in 2005.

Jon is dedicated to all things automotive and can be found in his fully-equipped virtual cockpit occupied by his favourite game, correction, simulation: rFactor 2.

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Roch Ripley is an intellectual property lawyer and patent agent with the Vancouver office of Gowling Lafleur Henderson LLP. Roch practises intellectual property law and focuses on developing corporate intellectual property management strategies, drafting and prosecuting patent applications, opining on patent infringement and validity, technology contracting and video game law. Roch has helped clients at all stages of development protect their technology and effectively use their intellectual property rights as a business asset to obtain financing, generate revenue through licensing, and cross-license and partner with other companies.

Roch's favourite game is Super Street Fighter II Turbo.

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