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No, Seriously? The Relevance of Patents in the Serious Games Industry

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Never has an industry evolved as fast as software has. From next to nothing in the 1970s, worldwide revenues now exceed 500 billion dollars and grow at 15% per year. Video game revenues alone exceed 20 billion dollars and grow at a staggering 30-40% rate. Price Waterhouse estimates that by 2011, the worldwide gaming market will be worth almost \$50 billion.

In a relatively small sub-sector of that, things take on a somber and serious tone. In the serious game industry "learning by doing" is the mantra for a variety of scenarios ranging from medical mass trauma to shipboard navigation. Although the serious game industry pulls in a paltry few hundred million dollars per year, it remains the most vaunted. This is purely a function of potential. Corporate America has underutilized serious games for training, but this is changing. In the years since early flight simulators caught our attention, serious game developers have vastly improved the user experience. Improvements in core gaming technologies help, such as 3D simulation engines, GUIs, artificial intelligence, and multi-player networking. Whenever a relatively young industry with huge commercial potential has low barriers to entry and many existing players, there is cutthroat market competition. Those existing players look for ways to increase their market share and inevitably consider the intellectual property system as a potential competitive tool.

Of course, patents are atypical in the business of education, which ought not be a proprietary thing. Patents are even more a contradiction in the world of software, where the open source initiative is pervasive. The Open Source Initiative (OSI) was hatched ten years ago and has a firm foothold in the serious games sector. The goal of OSI is to remove restrictions on the use or distribution of software. Conversely, software patents increase restrictions and prevent sharing without permission. Still, patents can play a valuable role. Companies have a hard time investing in research and development unless they can own the result, which patents allow. Otherwise, competitors can copy freely and (having avoided any R&D expense), sell cheaper and steal market share. Even the OSI is beginning to consider whether open source licenses should accommodate software patents.

Amidst the competition of the serious game industry, the players are desperate to increase market share, and patents are becoming more prevalent. At the U.S.

Patent Office all patents are classified by subject, and serious games fall in classes 434 (education and demonstration) and 463.9 (amusement devices: games that require problem solving). There are approximately 4700 computer-related patents in these classes, and 3500 pending applications.

Lawsuits that have rocked the gaming industry threaten serious games as well. For example, Worlds.com recently filed suit against "City Of Heroes" publisher NCSoft charging patent infringement over a patent on user interaction in a virtual space. Worlds.com had been threatening enforcement over any online game that lets users talk and interact in a game world. In another case, Blackboard, Inc. sued and won a patent lawsuit based on their patent for online course-management software. Desire2Learn, Inc. was ordered to pay \$3.1 million and to stop selling infringing products and services, but the outcome of that case is far from certain. The U.S. Patent Office has invalidated the original patent in a reexamination and Desire2Learn has appealed the decision. In the meantime, Blackboard, Inc. was awarded an improvement patent and has sued Desire2Learn a second time. This battle will go on for years...talk about losing your primary business focus.

While the specific strategy above is not advised, all signs point to the fact that patents will play a much larger role in the serious game industry over the next decade. Apple Computer and their iPod™ stand as living proof that a low five figure investment in a patent portfolio can someday preserve market share in an \$80B market. At those numbers, the open source philosophy becomes less persuasive. Philosophy aside, serious game developers and publishers that ignore patents entirely will suffer, while those that make the effort to understand them and take an intelligent approach to them will enjoy the competitive advantage.

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