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Game Is Not Over Yet: Software Patents and Their Impact on Video Game Industry in Europe

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The European Commission proposed the First-Ever European Strategy for culture in May, 2007, which highlights the pressing needs for the creative industries. Video game industry plays a pivotal role in the international and regional economic arena. Despite the sustainable growth of video game industry, most video game developers have not yet realized the effects brought by the patent protection of software and business methods. Such ignorance of intellectual property rights increases the potential for litigation, which may result in financial loss and even significant business disruption.

This paper studies the software patent protection schemes in Europe and their impact on the video game industry, with the aim of seeking a balance between protecting core technologies and preserving innovation incentives. The paper first compares the European approach with the US approach. The US patent No. 6,935,954 “Sanity in video games” filed by Nintendo in 2005 will be analyzed. Compared to the liberal approach in the US, legislative efforts and judicial practices have shown that the European approach moves to stricter criteria over the patentability of software.

However, the EPO provides quite a broad interpretation to that restriction. For example, in 2006, game developer KONAMI was granted a European patent relating to a guide system for identifying player-controlled characters and the direction of the

nearest teammate. The EPO overturned the earlier decision and ruled that the feature of the invention contributed an objective technical function to the display. The paper further points out that there are still huge controversies over the scope of patent protection of software in Europe. Many national patent offices, such as the UK's, prefer a clearer exclusion of the patentability of software. The 2006 Aerotel/ Macrossan decision is an explicit indication that the current EPO approach is not accepted by its member states.

The paper goes on to explore the impact of patent protection of software in video game industry. The complexity of the underlying technologies in video games will be analyzed, and the strengths and weaknesses of software patent protection in this technology-dependent industry will be fully discussed. The paper contends that the opaque and inconsistent protection of software patents will greatly discourage the development of video game industry. Moreover, the borderless nature of internet games presents a substantial challenge to the current patent regimes based on geographical jurisdictions. Finally, the paper concludes that only when the quality of software patents has been improved, and the regional harmonization of the legal practices has been achieved, can the creative incentives in the video game industry be best preserved.