

The online leisure and social gaming sectors are amongst the fastest growing and changing sectors. Simont Braun makes sure you stay on top of your game. This article is part of a series intending to guide you through the regulatory landscape applicable to video games. This series is intended as practical, business-focused and attention grabbing, emphasising the most important topics and developments that may interest an international audience, whether you are a gamer, a game developer, a publishing agency or a governmental organisation.

GAMING: WHAT'S LAW GOT TO DO WITH IT ?

EPISODE 2

MAPPING THE REGULATORY LANDSCAPE (2)

The first step in protecting your intellectual property is to recognise what kind of IP rights you or your company may have or could have. You then want to invest in protecting those rights to ensure you do not inadvertently lose them and to ensure you maximise the value of the game and/or company.

Last week, we saw how trademark, copyright and software rights may apply to video games. This week, we will focus on less known forms of IP protections: database rights, design rights and patent rights. We will also have a look at trade secrets and how they may apply to the video game industry.

1. Sui generis database rights

Databases in whatever form, where the acquisition, verification or presentation of its contents testifies to a significant qualitative or quantitative investment (e.g. a game directory) can be protected under sui generis database rights.

The rights of database producers run from the moment when the database manufacture is completed and expire fifteen years after January 1 of the year following the date of completion. Any substantial change in the contents of the database (as a result of successive additions, deletions or modifications) may lead to a new protection period. Therefore, some databases may enjoy protection for an unlimited period, to the extent that they are regularly updated.

2. Designs

A design or drawing relates to the appearance of a product or part of a product, for example, a new design for a game controller, a virtual reality headset, a game box. The appearance, which is also referred to as the design, results from features such as lines, contours, colours, shapes, textures, materials of the product itself or its ornamentation.

The rights conferred by a design may be acquired without registration. However, the duration and scope of the protection conferred by unregistered designs are more limited than those of registered designs. One can register designs at the BOIP for the Benelux region and/or the EUIPO for the EU region. The term of protection of registered designs is up to 25 years in both cases, while that of EU unregistered designs is 3 years from the date the creation was first made available to the public within the EU.

3. Patents

Patents – the most diverse form of intellectual property – protect inventions from being copied. An invention is any new and inventive useful process (e.g. gameplay method, graphics technique, user interface communication), machine (e.g., a computer programmed with computer software), article of manufacture (e.g., a disk or storage media on which software is distributed), or composition of matter. Patents can be thought of as protecting ideas, as long as they are sufficiently disclosed to be implemented, whereas copyrights only protect a particular expression of an idea.

All patents include a description of the invention and one or more “claims” defining the invention’s legal limits and boundaries (similar to physical boundaries of real estate that a trespasser must stay out of). Accurately determining these bounds is important because a patent provides a limited but powerful monopoly on what is claimed. A patent prevents anyone other than the patent owner from making, using, selling, or importing an item, or performing a process encompassed by the patent’s claims. These acts are considered patent infringements. A claim drafted too broadly may be invalid for attempting to encompass what is old or obvious. At the same time, a claim that is too narrow may be ineffective against competitors making minor modifications to your invention.

Patents are valid in principle for 20 years from the date of application filing, subject to payment of the annual fees and not being revoked for one reason or another.

4. Trade secrets

The last regime we discuss here is perhaps the easiest to obtain protection for. A trade secret is an information that has business value, that is kept secret, and has been subject to reasonable steps taken by the rightful holder of the information to keep it secret, including the use of confidentiality agreements



for business partners and employees. The unauthorised acquisition, use or disclosure of such secret information in a manner contrary to honest commercial practices by others is regarded as an unfair practice and a violation of the trade secret protection.

The most common form of trade secret misappropriation occurs when employees leave a company and take information that the company keeps secret (e.g. a list of registered game players in a virtual world, manufacturing techniques or tools such as unreleased in-house software used to create game levels, etc.).

Suppose you have developed in-house information of value to your company and you want to protect it as a trade secret. In that case, all you have to do is take reasonable precautions to keep it a secret (e.g. controlling access to the information, having employees agree to keep secrets... secret).

The protection lasts as long as this “secret” criteria remain fulfilled and, hence, can be potentially unlimited in time.

So, what did we learn? Over the last two weeks, we covered the main forms of IP rights that can protect a brand new video game. Each right has its advantages and disadvantages. In theory, patents provide the broadest and strongest protection, but they are the hardest to get, are the most expensive and remain in force the shortest time. Copyrights are easier to obtain, less expensive and last at least 70 years, but have the narrowest scope of protection (only cover the specific expression). Trademarks last as long as you keep using the trademark for the registered goods and services and pay the annual fees. However, they do not prevent anyone from, for example, copying the content and graphics of the game. Trade secrets last as long as you can keep a secret and as long as you implement measures to keep them secret. The strongest approach is undoubtedly to pursue all as appropriate, but do not overlook the benefits of even one or two forms of intellectual property protection when budgets are tight, because intellectual property is often the lynchpin of a company’s success.

In an ideal world, you would protect all the various kinds of IP that apply to your video game and company. However, the reality for many in the video game industry is that funding can be limited and technological advances can happen rapidly. Both of these forces can pose obstacles in protecting your IP. In such circumstances, you should consider protecting your core IP assets first, as those will be the most important for development and commercialisation purposes. You should also consider legal time limits if you have time-sensitive IP rights like patents and industrial designs. Ensuring the necessary filings within the relevant deadlines is critical when evaluating what aspects of your IP to protect and when. Understanding your business objectives, plans for further development and consulting with legal experts will ensure adopting the best strategy.



In conclusion, being proactive in understanding and protecting your IP is a critical part of the gaming industry. While designing and developing a creative new video game, you should take time also to create a coherent IP strategy and get your IP game on! At the same time, knowing about your own IP is not enough. Third party's pre-existing rights can very easily get in the way of the development of your own video game. That is why early attention to IP is key.

To find out how exactly this problem unfolds, tune in next week!

For any questions or assistance please contact our Gaming Team:
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This article is not legal advice or opinion. You should seek advice from a legal counsel of your choice before acting upon any of the information in this article.

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