

Video game industry lags in intellectual property protection

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Copyright and patent protection have become complicated in the age of the digital dissemination of intellectual property. One of the newest areas in which these rights are being redefined and applied is that of video games.

The video game industry continues to soar. In 2004, more than \$6.9 billion worth of games were purchased, according to a 2005 report in *The New York Times*.

Austin has become a global center for the development of video games, being home to several world-renowned companies.

Yet an emerging trend in the video game industry is a lack of intellectual property protection. Industry experts are uncertain why video games seem to be lagging, but one possible explanation is philosophical resistance.

"Many people who use computers for creative work have a philosophical, almost political, inclination to resist some forms of IP protection, especially patents," says Matthew Burr, a patent attorney with law firm Moster & Wynne PC.

But financial constraints also may be contributing to a lack of IP protection.

"Many video game companies in Austin are small companies, and like many small companies, they have to use their resources wisely," Burr says. "So many small companies elect to cross their fingers and pray, rather than talk to a lawyer."

According to Kelly Kordzik, IP attorney in the Austin office of Winstead Sechrest & Minick PC, the amount of time required to patent intellectual property usually is longer than the shelf life of a typical video game.

"Since it takes years to obtain a patent, it does not make sense to attempt to patent anything in the software of the game," Kordzik says. "Instead, the patent battles are all about the hardware."

In addition, video game programmers tend to surrender IP ownership to publishers during contract negotiations in exchange for distribution, according to Mike McShaffry, head of the Austin division of BreakAway Studios.

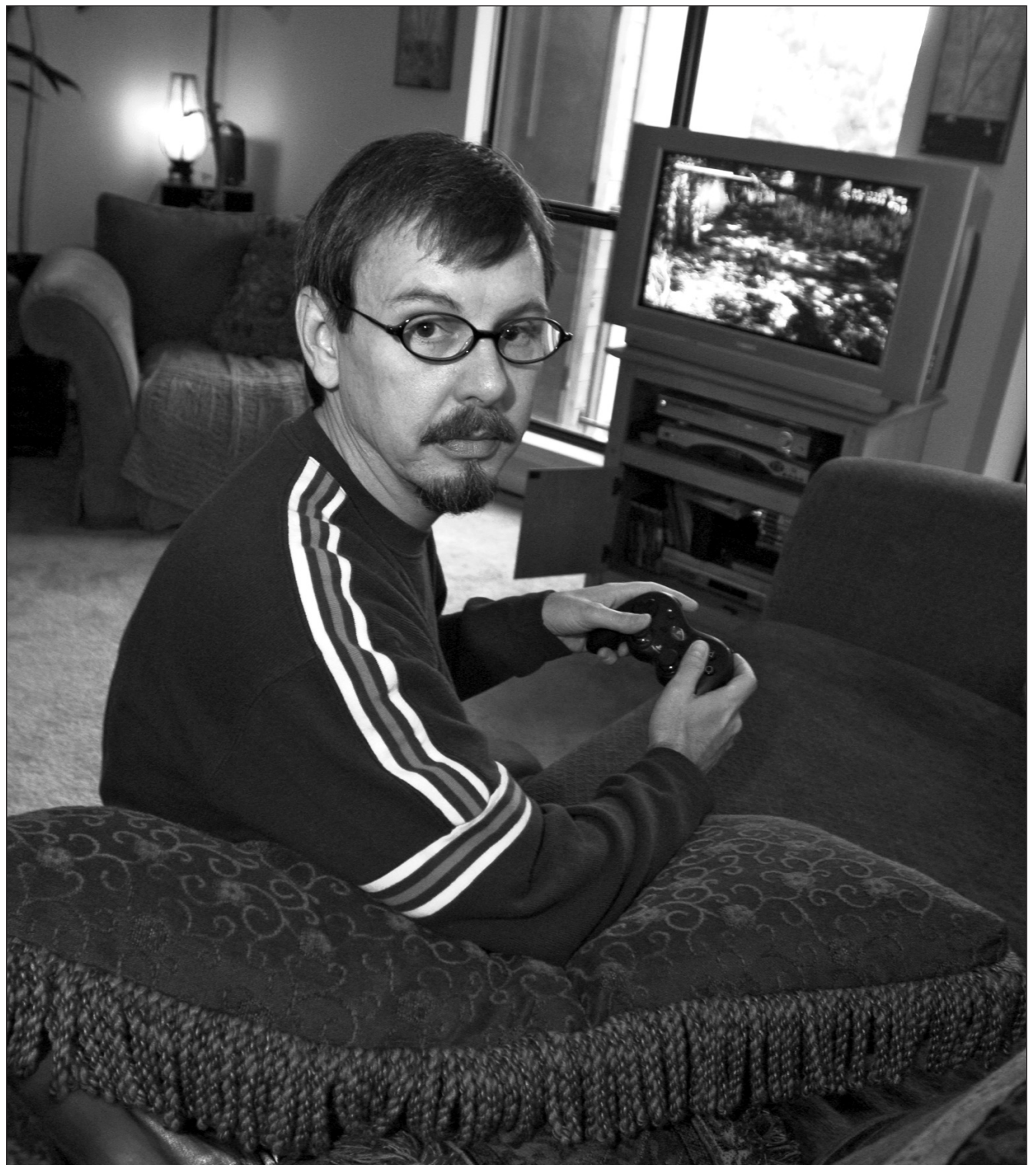
"Very few games ever 'earn out,' which is to say that their revenue exceeds the production, manufacturing and marketing costs, so royalties are fairly rare," McShaffry says. "These conditions tend to concentrate IP ownership in the publisher's camp instead of the developer."

Another threat in the gaming industry, according to Kordzik, is theft of trade secrets. Game programmers who move from one gaming company to another may share concepts ideas, and possibly even code for games they've created.

The most commonly stolen properties are game-play mechanics and character likenesses, says Billy Cain, vice president of development at Austin gaming firm Critical Mass Interactive Inc..

"Violating someone else's patents, knowingly or not, can get you into hot water," Cain says.

The video game industry, however,



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Patent attorney Matt Burr says gaming companies should obtain patents for their property.

tends to move faster than the laws designed to protect it, according to Cain. Some entities make money by obtaining a patent on properties others have invented and used, but have never licensed themselves.

One famous example of an allegedly unwitting theft of gaming IP occurred when Microsoft Corp.'s Xbox controllers began using "controller vibration," which occurred when a target in a game was hit, or a character was destroyed.

This kind of device vibration was so ubiquitous that Microsoft allegedly didn't verify whether any patents existed. In fact, a small company did hold a patent on this feature and successfully sued Microsoft.

Ultimately, Microsoft invested in the company, and now earns a royalty for every licensed use of this patented feature.

But intellectual property isn't the only

concern gaming companies face. A new gaming phenomenon known as "virtual property" is emerging.

When weapons or characters within a massively multiplayer online game accumulate power, they become more valuable to gamers, who have begun buying and selling these items in real-world currency.

Unprotected games are vulnerable to lost revenue when properties within them are bought and sold outside normal game play.

Companies with well-protected properties have more control, Burr says.

"Some of the game companies explicitly prohibit virtual property sales in their subscription terms and conditions," he says. "Sony, on the other hand, has created a virtual space to facilitate the sale of virtual property from its online games."

Being aware of other companies' patents and aggressively seeking to obtain licensing should be part of every

gaming company's business plan, Burr says.

And it helps that out-of-state or overseas organizations wholly own most gaming development businesses in Austin.

"Since these larger organizations tend to be more cautious about IP infringement and energetically defend their own property rights, I'd say that, in general, Austin's development community is in good shape concerning these issues," Burr says.

Indeed, according to Cain, Austin's gaming industry has matured to the point where developers understand the high stakes of IP protection.

"This isn't a garage industry anymore," he says. "It's run by people in business suits with armies of lawyers behind them, and they are ready to make the most money out of your property."