



Video Games: Canadian IP Issues & Strategies

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O Canada – 3rd in World Gaming

- Canada is the 3rd largest video game industry in the world
 - Behind U.S. and Japan
- 58% of Canadians are gamers
 - 61% of households own a game console
 - 36% play on a computer
 - 33% play on a game console
 - 25% play on a smartphone or tablet
 - 6% play on a handheld system



Source: “Essential Facts About the Canadian Computer and Video Game Industry 2012”, Entertainment Software Association of Canada

Identifying the Rights Holders – Which *Sim*[®] are you?

- IP rights may be owned or controlled by multiple entities, including:
 - Game developer
 - Creator
 - Music composer
 - Programmer
 - Graphic designer
 - Publisher
- It is vitally important to identify all potential IP owners, to secure an assignment or a license, particularly for financing and litigation purposes.



Doing Your Due Diligence

- Before entering into an agreement with any of the parties we just discussed, you must ensure that they own or control the IP they claim to have rights in
- Due Diligence helps avoid lawsuits in all jurisdictions in which the game will be sold or exploited



Difficulty in Defining Exclusive Rights

- Is the game developer assigning all rights in the game, or only in specific aspects of the game?
- Are there developer properties that are routinely used by the developer for which only a license is being granted?
- Have these rights been defined clearly?

Limitations on Warranty and Indemnity

- Practically speaking, what recovery is possible if a warranty is breached?
- Location of the parties and their assets impact enforcement options
- Need to consider possibility of insurance
- Need to consider arbitration instead of litigation

The Changing Avatar of Canadian Copyright Law

- In July 2012, the Supreme Court of Canada released five decisions that changed the landscape of copyright law in Canada. Some of these are relevant to game development.
- Shortly thereafter, sections of the *Copyright Modernization Act* came into force, making additional changes to Canadian copyright law



The Copyright Pentalogy



- *Entertainment Software Association v. SOCAN*, 2012 SCC 34; and *Rogers Communications v. SOCAN*, 2012 SCC 35
 - Downloading is a reproduction not a communication to the public, hence no tariff payable to SOCAN
 - Streaming is a communication to the public not a reproduction, hence a tariff is payable to SOCAN
 - Copyright licensing for works/subject matter synced in games should reflect how you are delivering games to your customers

The Copyright Pentalogy



- *SOCAN v. Bell Canada*, 2012 SCC 36; and *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37
 - The user’s, and not the service provider’s, purpose of dealing with a work is predominant for determining “fair dealing”
 - Previews of songs are necessary “research” for consumers prior to purchasing songs (hence no tariff is payable)
 - Previews of a game may also be fair dealing (provided the dealing is “fair”)

Copyright Modernization Act

- New prohibition against providing a service that is primarily used to enable acts of infringement
 - BitTorrent websites (e.g. The Pirate Bay, isoHunt) may be liable for infringing copies of games distributed using their platforms
- “Telecommunication to the public” includes “making available”

Copyright Modernization Act

- New exception for non-commercial user-generated content
 - May be harder to challenge when game players become developers, making mods or memes
 - Must be non-commercial, not have substantial adverse effect on exploitation of existing work, and attribute its source if reasonable
 - Arguably, greater reliance on EULA now

Copyright Modernization Act

- New prohibition against removal or circumvention of Technological Protection Measures (TPMs), and alteration of digital copyright information
 - Circumventing TPMs on video games now generally prohibited – for example, breaking TPMs to make backup copies or copies for private purposes is prohibited
 - Scope of prohibition not yet settled
 - NOTE: many user exceptions are conditional on not circumventing TPMs (e.g. copies for private purposes, backup copies, time-shifting, but not UGC)

Moral rights

Moral rights of authors and performers

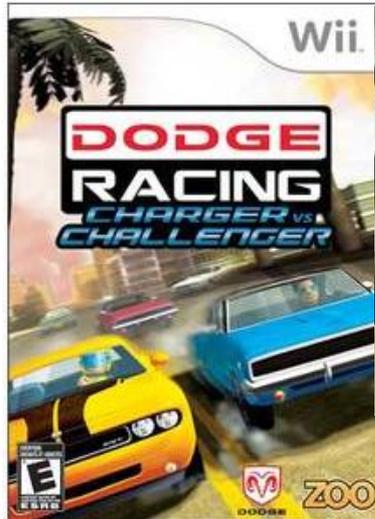
- Attribution/anonymity
- Integrity of work
 - Associate work with cause, service or institution to prejudice of author/performer



- Importance of moral rights waiver



Advergames and in-game advertising

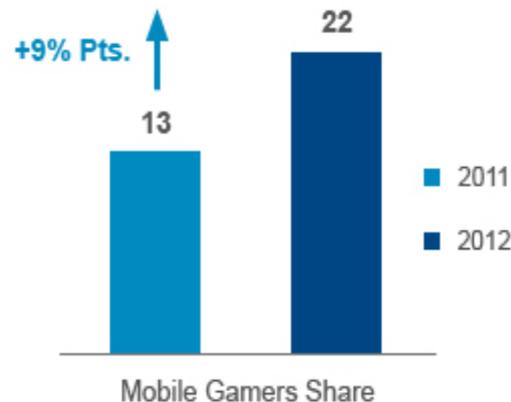


Today's Business Challenges

- Decline in console business
- Increase in mobile and online gaming business, resulting in cheaper games but smaller margins
- Decrease in the retail market (more online distribution and sales)
- Availability of government funding
- Significant creative talent in British Columbia, Ontario and Quebec

Increasing Mobile Gaming business makes for cheaper games and smaller margins

- Mobile games offer smaller games for cheaper prices, undercutting retail games (e.g. *Angry Birds*[®] and *Fruit Ninja*[™])
 - Smaller publishers do better as a result; they get games on the market where otherwise they could not
- Between 2011 and 2012, mobile gamers market share grew 9%



Source: The NPD Group / Gamer Segmentation 2012

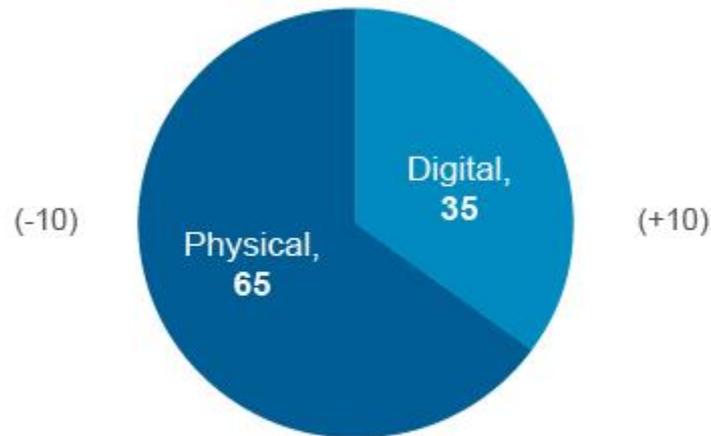
Increasing Mobile Gaming business makes for cheaper games and smaller margins

- Major developers have gone mobile to compete

The image is a screenshot of the EA website. At the top left is the EA logo. To its right are navigation links for GAMES, NEWS, and HELP, followed by a search bar. A dropdown menu is open under GAMES, listing 'Browse Games', 'Latest Releases', and 'Upcoming Games'. Below this is a 'FEATURED PLATFORMS' section with links for PC Games, Wii™, Wii U, Xbox 360®, PlayStation®3, Android, and iPhone & iPod touch, along with an iPad link and a 'View All Platforms' link. The main banner features the game 'Army of Two: The Devil's Cartel' with the text 'OWN THE CARTEL' and 'SINGLE ENGINE OF DESTRUCTION ULTIMATE CO-OP EXPERIENCE'. Below the banner is a 'LATEST FROM EA' section with a featured game 'TIGER WOODS PGA TOUR 14' available on Xbox 360 and PS3. To the right is a 'BREAKING NEWS' section with two news items: 'Jen Riley From EA SPORTS In Vancouver Explains How She Created Yogify' and 'EA And ESPN Kick Off Madden NFL 25 Cover Vote'.

Decline of the Retail Market

- As the digital and mobile markets increase, the retail market decreases
- It is becoming more costly to develop retail games, with higher prices necessary to justify the retail publishers' expense
- Gamers increasingly prefer digital to retail copies – in the last year, the number of gamers who would prefer to purchase a digital copy increased by 10%



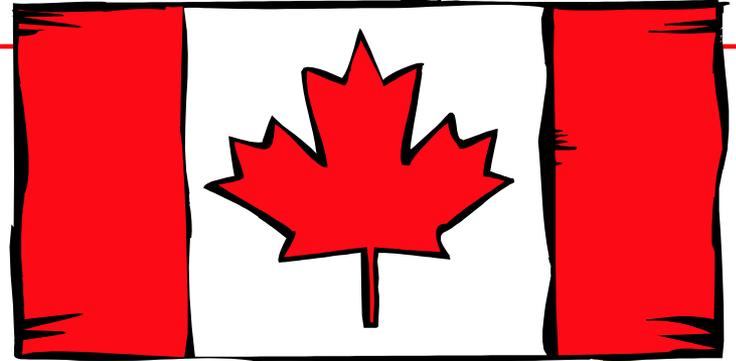
Source: The NPD Group/Online Gaming 2012 – The Impact of Digital

Availability of Government Funding

- Federal tax credits are available, but...
 - The credit applies after the funds are spent, requiring up-front capital
 - All the game development must be done in Canada to get the credit
- Provincial governments also have grants and credits
 - E.g., Ontario Interactive Digital Media Tax Credit (OIDMTC): a refundable tax credit to eligible Ontario-based Canadian and foreign-controlled corporations of up to 40% of eligible Ontario expenditures for interactive digital media products created in Ontario.
- Canadian Media Fund offers experimental and convergent funding streams



Creativity in Canada



- British Columbia, Ontario and Quebec are home to many international game developers
 - E.g. EA, UbiSoft, Capcom, Rockstar, Blizzard
- Ontario is expected to have 21% growth in industry jobs in 2013
- Canada's industry has traditionally been console-based, but the landscape is rapidly changing
 - Increasing focus on internet, mobile, social and casual gaming

Source: "Essential Facts About the Canadian Computer and Video Game Industry 2012", Entertainment Software Association of Canada



Thank You

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