

Protecting video game developers through mechanics patents

SPECIAL TO THE RBJ



Arjay Parhar

When the highly anticipated video game, *The Legend of Zelda: Tears of the Kingdom*, was released earlier this year, the gaming website Automaton found 31 video game mechanics patents that Nintendo filed that caused “an outcry of fans claiming Nintendo has overstepped their boundaries and is restricting creative freedom due to the broad nature of some of these patents.” (Philip Proctor, Nintendo releases large number of patents related to *Tears of the Kingdom*, *Zelda Universe*, Aug. 11, 2023). Video game enthusiasts worried that these patents could “create a minefield for other developers to navigate when wanting similar mechanics in their future games.” Id. Are consumers right to worry that patenting broad game mechanics is going to stifle innovation in the video game industry?

While the scope of inventions the video game industry covers is vast, such as the ability to capture and share recordings of gameplay to haptic feedback on controllers, the worry over the *Tears of the Kingdom* patents is specifically over how the video games themselves are played. An early example of a broad video game mechanic patent that posed a threat to the evolution of gaming is Sega owned US Patent No. 6,200,138. Filed in 1998, this patent covers a mechanic where a moving vehicle is accompanied by a large dy-

namic overhead directional object (in the corresponding *Crazy Taxi* game, an arrow) that indicates the direction of the objective – a mechanic used in countless variations since. Famously, two years later, *The Simpson’s: Road Rage* came out with an incredibly similar mechanic, except the game had a pointing finger instead of an arrow. The scope of Sega’s claims was met with criticism over whether Sega was truly the first to cover such a game mechanic. Still, the similarity led to a patent infringement suit, eventually leading to an undisclosed out of court settlement. Examples like this, of expensive enforcement by large video game companies, tend to scare consumers and smaller video game developers from experimenting with ideas and mechanics.

Fears over the granting of broad patents concerning game mechanics are likely overstated because prosecution of game mechanics are uniquely disadvantaged. According to USPTO data, approximately 50% of total patent applications that have been filed will be granted. Starkly contrasting that average, the chances of industry giants in the video game industry actually obtaining video game related patents is as low as 6%.^[1] With such a low allowance rate, why are so many video game mechanics patents being filed?

Instead of focusing on video game consumers’ worries from the vantage of the typical protections that granting a patent can provide, shifting the perspective to the protections from fil-

ing a patent provides valuable insight into conduct that protects video game development. Under 35 USC § 102(a), prior art that exists before the effective filing date of a patent will prevent the claimed invention from being patented. Stated another way, a claimed invention that is made publicly available cannot be disqualified from practice from a later dated patent. Almost every prior art date is set at the date that the prior art is made publicly available. However, a single exception to this rule exists that sets the prior art date before the date the prior art is made publicly available, which is uniquely advantageous for retaining patent rights while not publicly disclosing one’s invention. When a patent application is granted, the patent itself becomes prior art from its filing date, even though the day the patent application is first made publicly available is actually 18 months after the non-provisional application is filed, or a maximum of 30 months after the provisional application is filed. This unique exception to the prior art dating rule gives 30 months, or two and a half years, of protected and concealed development time with a video game mechanic before that mechanic is revealed to the public. Thus, filing a combination of provisional and non-provisional patent applications when a developer is creating a new game mechanic may be primarily a preemptive method of ensuring that developers can continue to put time into developing novel game mechanics, rather than purely a method of pre-

venting others from innovating their methods. For those less knowledgeable about patents, the published patent applications may deceptively give only the impression that these major video game companies have already received a patent on an incredibly broad video game mechanic that could stifle the gaming industry. Instead, those published patent applications may be a by-product of attempting to retain an early prior art date that prevents others from creating prior art that could stifle development for that mechanic.

Even though major video games companies, like Activision and Game Freak, generally output yearly products, the development time of these products often takes approximately 2-3 years as the company splits up teams to work on different games. On the longer end of video game development cycles, Nintendo's *The Legend of Zelda* franchise generally outputs two main franchise games per decade. Especially in the latter case, there are heavy financial risks of being prevented from using a game mechanic or being forced into a license after years of development. A simple and effective alternative to seeking patent protection, which would prevent others from encroaching upon one's legal right to use a game mechanic, is to make a public disclosure – perhaps in the form of a trailer. Unfortunately, running a trailer too early, e.g., when a development cycle will span for years, runs the risk of giving other game developers the blueprint to incorporate their version of that same game mechanic into their own games – possibly at the same time or even before the initial game release. Filing a patent application therefore makes the most sense to maximize the time a developer has to create a new game mechanic uninhibited by the peering eyes of competition, while also preserving one's legal rights in the

best-case scenario where the mechanics patent beats the high odds of not being granted.

Furthermore, retaining the ability to use a couple game mechanics may go to the heart of the game itself as some of these long development times can be entirely based on one or a few unique mechanic(s). The developers may take a few new game mechanics and create a new game that fits a template of its franchise through unique puzzles, dungeons, and quests that explore those mechanics. For example, *Tears of the Kingdom* centers around ostensibly three newly introduced video game mechanics (essentially split into five features within the game). The most important new mechanics are (1) the ability to three-dimensionally manipulate any movable object in the game, (2) the ability to attach multiple movable objects together to create a cohesive new object with multiple functionalities and/or a cohesive new functionality, and (3) the ability to reverse the movement of any movable object in the game while the game is recording in the background the movement of every movable object. The entire game is built for the player to explore and use these mechanics. The inability to use any of these mechanics would completely frustrate the entire game and scrap years of development. As Nintendo sold approximately \$1.3 billion worth of *Tears of the Kingdom* copies in only the first seven weeks of its release, a highly robust defensive intellectual property strategy to ensure that Nintendo and other video game companies are legally able to practice their unique mechanics is vital. By fully utilizing a provisional patent application, followed by a non-provisional patent application, companies are able to mitigate the risk of being blocked from using those mechanics or of others seeking to use the same mechanics for at least a couple

years, thus protecting their investments in game development. Then, the companies can evaluate and survey the landscape to determine if they need to prosecute their application and preserve their rights or, if they determine that the low chance of allowance is not worth their efforts, to abandon their application and save money. Thus, filing a patent to protect the use of a mechanic may be one of the most important steps a company can take when developing their games. Each of the 31 mechanics patents filed for *Tears of the Kingdom* can then be understood as an effort by Nintendo to protect its years of game development by preserving its legal right to put a foundational mechanic in its game.

By filing patent applications early, regardless of whether that patent is granted, developers are protected from other developers obtaining patent rights over them during the development process and acquire up to two and a half years of secret development time for a video game that will eventually be released directly to consumers. In an industry keen on copycatting and improving upon the newest developments, protecting one's own mechanics is paramount – even if the application does not eventually lead to an issued patent. And if it does, all the better. While an aggressive video game mechanics patent strategy and a review of the published patent applications may worry typical video game consumers, the strategy may just indicate that a company is taking proper steps to ensure it can deliver its own product to the consumer at all.

Arjay Parhar is an associate attorney in the Albany Office of Heslin Rothenberg Farley & Mesiti P.C. His experience includes patent prosecution, litigation, and copyrights. He can be reached at (518) 452-5600, or Arjay.Parhar@hrfmlaw.com.

[1] Narrowing video game mechanics patents down to CPC Classification A63F 13/55 (i.e., Controlling Game Characters or Game Objects Based on the In Game Progress) and using Google Patents research tools, the top assignees of utility patents in this classification (i.e., Nintendo, Konami, Bandai Namco, Sony, EA, Microsoft, Pokemon, and Activision) own approximately 12,765 patent applications. However, the number of those that are granted is only about 800. Thus, the allowance rate is approximately 6%.