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

By Paul S. Hunter, Philippe Vlaemminck & Annick Hubert

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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.

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.

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

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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 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, 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.

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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-

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pensated 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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