

# PATENTS IN THE GAMING SECTOR – IS IT A GOOD BET?

By Paul S. Hunter, Philippe Vlaemminck & Annick Hubert



Paul S. Hunter

Both in the USA and in the EU the future of gaming follows a pattern whereby technology is playing an ever increasing role. Competition between suppliers is also growing fast to the benefit of the operators and ultimately the players. But as in every other area it is not possible to continue to develop new gaming formats, data or technological devices, if the industry behind it is not able to secure its ownership, innovation and technology through adequate legal instruments. Patent protection is a vital

component to guarantee ongoing innovation and technological progress by assuring that resources allocated to R & D generate an adequate return on investment. Technological development has precipitated an exponential increase in patents applications to the benefit of society. In Europe this is in line with the so-called Lisboa agenda adopted by the European Council to make from Europe a high level knowledge based society. In line with it, a new Belgian tax incentive has been adopted by the Parliament, providing for a special patent income deduction. This concerns a tax deduction for new patent income, amounting to 80% of the income, thereby resulting in effective taxation of the income at the rate of 6.8%. The new tax measure is aimed at encouraging Belgian companies and establishments to play an active role in patent research and development, as well as patent ownership. The tax deduction applies to new patent income and came into force as from tax year 2008.

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In the EU we have seen long debates about data protection and the so-called “sui generis” right. That discussion is currently over following the judgments in the Fixture Marketing vs. Sven-



Philippe Vlaemminck

EU member States. In order to revitalize the debate on this issue the EU Commission has published a Communication ( “Enhancing the patent system in Europe” ) setting out its vision for improving the patent system in Europe,



Annick Hubert

which is currently considerably more expensive than the US system. A separate and comprehensive Commission Communication on Intellectual Property Rights ( IPR ) is planned for 2008 and intends to address the main outstanding non-legislative issues in all IP fields. Also in the WTO, IP plays an increasingly important role. The TRIPS agreement is the clear evidence of the commitment to enhance trade in respect of IP rights. Unfortunately some see in this opportunities to improve their own status in the WTO dispute settlement process. Antigua, supported by some off shore operators, tries indeed to use the IP issues as regulated by the TRIPS agreement to increase its financial compensation in the WTO battle against the USA. Antigua is requesting the right to retaliate against the USA for not granting market access for Internet gambling services into the US territory. So far no problem. The problem starts where Antigua asks for the permission to be com-

ska Spel, Veikkaus and Opap cases. But what about patents?

Certainly in the EU this has not (yet) been the focus of the gaming sector, although the matter requires serious consideration. Besides the EU is still struggling with the need for a single Community patent and the creation of a unified and specialized patent judiciary to replace the bundling of national patents and the costs of multiple patent litigation in several

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**Paul S. Hunter** is a partner in the Madison, Wisconsin, office of Foley & Lardner LLP. His practice focuses on patent counseling in electrical and computer technologies. His email is [HYPERLINK “mailto:phunter@foley.com” phunter@foley.com](mailto:HYPERLINKmailto:phunter@foley.com)

**Philippe Vlaemminck** is the managing partner of Vlaemminck & Partners , a Belgian law firm specialising in EU & WTO law and since more than 20 years substantially involved in defending the cause of lotteries at all levels ( Internet, privatizations, regulatory approaches, ... ). His email is [HYPERLINK “mailto:Ph.Vlaemminck@Vlaemminck.com” Ph.Vlaemminck@Vlaemminck.com](mailto:HYPERLINKmailto:Ph.Vlaemminck@Vlaemminck.com)

**Annick Hubert** was previously a State Attorney of the Belgian Department of Foreign Affairs, legal representative of the Belgian Government at the Court of Justice of the European Union and the European Free Trade Area Court. She joined the EU law practise group of Vlaemminck & Partners this summer. Her e-mail is [HYPERLINK “mailto:A.Hubert@Vlaemminck.com” A.Hubert@Vlaemminck.com](mailto:HYPERLINKmailto:A.Hubert@Vlaemminck.com)

compensated through the right to deny IP protection for US products on its market. In the past such approach was successfully used by some banana producing countries in the exceptional circumstance that the EU continued to refuse market access to the EU along the terms of the WTO and its recommendations. However the retaliation instrument was actually not used at that time.

With the purpose of defending its public order and its citizens the US is using the normal legal means provided by the GATS agreement to stop market access for Internet gambling services from third countries. There is nothing wrong with that. If companies or other governments would support Antigua in its “bargaining chip” tactics to get more compensation for such loss of potential market access, it will give a negative signal for those continuing to invest in innovative technologies and IP. The WTO dispute settlement body should be careful in letting some governments use TRIPS for the purpose of retaliation in order not to undermine technological developments.

Meanwhile the US made its own way forward. Over the past eight to ten years, the U.S. Patent and Trademark Office (PTO) has been flooded with patent applications. Individuals and companies see great potential value in the exclusive rights of a patent.

Much like other industries, the gaming sector has experienced an explosion in the number of patent applications filed. Based on an analysis conducted of gaming patent filings, fifteen times as many gaming patents were filed in 2000 as were filed in 1980.

The large gaming companies also need patents to generate “prior art” which is what patent lawyers refer to as patents or articles that pre-date a filed patent application and help prevent the patent application from becoming an approved patent.

Are there ways to gain an “edge” with patents? Much recent development in the gaming industry has been with software. While there are a number of software patents, companies are beginning not to file patent applications for software applications because of the delay in obtaining a patent in software which can be longer than the life span of the invention. Currently, there are so many filed software patent applications that the average software patent application in the U.S. is pending for six or more years. This long delay cuts into the potential profits a company could experience by excluding others from the invention with a patent since protection does not begin until the application is accepted.

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**MK:** Traditional single machines are just that, single. Linking single machines is difficult due to the complexities of the protocols and difficulties of the connecting network.

Downloadable machines, based on server technology, are, by definition, linked. Linkages allow us to run many forms of game content: slots, poker, blackjack, roulette, bingo, keno all on the same terminals. Linkages also allow us to develop new forms of content: competitions, tournaments and new forms of progressive and mystery jackpots.

Down Loadable Server (DLS) simplifies and in some cases removes the requirement for floor technicians, reducing the cost of operations.

**PGRI:** *What exactly is the difference between "Downloadable" and "Server-Based"?*

**MK:** DLS-based and Server Based Gaming (SBG) are two very different technologies that should not be simply bundled together. DLS allows an operator to control the deployment of content at the gaming machine.

SBG allows an operator to not just deploy and control content on a gaming terminal but to deploy and enhance the very way the player interacts with that gaming terminal. SBG deploys a limited protocol between the terminal and the server because the game logic is actually executed on the server. The advantage of this is that 'linking' the player experience is now easier and it is this linkage which will allow us to develop and deliver new gaming content in the future.

**PGRI:** *So SBG will, in the end, have a bigger impact on the industry than Downloadable?*

**MK:** Downloadable has very limited potential to change the industry. Essentially, all that is happening is that instead of physically altering or changing the game we are doing it automatically or remotely. It is still the same basic game.

*SBG does have the potential to alter the industry substantially, akin to the way iTunes has changed the delivery of music.*

SBG does have the potential to alter the Industry substantially, akin to the way iTunes has changed the delivery of music. The decrease in the cost of distribution in the music industry has resulted in a phenomenon called the 'Long Tail' whereby consumers seek and play music that is attuned to their specific preferences. SBG has the potential to create the Long Tail effect in gaming, fundamentally changing the way content is delivered and developed and the way that the operators pay for it.

In particular this means that instead of the industry determining when a game is available to the player, it will now be the player's choice because all the games of his or her preference are available at any gaming machine at any given moment. This way an operator can generate profit from games that have already far surpassed their peak times in a traditional EGM model where the games would have been taken off the floor already and thus be unavailable to the player.

**PGRI:** *Will it be difficult to get the SBG and Downloadable platform and the games certified in various jurisdictions due to the disembodied nature of games and machines in a downloadable system?*

**MK:** In a DLS environment the games can only be developed by the current game developers associated with a particular manufacturer. The route to regulatory approval will not change to the one we have today. In an SBG environment the games are 'ported' to the technology. This porting process encompasses sophisticated testing and quality certification. The game once ported will be presented to the regulators as part of the SBG suite. ♦

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To address this delay the U.S. Patent Office introduced at the end of 2006, the Accelerated Examination Program in which a patent application is examined in twelve months or less. For this "fast track," applicants are required to provide a worldwide search of patents and articles as well as a comparison of relevant search results to the invention they are trying to patent. Regular patent applications are not required to submit a search and evaluation. To date, only a small number of patent applicants have chosen to use the accelerated program. First, the additional work increases costs. Professional search firms can charge \$5000 for this type of search. Then, patent lawyers must study the results and prepared a detailed, costly analysis. In all, the accelerated examination requirements can double or triple the total costs of patent application preparation.

Second, many patent lawyers discourage clients away from using the accelerated program because there is a certain measure of risk. The idea of preparing a detailed report indicating what is and is not new in the patent application is seen by lawyers as risky. If a relevant article or patent is not included in the search or the report of the relevant material is mischaracterized, the attorneys can be accused of "fraud" and the patent rendered unenforceable.

Despite these drawbacks, accelerated examination can provide an edge—patents are issued sooner, the patents become prior art sooner, and patent owners have a much better idea that the patent will stand up if challenged. Some may find it hard to believe that faster patents provide an "edge," and sometimes they do not, but, as in gambling, patent players should try to do as much as possible to preserve their R&D investments. ♦