Creative vs. Corporate: Patent Infringement Awards Respawn the Debate Over Patenting Video Games
The Intellectual Property Strategist
Mark D. Simpson and Paul Leicht
November 2021
[Link]

Patents can provide the broadest and strongest form of protection in the video game field. They can protect the methods and processes performed by the game software, and they can protect the hardware components of the game system, both in function and aesthetic design.

This past May, a Texas jury awarded GREE Inc., developer of the game *Fishing Star*, $92 million in damages against Supercell Oy, the developer of the game *Clash of Clans*, based on allegations of patent infringement.

It is common for businesses involved in developing and bringing to market consumer products to go through the "it's all about the art" vs. "it all about the bottom line" conflict that invariably raises its head from time to time. This conflict tends to arise when individuals from the creative side of the house and individuals from the business side of the house get together with legal counsel to discuss strategies for protecting the fruits of their collective labor. Nowhere is this tension more apparent than in the world of video game development.

The basic tools available for protecting video game intellectual property are no different than those generally available for any field, and include patents, trademarks, copyrights and trade secrets. Trademarks create brand identity and can be the first consumer-facing aspect of a product, making protection of trademarks vital. Copyrights protect the tangible creative writing, including computer code, artwork, music and other artistic elements of game development. They can be very valuable, but are generally limited to protecting the actual expression of the author, and infringement is generally limited to actual copying. Trade secrets can protect ideas (*e.g.*, game story concepts and characters that are still in development and not yet made public), important algorithms, source code that is not readily accessible, etc. However, trade secrets are only afforded protection if kept secret, and if the secret is discovered through legitimate research, the protection can be lost.

Patents can provide the broadest and strongest form of protection in the video game field. They can protect the methods and processes performed by the game software, and they can protect the hardware components of the game system, both in function and aesthetic design. Copying is not required to infringe a patent; an independently developed product can be infringing just as a copied product can. A polished, ready-to-market video game combines a multitude of complex software bundles and specialized hardware (user input/output like game controllers, game engines, and the like) to implement the finished product. Any one of these components, be it hardware or software, can potentially involve one or more inventions that may be protectable via the patent process. However, whether video game developers seek patent protection for these developments can depend significantly on the basic philosophies of the developers and how they balance their corporate and creative values.

Patent protection is, in essence, a legally created property right. The U.S. Constitution explicitly discusses patent protection in Article I, Section 8, Clause 8 (Patent and Copyright Clause):

The Congress shall have power…. [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

The intent of patent protection is to grant exclusive rights in discoveries in order to "promote the progress of science and useful arts." It is notable that the language of the Constitution places no limit on the technological or industrial field in which these discoveries can be found, and courts have found that the underlying technology implemented in video games falls within the purview of patent protection.

In the video game industry, significant time, effort, and funds are spent developing, launching, and maintaining games. From coding, voiceovers, modeling, music generation, debugging, product testing, and marketing, video game development can reach into the tens of millions of dollars and can average three to seven years from conception to launch. *Grand Theft Auto V*, for example, included a development team of around 1,000 people, took over five years from preproduction to launch, and cost around $ 265 million to bring to market. (*See*, French, Michael, "Inside Rockstar North – Part 1: The Vision," Develop. Intent Media. (Oct. 3, 2013).

Given the size and complexity of such an undertaking, it is not surprising that along the way, inventions can result from the development of the specific video game technology (*e.g.*, if the development team creates a novel technological hardware or software solution to a problem it experiences during production, there may be an invention involved). Beyond the profits the company generates from the video game itself, game developers and game development teams are often incentivized by the prestige of being inventors named on a patent and in some cases receive monetary awards from their employer for creating patentable invention. Steve Jobs, the founder of Apple, Inc, was a prolific inventor, and was named on over 400 patents (and he made sure that people knew it). (*See*, Regalado, Antonio, "Steve Jobs Lives on at the Patent Office," *MIT Technology Review* (Nov. 27, 2014).) Inventors often receive a copy of the "original patent" in the form of a plaque. Qualcomm, the telecom giant, is known for its "wall of patents" where around 1,400 of its patents are hung. (*See*, Lai, Richard, "Pictures of Qualcomm's Patent Wall," Gleam Law (2021) (https://bit.ly/3pi1Sax)). To employees and visitors, this creates an -inspiring display.

There are numerous ways a patent owner can monetize patented technology beyond product sales, most commonly by licensing the patented technology or an outright sale (assignment) of the patent and the rights that go with it. The value of video game patents can also be measured by the damages awards resulting from successful patent infringement litigation. In 2013, for example, Tomita Technologies was awarded $30.2 million in damages for infringement by Nintendo of a patent related to 3D imaging for handheld entertainment devices. More recently, in January 2021 Ironburg Inventions was awarded $ 4 million in damages for infringement by Valve Corp. of a patent dealing with video game controllers, and, as mentioned above, in May 2021 GREE was awarded $92 million in damages for infringement by Supercell of patents related to mobile battle game engagement.

Such cases confirm the potential value of video game patents. If utilized correctly, video game patents can increase a company's value, a company's leverage in a respective technical field, and can also provide reputational and commercial value to the individual inventors.

On the other side of the coin, there is a strong contingency in the video game and software fields, and in particular among independent developers, who consider patenting of video games to be out of bounds and a hindrance to innovation. The video gaming industry came into being through the work of independent programmers who considered each other more as colleagues trying to achieve similar results rather than competitors trying to squelch each other. Developers embracing this philosophy thrived on the sharing of ideas and building on each other's work, and they see the "right to exclude" provided by the patent system as putting the brakes on creative advancement in the field and limiting success to larger entities with the funding to afford working within the patent system.

Open-source software is one example of this philosophy that has met with great success, and a substantial population of programmers practice in open source programming. According to Red Hat, a leading provider of open source software, open source programming "is developed in a decentralized and collaborative way, relying on peer review and community production. … Open source has become a movement and a way of working that reaches beyond software production." (*See*, "What is Open Source?"(Oct. 24, 2019); https://red.ht/3lTuHZ0.)

Open source programming is antithetical to patent protection of software. The goal of open source programming is to provide programming building blocks free to the public to use. In turn, programmers build their own code off these building blocks, and provide their code as open source material. As this

cycle continues, these building blocks grow over time with input from various programmers, which, open source advocates argue, builds a collaborative network between programmers and advances the technological field.

Another point argued by those who advocate against videogame patenting is that technological advancement experienced in the video game industry is *too quick* to work effectively with the patent system. A granted patent gives the patent owner property rights for 20 years from filing the patent application. However, technological advancements in the video game industry can occur at a very quick pace, and a key aspect of success in the video game space is keeping things fresh, challenging, and interesting for the user. This means that something that is innovative and desirable to the end user today may become boring and routine in just a few short years, giving rise to the argument that the 20 year patent term granted by a patent is really only helpful for a small fraction of that time.

Finally, those arguing against patenting video games often assert that the patent system provides an uneven playing field that favors large, well-funded companies and drives away the small, independent developers that have been and continue to be a significant creative force in the field of video game development.

As an attorney advising clients in this field, it is important to be familiar with both sides of this issue and, as with any client, it is critical that the goals and philosophies of the client be understood at the onset of the representation. From a purely financial perspective, seeking patent protection for the games developed by a video game company may seem like an obvious choice. Patents can enable the client to prevent competitors from profiting from the hard work and substantial time and funding it and its developers put into bringing a game to market, and can provide additional sources of revenue (*e.g.*, via patent portfolio licensing or sales). However, it should be remembered that the client's development teams, and perhaps even its founders, may well be programmers who cut their teeth in the open source, share-what-you-develop environment and believe in freely accessible software for other programmers to use and build upon. Clients should be advised of all available avenues for protecting their intellectual property, including patents, copyrights, trademarks, and trade secrets, and the strategy they eventually employ will be guided by their goals and philosophical beliefs about patent protection for video game products and processes.

*****

Mark D. Simpson is a veteran IP attorney in the Philadelphia office of Saul Ewing Arnstein & Lehr LLP who in the course of his 20+ years as an IP attorney has counseled clients in protecting and managing their IP assets via patent preparation and prosecution, IP counseling and litigation, and IP due diligence and opinions. He represents U.S. and overseas-based clients, with extensive representation of clients in European and Asian countries. He can be reached at **mark.simpson@saul.com**.

Paul Leicht helps clients protect their intellectual property though his work drafting patent and trademark applications and prosecuting them before the U.S Patent and Trademark Office. Paul has assisted clients with patent portfolios for inventions involving electrical engineering, software, home automation systems, memory devices and semiconductors. He has particular experience working on patents for technology dealing with the physical layer and media access control (MAC) layers of telecommunication systems.

The views expressed in the article are those of the authors and not necessarily the views of their clients or other attorneys in their firm.

This article originally appeared in The Intellectual Property Strategist, Vol. 28 No. 2 (2021).