Studios and designers: How to protect the intellectual property of your video games?

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Behind every video game, there is intellectual property (**IP**) which is worth protecting to optimize monetisation of the game. As discussed in *Studios and designers: Are you sure that you own the intellectual property rights to your video games*, the first step for studios and designers is to make sure that they own all IP rights on the video game.

The next step is to identify what type of IP protection is available between trademarks, copyrights and patents and then put in place an IP strategy to protect these assets in Canada and abroad.

Below is a summary of the types of protection to consider to fully protect a video game.

Trademarks

The name of a video game is a valuable asset, with a potential to become internationally famous. Just think about *Call of Duty*, *Fortnite*, *Minecraft* and *Assassin's Creed* or, for the more nostalgic, classic games such as *Super Mario*. *Pokémon* and *Pacman*. Trademarks have this power to evoke unique and captivating experience in the gaming world.

In this industry, experience shows that a video game may become an instant international success, since it is an online market with powerful gaming influencers. For this reason, being proactive with trademark protection is key. What does it mean?

First, clearance searches should be made as soon as you decide on the name of your game, in the most important markets where you anticipate sales. The idea here is to make sure that your brand is not conflicting with other marks so that you may use it and register it in your main market.

Once the mark is cleared, you may then proceed with filing. Here again, the earlier the better as trademark protection is, in most countries, granted to the first-to-file. Filing before your project

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becomes public is therefore strongly recommend. As for the scope of the application, it should of course cover the game itself but also potential merchandising goods, either because it is part of the business plan to monetize the brand, or as a defensive strategy.

Apart from the main brand, other aspects of the game may qualify as trademarks and be protectable. For instance, a sound or sequence of sounds associated with starting a console or a game could potentially be registered as trademarks. The names and image of characters in a game may also be protected, especially for merchandising goods.

In short, for studios and designers involved in the video game industry, trademark registration is key to getting the most value out of a video game. This begins with a well-orchestrated protection strategy to minimize risk of conflicts and to build a solid and valuable brand.

Copyrights

A video game is a mix of literary, artistic and musical works which are protected by copyright, including computer program behind a game's architecture is also explicitly protected by law.[1]

The protection offered by the *Copyright Act* ("**CA"**) applies as soon as a work is created, without the need for registration. This protection extends to the 176 member countries of the Berne Convention. Although the protection of a work by copyright is automatic, copyright owners may register their right with the Canadian Intellectual Property Office ("**CIPO"**) at any time. In particular, registration makes it easier to prove ownership of the right in the event of a dispute in that it creates the presumption that the person named in the registration owns the copyright.

Copyright protection applies to the entirety of the game, as well as to its various components. Any infringement of these rights by a third party may give rise to a copyright infringement claim if the work or a substantial part of it is copied, unless a defense such as fair dealing is applicable. In this respect, the following activities may qualify as fair dealing: research and private study, education, parody as well as criticism or review and news reporting.

Is video game live streaming copyright infringement?

In recent years, the phenomenon of video game live streaming has really taken off. Video gamers film or record their computer screens and broadcast them on platforms such as YouTube and Twitch to show their characters, strategies and tactics for completing certain levels of a game. Some live streaming video gamers, who make this their living, have achieved celebrity status and have thousands of followers.

Is live streaming a video game without express permission copyright infringement? The courts have yet to rule on whether live streaming games online constitutes a copyright infringement to communicate the work to the public by telecommunication under section 3(1)(f) of the Act.

Faced with this widely popular trend, some studios accept this practice because positive reviews from such gamers can boost game sales. Others criticize the fact that they profit from video games without copyright owners receiving any compensation.

Chances are that live streaming is not the highest priority of the video industry who is more concerned by the illegal downloads and counterfeits, which may explain why the courts have not yet had the opportunity to rule on video game live streaming.

Patents

Patents protect the functional aspects of an invention. The owner of a patent may prevent anyone

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from making, using or commercializing the patented innovation from the date the patent is obtained.

Three aspects are taken into consideration before granting a patent:[2]

> Novelty – The invention must be different or be innovative compared to anything that has been done before, anywhere in the world.
> Utility – The invention must have a useful function and economic value.
> Inventiveness – The invention must not be obvious to a person skilled in the field.

In Canada, it is not possible to patent an abstract idea, but it is possible to patent the physical embodiment of that idea, provided that it meets the criteria of novelty, utility and inventiveness.

Canadian patents in the video game industry

Patents obtained in the video game industry mainly relate to consoles, controllers, headsets and other gaming accessories.

The video game industry has proved to be innovative with the development of inventions that are both fun and useful. In 2012, Nike patented an invention to encourage physical activity among video game players.[3] The patent describes a device placed in a gamer's shoe when the gamer is physically active and connected to a video game. The energy spent by the gamer gives energy to the virtual character. Once the character's energy is depleted, the gamer must engage in physical activity again.

Are game play mechanics patentable?

Certain aspects of a video game are less easy to patent, in particular the game play mechanics, which are a distinctive aspect from the standpoint of gamers when choosing a video game.

The game play mechanics consists in the virtual experience of a video game: character movement, the interaction of the player with the game, the way the player moves through the levels of the game, etc. Unique and well-developed game play mechanics can be a great asset for a developer wanting to market new versions of a game. Gamers will go back to a familiar game to get immersed in a new experience. This makes patenting such an experience appealing for a studio.

Given that game play mechanics are developed using computer code, it might seem that even if the criteria of novelty, utility and inventiveness were met, this type of invention could not be physically embodied and thus could not be patented. To be patented, game play mechanics must have a physical component in addition to the code itself. Consider a patent describing a video game in which a gamer's heartbeat is integrated into the game,[4] which is a good illustration of physical embodiment. Such transposition of a gamer's vital signs is done physically through a heart monitor worn by the gamer and connected to the game. As all these aspects were described in the invention, this type of inventive game play mechanics was considered patentable.

In the United States, the criteria for patents are similar to those in Canada, meaning that abstract game play mechanics would have to be linked to a physical aspect in order to be patentable.

Conclusion

Implementing an IP protection strategy prior to launching a video game can prevent conflicts, increase the value of assets and strongly position a company in the market to maximize profits.

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1. *Copyright Act*, section 2.

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2. “A guide to patents,” Canadian Intellectual Property Office, Government of Canada, 2020-02-24.
3. Patent No. 2,596,041, issued February 9, 2006.
4. Patent No. 2,208,932, issued June 26, 1997.

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