

The Interplay Between Intellectual Property Law and the Virtual World

LegallIT 4.0 Montréal, Canada

April 27, 2010

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Introduction

- Growing popularity of virtual on-line games around the world has created new societies and economies.
- With any new society or economy, whether in the real world or a virtual world, civil disputes are likely to occur.
- Real world disputes are generally governed by « real world » laws.

Introduction (cont'd)

- In most jurisdictions, laws have not been enacted to govern « virtual world disputes ».
- As a result, the Courts and lawyers are required to rely upon « real world » laws to regulate « virtual world » disputes.
- Intellectual property law is no different.

Overview

Intellectual property laws were enacted to grant exclusive rights to entities that create and/or develop certain intangible property:

- Patent laws;
- Trade-mark laws
- Copyright laws
 - Moral rights

Most intellectual property rights are assignable except for moral rights which are unassignable and may only be waived by their owners.

Intellectual Property in Virtual Worlds

- In many on-line virtual games, users have the ability to create virtual personas, virtual objects and virtual environments.
- Evolving technologies provide users with greater abilities.
- Who is the owner of these creations and the intellectual property rights associated with them?
 - User vs. Service provider or Virtual game creator

Intellectual Property in Virtual Worlds (cont'd)

- What remedies are available to the owners of intellectual property rights when those rights are infringed in a virtual world?
- Can one apply for trade-mark or copyright protection covering virtual goods?

Ownership of Intellectual Property Rights in Virtual Worlds

- Ownership is usually dictated by the terms and conditions set forth in the on-line virtual game.
- End-User Agreements, Terms of Service Agreement, Private Policy, Rules of Conduct or other types of terms of use.
- Click-wrap agreement « I Agree ».

Ownership of Intellectual Property Rights in Virtual Worlds (cont'd)

- In most on-line virtual games, the service provider or virtual game creator retains ownership of all intellectual property developed and created by the user in the game.
- In very few instances, such as in the virtual game Second Life, users retain ownership of the intellectual property they create in the game.

Infringement in Virtual World

- In any instance where intellectual property rights are successfully commercialised, infringement is likely to ensue.
- Instances are now being seen in virtual worlds.
- Unauthorized copying of avatar personas and virtual objects.
- Misappropriation of images for user's avatars that are based on copyrighted characters.
- Misuse of well-known trade-marks and trade-names by unscrupulous users for their own virtual businesses and virtual products.

Applications to Register a Copyright or a Trade-mark Covering Virtual World Objects

Copyright?

Original work

Trade-mark?

Normal course of trade?

Cases of Intellectual Property Infringement in Virtual Worlds

- Canada – No decisions have been reported as of yet covering intellectual property infringements alleged to have taken place in a virtual world.
- U.S. – Some cases have been initiated but most have settled before a Court was able to adjudicate on their merits

Examples of infringement cases brought before the U.S. Courts

- Marvel Enterprises vs. NCSoft Corporation
 - Copyright infringement and trade-mark infringement
- Eros, LLC vs. John Doe
 - Copyright infringement
- Eros, LLC vs. Thomas Simon
 - Copyright infringement
- Eros, LLC vs. Linden Research
 - Copyright infringement and enabling infringement by third parties

Possible Relevant Statutory Bases to Regulate IP Infringements in Virtual Worlds?

Copyright Act

- Section 3 – Exclusive grant
- Section 5 – Subsistence of copyright
- Section 13 – Ownership
- Section 27 - Infringement

Trade-marks Act

- Section 2 – Definition of trade-mark
- Section 4 – Use of a trade-mark in association with goods
- Section 20 – Infringement

Is a sale of a virtual good featuring a trade-mark in a virtual world transaction deemed to be a sale made in the normal course of trade such that use of the trade-mark is deemed to have occurred?

Unfair Competition provisions in the Trade-marks Act

- Section 7 (b) – Passing off
- Section 7 (e) – Honest commercial usage

Digital Millennium Copyright Act (DMCA) U.S. Law

- Regulate infringements on the Internet
- Outlaw circumventing anti-piracy measures built into most computer software
- Immunity to ISPs is available in certain situations
- Applicability in Canada?

Conclusion

As online technologies evolve, so will the laws have to evolve in order to regulate them.

Until then, Courts and lawyers will have to become creative in order to apply « real world » laws to virtual world disputes.



QUESTIONS & ANSWERS

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