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Intellectual Property Protection for Games

Copying within the games industry is prevalent. Some people attribute this to the fact that this is just the way it is and has always been within the industry. This is often premised on the notion that the "idea" for a game is not protectable. But as the game market grows, so to do the losses from copying suffered by the game innovators.

One of the biggest factors contributing to this is that many game developers do not develop comprehensive strategies for protecting the valuable intellectual property that they create. This is generally due to several reasons. One is that historically intellectual property just not been a big focus for many in the industry. The other is that many people are not aware of the range of options available for protecting IP in the game space and what aspects of games are protectable. This often is due to some common misunderstandings about intellectual property, particularly with respect to the patentability of game features.

While it is true that one can not protect the "idea" for a game, this does not end the inquiry. Many aspects of games are protectable by patents, copyright and trademarks. Of these, patents are probably the most overlooked and least understood. While this applies to all types of games, there are particularly compelling opportunities to patent many of the innovative aspects of social and online games. This is due in part to the many recent developments in the relevant technology and business models for these games. Prudent developers and publishers will seize these opportunities to develop a comprehensive IP protection strategy.

Overview of Forms of IP Protection

Games are basically software and content running on a platform. Other applications of software and technology platforms are patentable and are frequently patented. The patentability of software and technology platforms does not change just because the application is a game. Yet, many game developers overlook this and forego patent protection. Additionally, the content, source code and other creative aspects of a game can be protected by copyright. The name and other brand elements of a game can be protected by trademark.

Patents

Patents are without a doubt the most misunderstood form of IP protection for games. We have frequently heard people say you can not patent games. This is a gross over- generalization and leads to many missed opportunities for those who hold this belief. Broadly speaking, patents are available for the software and platform aspects of games, but generally not the content per se. Patents cover various features, functions and processes within a game, and the technological components of game platforms, among other things. Patents also are available for innovative business methods that are developed for use in or with games (e.g, business methods to monetize games). Yes, despite the widely held misbelief, there is no prohibition on patenting business methods.[1]

Some examples of patentable aspects of games include:

Games Incorporating Real World Information

One example is U.S. Patent Application Publication No. 2006/0281553 (Digital Chocolate, Inc.), which relates to adjusting an element of a game (e.g., a character strength, a reward amount, a reward type, an enemy type, and/or a game environment action) based on a real world location of a device on which the game is being played.

User Interactions

U.S. Patent Application Publication No. 2006/0135264 (Microsoft), which relates to different player usage parameters that can be used to determine socially compatible users to be paired together in gaming sessions.

Game Balancing Mechanics

U.S. Patent No. 6,729,954 (Koei Co., Ltd.), which relates to balancing battles in an MMO such that the team with fewer players will receive an increased strength during fights with a larger team.

Server-side Performance

U.S. Patent Application Publication No. 201002416921 (Sony Computer Entertainment America Inc.), which relates to determining update rates for objects in a virtual environment on a per-client, per-object basis so that the farther away an object is from the viewpoint associated with a given client, the slower its update rate will be.

User interface features

U.S. Patent Nos. 5,269,687, 5,354,202, and 5,577,913 (Atari Games Corporation now owned by Warner Bros. Entertainment, Inc.), which relate to the well known "ghosting" mechanic often used in racing games to enable a user to compete against a previously completed race/lap.

Virtual Currency Model

U.S. Patent Application Publication No. 201%227675 (Zynga), which has received much media attention, relates to a virtual currency, which is purchased with real world money but is not redeemable for real world money, so it can be used in a gaming environment such as Zynga Poker.

The foregoing are just some of the many examples of the types of game features that can be patentable.

Common Patent Misperceptions

Even when developers believe they have a potentially patentable invention, they often choose not to pursue patent protection due to one or more of a number of common misconceptions. Some of these misconceptions include the following:

Misconception: It takes too long to get a patent/the game will be obsolete by the time it issues.

The truth is that it can take 1-3 years or more to obtain a patent. It is also true that a particular game may evolve or become obsolete in that time. However, the misconception here is that this means the patent is necessarily worthless by the time it is granted. Many game-related patents, if drafted properly, will not be limited to covering a single game. If one carefully chooses the patents to pursue, and covers fundamental functionality or features[2] that become standard features of games or a genre of games, the patent can have significant value for quite some time. Some of the applications and patents listed above are examples of this principle. For example, the patents listed above related to "ghosting" have been licensed for use in over a dozen games.

Misconception: Most patents are invalid so why bother to pursue them.

It is true that some patents that issue are later invalidated, but that is more a function of the quality of a patent then an indictment on patents in general. With careful research, a patent attorney knowledgeable of the industry and quality patent drafting, many invalidity challenges can be avoided.

Misconception: Patents are too expensive.

The notion of "too expensive" is a relative matter. Patents can cost $20-30,000 or more to obtain. Given the millions to billions of dollars successful games and game franchisees can generate, are they too expensive? A properly crafted patent can deter or prevent copying of innovative game features and avoid loss of hundreds of thousands or millions of dollars of revenue to clones. Additionally, patents for start-ups can also add significant value in other ways. More sophisticated game investors understand the value of patents and this can help with funding. We have worked with many companies to license or sell patents that have generated millions of dollars in revenue for investments in the tens of thousands of dollars.

These 10x or more returns provide great value and provide an example of how patents are not too expensive. Additionally, when games or game companies are sold, patents can substantially enhance the value on exit. The bottom line is that like other business tools, there is a cost to obtaining a patent. But in many cases the cost can be a very sound investment.

Misconception: We would never sue so why get a patent?

Filing a lawsuit for infringement, or aggressively seeking licenses from others are examples of two of the "offensive" uses of patents. Patents also have "defensive" value that is often overlooked. For example, having a patent portfolio is a key deterrent in keeping others from asserting their patents against you. A competitor is much less likely to bring an action for infringement if they know the potential target also owns patents that can be used to bring a counterclaim. As another example, patents and published applications are the primary source to which patent examiners look during examination. If you do not file a patent application for your invention, it is

possible that someone else may. If they obtain a patent this may require you to deal with their patent at a much greater cost than if you had filed and blocked them in the first place. Even if a later-filed patent is invalid, proving its invalidity may nonetheless create a cost in time and effort that could have been avoided.

Misconception: Even if we wanted to sue, we couldn't afford it.

This may have been the case years ago (if ever), but not so today. Now more than ever, there are a wide range of options for funding meritorious patent suits. More law firms (including Pillsbury) will consider taking cases on a contingent fee basis. Additionally, there are a number of private equity firms that have created funds to invest in patent centric-businesses or even pure patent plays. If you have a valuable patent, there will be a way to fund the enforcement. The value of patents as a business tool and even an asset class is at an all time high.

Misconception: I have not invented any new technology, I am just using existing tools/components.

One need not develop a whole new technology to have a patentable invention. In fact, most patents are merely improvements over existing inventions. More importantly, there is nothing that prevents one from obtaining patents on things that leverage existing tools/components. A concrete example from the old days of analog circuits may help. All analog circuits are a combination of existing components (resistors, capacitors, inductors, etc.). Yet, there are tens or hundreds of thousands of patents for circuits. These patents cover not the components themselves, but the unique combination of components and the resulting functionality of the circuit.

These are just some of the many misconceptions that we commonly hear. Many others exist.

Copyright

Copyrights do not protect ideas or functional aspects of games. Rather, they cover the expression of ideas. Loosely speaking, copyrights cover the content in games (the art work, virtual goods, etc.) the look and feel of the game and any source code, among other things. While this coverage is not nearly as broad as the protection provided by patents, copyrights can provide a deterrent to those seeking to clone a game. Additionally, for games that rely on virtual goods, unauthorized secondary markets are likely to arise. Having copyright protection on the virtual goods can be one of the tools useful to shut down any secondary market sales of the goods, if desired.

Many people are aware that copyright protection exists once a work is created and you need not file a copyright registration to have copyright protection. However, that is only half of the story. What is less well understood is why it is very valuable to file for copyright registrations in a timely manner. Having a timely filed copy registration provides the possibility of collecting statutory damages of up to $150,000 per infringement, and for recovery of legal costs and attorneys' fees. Certain legal presumptions regarding ownership and validity are also available to a copyright holder. It is important to note that these advantages are generally only available for works that were timely registered with the Copyright Office (e.g., prior to infringement or within three months of first publication). Absent a timely filed copyright registration, you have to prove actual damage, (which is often difficult particularly if you catch the infringement early on) and you typically do not get attorney fees.

Another aspect of copyright law that is of growing importance in some games is the Digital Millenium Copyright Act (DMCA). One part of the DMCA provides liability protection for online service providers that host content uploaded by users. This can be a powerful tool to avoid liability for copyright infringement if any of the users do not own the copyright to that content. But this protection is not automatic. You must strictly comply with the DMCA requirements to obtain this protection. This includes, among other things, registering a DMCA agent with the Copyright Office, have an effective DMCA policy and publicly accessible notice to this policy, having a policy to terminate repeat infringers, and timely taking down or disabling access to content upon receiving effective notice. If you are a copyright owner, you can use the DMCA to facilitate your enforcement efforts, but your notices must comply with the DMCA requirements. Additionally, if you send an improper notice (no good faith basis for alleging infringement or failing to consider fair use), you can create a liability for sending a DMCA notice.

Trademarks

Trademarks have been more widely used to protect the names of games. Trademark protection is fairly straight forward. However, as some recent lawsuits demonstrate, if you are successful others will try to leverage your success by using a variation of your name. One of the important things to consider when selecting trademarks is how strong or weak the mark may be even if you are successful. in the game space, the battle over trademarks is heating up. in part this is due to the great success of some offerings that arguably are weak trademarks. For example, Zynga's Farmville has been quite successful. As a result, many more games are now coming out with the "ville" suffix. So Zynga is starting to go after these uses.

In another case, Apple's App Store is also causing trademark issues. While the App Store has been incredibly succesful, the name is fairly descriptive. Descriptive marks generally are relatively weaker marks than those are more arbitrary such as Zynga. Careful selection of strong, defendable trademarks is an important aspect of an overall IP strategy.

How to Develop an IP Protection Strategy

Two of the most important things that a developer can do to maximize IP protection for their games are:

- Be informed of the true facts regarding patents, copyrights and trademarks and not fall prey to misconceptions or "advice" from people who are not true IP game experts.
- Consult with an IP attorney who specializes in IP protection for games. Even within the IP field, there are many nuances to protecting inventions in different industries. For example, patents for games require expertise in the areas of software, internet, business methods and knowledge of the game industry. Consulting an IP attorney who does not focus in these areas can lead to missed opportunities.
- We recommend that once you select a knowledgeable attorney, you sit down with the attorney and walk through all of the details of your game, your business model and your product road map. Based on this, a competent attorney can help you develop a comprehensive IP protection strategy. Many attorneys will do such an initial meeting on a complimentary basis. If so, there is little to lose in participating in such a meeting and everything to lose by not doing so.

Conclusion

Many misperceptions cause developers to miss great opportunities to secure IP protection for their ideas. In part, this is due to a lack of a true understanding of what is protectable and/or not working with an attorney with the relevant expertise. Games are all about IP. Why make it unnecessarily easy for others to free ride on your hard work and creative genius.

Intellectual Property

Pillsbury's Intellectual Property practice advises on developing successful and comprehensive IP strategies by protecting, managing, asserting, defending and monetizing IP assets. Our team includes lawyers, technical consultants and patent agents with a wide range of advanced scientific and technical degrees in areas including electrical and mechanical engineering, chemistry, biology, physics and a number of other technical disciplines, including many former patent examiners.

About Pillsbury

Pillsbury is a full-service law firm with a keen industry focus on the energy and natural resources, financial services, real estate and construction, and technology sectors. Based in the world's major financial, technology and energy centers, Pillsbury counsels clients on global regulatory, litigation and corporate matters. We work in multidisciplinary teams that allow us to anticipate trends and bring a 360-degree perspective to complex business and legal issues—helping clients to take greater advantage of new opportunities and better mitigate risk. This collaborative work style helps produce the results our clients seek.

Endnotes

1 See *Bilski v. Kappos*, 561 U.S. _____ (2010), in which the United States Supreme Court rejected a categorical exclusion of business method patents.

2 It is important to note that patentability includes at least two considerations. The first is whether the invention is the type of thing that can be patented. The second is whether the invention meets the other criteria for patentability, including whether it is obvious over the prior art. This too is an often confused aspect of patent law, and too many non-qualified commentators are quick to draw conclusions that an invention is obvious, without understanding the full legal test.