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Growing Legal Issues In The Video Game Industry

Law360, New York (November 26, 2008) -- When you start playing games on your Nintendo Wii, your Microsoft Xbox 360 or even your computer, you might not realize the thorny legal and business issues behind the amazing graphics and the gripping musical score.

Digital gaming is one of the world's fastest growth industries — up 26 percent last year, even with the economic slowdown — and it is no surprise that where there is money, there are lawsuits.

One of the trickiest areas is the intersection of intellectual property law and virtual worlds. One example is the recent \$6M settlement between Blizzard Entertainment and MDY Industries. Blizzard Entertainment makes the popular online game called “World of Warcraft.”

World of Warcraft is competitive, with thousands of people from all over the world participating at any given time. The longer people play in the game world, the more powerful their game characters become.

A company called MDY Industries created a program called “WoWGlider,” which would “play” for the gamer in World of Warcraft. When gamers came back, their characters would be more powerful because of the time “played” by WoWGlider.

Blizzard sued MDY for copyright infringement last year, and settled in late September after a summary judgment holding from the United States District Court of Arizona.

MDY made a simple argument: WoWGlider itself did not copy or modify the World of Warcraft game—instead, it only interacted with the game software by simulating a human player.

MDY admitted that use of WoWGlider was prohibited by Blizzard's terms of use. It simply

argued that WoWGliders did not infringe Blizzard's copyright, because it never did anything more than communicate with the World of Warcraft software.

To win, Blizzard advanced a novel copyright argument. Blizzard noted that any time software is run on a computer, a copy of the software loaded into the computer memory (the RAM) so that the computer can execute it.

Blizzard argued that this "RAM copy" was authorized when a human was playing the game, but prohibited when WoWGliders was playing the game in violation of Blizzard's terms of use. The court held that violating the terms of use exceeded the copyright license granted by Blizzard, making the RAM copy of the game infringing.

Blizzard and MDY aren't alone in arguing about the legal ramifications of digital games. "Cutting-edge graphics and great storytelling aren't enough to keep this industry going," according to Dr. Peter Raad, executive director of The Guildhall, a graduate-level game development specialty program at Southern Methodist University.

"Successful publishers and independent developers know that video gaming is a business first ... a very big business. The legal issues are enormous for this industry. The only thing growing faster than this sector is the need of legal specialists who understand it fully."

Digital gaming businesses need to juggle the demands of intellectual property, licensing, user-generated content, free speech, online ownership, revenue recognition, employee rights and new business opportunities.

Business issues also surround digital gaming. Last year, overall U.S. industry sales (which include not only software, but also accessories and hardware) were \$18 billion, a new record, according to the NPD Group. NPD analyst Anita Frazier said this month that the U.S. is on track for sales in the \$21-\$23 billion range in 2008.

To further explore the legal and business issues surrounding digital gaming, the Guildhall at SMU, the SMU Dedman School of Law and The Center for American and International Law have announced plans to hold Game::Business::Law, an international summit on the law and business of video games on January 14-15 in Dallas [1].

Mitch Lasky, general partner at Benchmark Capital, will lead the first day's panels as keynote speaker. Mitch has spent more than two decades in the video game, new media and interactive entertainment business. Mike Hogan, chief marketing officer of GameStop

Corporation, the world's largest video game and entertainment software retailer, will be the keynote speaker on the second day of the conference.

"In some ways, we only in the very early stages of understanding how the law applies to digital worlds," says Xuan-Thao Nguyen, professor at the SMU Dedman School of Law. "So many of the rules in the law carry the implicit assumption that everything is physical. What happens when that assumption isn't true?"

One example is the idea of trademark rights in virtual worlds. Brand owners are looking to extend their rights into these virtual worlds to protect "authentic" digital replicas that are created within the virtual worlds and to stop "unauthorized" digital replicas.

In fact, many physical world brand owners have established a presence in one virtual world known as Second Life to advertise or sell "authentic" digital replicas of their physical products.

Additionally, brands for virtual products are being created and maintained solely within the virtual world of Second Life, and these brand owners are looking to protect their rights within the virtual world, perhaps with the intent to expand into the physical world.

As these two worlds collide, the traditional notions of physical world infringement will be put to the test. And, while some early lawsuits have been filed involving unauthorized digital replicas within Second Life, and attempts have been made to protect virtual brands, these issues still remain unanswered and untested.

The only certainty in the new business of digital gaming is that it will be a hotbed of legal and business activity — it literally is a whole new world.

For example, the Game::Business::Law summit will be examining business models for digital games, including the effect of *In re Bilski* on business method patents; game finance and venture capital; game-related litigation, and regulatory and free speech issues in games.

--By David L. McCombs (pictured) and Andrew S. Ehmke, Haynes and Boone LLP

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[1] More information on the Game::Business::Law Summit is found at www.game-business-

law.com

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