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Video game theme parks have arrived

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You've probably heard about video games that are based on movies, or movies that are based on video games — but how about theme park attractions or entire theme parks based on video games? These are now a reality on a small scale, and they will no doubt become a popular trend in the future.

This summer, for example, *Rock Band Live* went on tour at several theme parks across Canada and the U.S. It was essentially an interactive live rock show based on the *Rock Band* video game. It was staffed by paid performers who followed a set story line starting in the band's garage and ending in a full arena, complete with managers, roadies, and groupies. Before the show, park guests were able play *Rock Band* and compete for a chance to be called on stage to perform with the rest of the band.

Also, at least one company is thinking even bigger and plans to open an entire theme park based on video games. "Game Nation" would feature separate zones based on different types of video games, and would allow guests to interact with cartoon animals, take space ranger training, and basically participate in a large, virtual reality game throughout their entire visit.

There are a number of potential legal issues with video game theme parks, including:

Theme park liability

First, there is the typical liability that theme park operators are accustomed to, but that gaming companies don't normally experience. This includes physical injuries, deaths, damage to or destruction of guests' property, and other liability associated with operating facilities that the public can access.

Patents

There are currently hundreds of patents relating to amusement park rides or video games. And recently there have been applications to patent a combination of these technologies.

For example, Disney has applied to patent an "amusement ride and video game" for the *Buzz Lightyear* ride at Disneyland. The patent claims "a system of integrating an amusement ride and video game" which comprises a path for the ride, a number of vehicles which move along that path, a simulated weapon on the vehicles, a number of targets and detectors along the path, etc. If issued, this patent could potentially be a problem for other companies that offer interactive amusement park rides.

Trade-marks

If an amusement park ride is based on a video game, the ride operator needs a licence to use the name or title of the game in connection with the ride. However, trade-mark rights can go even further than this.

BMW recently sued an amusement park in North Carolina for trade-mark infringement because the cars on one of its roller coasters looked a lot like Mini Coopers. Presumably there was no concurrent action for depreciation of goodwill, because the cars really did corner like they were on rails.

Copyright

Likewise, if a ride based on a video game will reproduce characters, art, music or other content from the game, then the owner of the copyright in that content will need to grant a licence permitting the reproduction. Copyright licensing can be complex because there are several layers of copyright in a game, or even in a portion of the game.

For example, in the music alone there is copyright in the composition, sound recording, and artist's performance of that sound recording. *Rock Band Live* adds an additional level because it includes onstage performances, some of which are by members of the public.

Personality and privacy

The main issue with personality and privacy rights relates to using a recognizable person's image in advertising or other publications. It's fairly easy to cover this issue for park employees or contractors, but it's a bit more difficult when park guests are involved, especially when the guests are minors and unable to form a legally binding contract.

Most amusement parks post contract notices at their ticket windows and include legal terms on the back of their tickets, but those agreements might not be sufficient to cover off the copyright or personality/privacy issues associated with a guest performance on stage. If an amusement park operator wanted to record or photograph those performances and include them in promotional materials or in videos for sale, the operator would want the guests and their parents to sign an additional contract or waiver for additional protection.

Overall, the legal issues associated with video game theme parks are surmountable and are not significantly different from the legal issues associated with video game development, movie production, or theme park operation. They're just a lot more fun. ■

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The legal implications of app development

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The app economy is big business and is poised to grow to a billion-dollar industry in the next few years. Apps, the small software applications that sit on your handheld devices, include the games, maps and social-media tools for your iPhone, iPad, BlackBerry or Android smartphone.

Web-based apps can be used on Facebook or other social media sites. An example is the popular FarmVille app for both the iPhone and Facebook platforms. Users download a software application and play a social farming game. The download is free but to play the game, users purchase "virtual, in-game digital items" such as seeds, equipment and livestock. Sound frivolous? Don't kid yourself. The developer of this little gem is earning annual revenues of over $200 million.

Companies who want their own app may hire a developer to write the software. For example, *The Globe and Mail* hired Spreed, a Toronto developer, to create an app for the iPhone and BlackBerry platforms. Independent app developers typically hire out their services, and often develop in-house applications of their own.

What are the legal issues surrounding app development in Canada? "App law" is a subset of software licensing, and in addition to contract issues, it also brings together intellectual property (IP) law, trade-marks, Internet law, jurisdictional questions and privacy law. Here are some of the most common issues for both app developers and the companies who hire them:

Copyright

Copyright law provides fertile ground for app-related disputes. Video gamers with functioning memories of the 1970s may recall the Atari games "Breakout" and "Asteroid." In 2007, Atari alleged that the copyright in these games was infringed in the creation of RIM's apps "BrickBreaker" and "Meteor Crusher" for the Black-

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Some developers will finance apps in exchange for share of revenues

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Berry platform.

A 2009 dispute involved an iPhone app called i.TV which displayed an image owned by photographer Louie Psihoyos. The photographer sued both the app developer and Apple for copyright infringement. Canadian copyright law is clear that ideas and functional structures in software are not protectable by copyright, whereas front-end images and graphics are. Courts have yet to settle the question of whether Apple or the developer is liable for copyright infringement in an iPhone app.

Trade-marks

In the U.S. decision, *Cartier International NV v. Apple, Inc.*, (Case No. 1:2009cv04857 SDNY), Cartier sued Apple for infringement of trade-marks based on an app called "Fake Watch," which allegedly reproduced Cartier's trade-marks without authorization. Both apps were pulled from the iTunes App Store and the lawsuit was dismissed.

Trade secrets

Ideas and underlying strategies for making and marketing games are valuable assets in this highly competitive sector. In *Zynga Game Network Inc. v. Playdom Inc.*, (Case No. 109cv161723, ND Calif.), Zynga sued rival app developer Playdom and a number of ex-employees for misappropriation of trade secrets and unfair competition.

App developers should review their employment agreements and maintain internal policies for the protection of trade secrets.

Contract law

The relationship between developers and their customers should be governed by a well-drafted app development agreement. These contracts address IP ownership, payment terms, limitations on liability and representations and warranties as to the skill of the developer.

Consider who will hold the iTunes app store account. Some developers are willing to finance up-front development costs in exchange for a share of the revenues from the eventual sale of the app. The parties should ensure that content used in the app — including artwork and music — is original or properly licensed, with appropriate indemnities for infringement claims.

Licensing

In most cases, the end user simply downloads an app and starts using it, without accepting any special terms. In the iTunes Store, the end-user is bound by Apple's default end-user terms. Developers may also implement their own custom end-user license agreement (EULA) and the terms should be properly drafted to address the issues unique to that app (for example, the sale of "virtual items," health advice or geo-locating services). End users should be obliged to "tap-through" to show they accept special terms.

Two things to remember: first, when published in the App Store, an app is available worldwide, with the result that end-users could be buying it in over 90 countries. Dispute resolution clauses are critical. Second, don't forget that if an iOS developer is implementing its own custom EULA, Apple requires that certain mandatory terms be included.

Privacy

A recent investigation by the *Wall Street Journal* uncovered a series of privacy breaches involving popular Facebook apps, where third-party developers allegedly accessed users' information (see story on p. 11). In the case of iPhone apps, in *Turner v. Storm8 LLC* (Case No. 09cv05234CW, ND Calif.), a class-action suit was launched against an app developer based on the unauthorized collection of users' phone numbers.

Remember that privacy laws change from country to country. In Canada's consent-based privacy regime, well-drafted privacy policies are one way to address the issue, bearing in mind that collection, use and disclosure of personal information must be reasonably tied to providing the product or service.

This fascinating area of law is likely to grow as smartphones and mobile devices become embedded in our daily lives. ■

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