The basics
Patents are intellectual property rights which are granted for inventions which are technical. Where there is no technical innovation, other intellectual property protection may be available such as trade marks, copyright or design right.

Patent protection for an invention is gained by seeking the grant of a patent covering the invention. Applications for patents are sent to the Patent Office in the jurisdiction in which protection is sought and the Patent Office decides whether or not to grant the patent and the scope of it.

In Europe, there are national patent offices in each country which issue patents and, in addition, there is the European Patent Office (EPO). In an application to the EPO, the applicant designates the countries over which protection is sought and the grant of the European patent results in a bundle of national rights. A European patent is asserted in each country separately. Countries of the European Union have set in motion the legislation required to offer the additional Unified Patent, which will be a patent covering all European Countries who have signed up to adopt the system, rather than distinct national rights. The Unified Patent and a central Unified Patent Court is expected to be functional some time after 2015. European patents and national patents will still also be available.

In Europe and the UK, patents are granted for inventions which are new and which are inventive compared to technology which has gone before (known as prior art). They must also be capable of industrial application and the invention must not fall within a category of subject matter excluded by statute from patentability. Excluded subject matter is considered further below.

A patent is a monopoly right. This is broadly a right of the patent owner to prevent anyone from using the invention covered by the patent in the jurisdiction of the patent without the patent owner’s permission. Unlike copyright, for example, actual copying of the invention is not required to fall foul of the patent. It is enough that the product, system or method is covered by the claims of the patent. It is the “claims” of the patent that set out the scope of the invention being protected. Patents are territorial rights and generally last 20 years.

Patentability of computer implemented inventions
Patents in Europe and the UK are not available to protect computer programs, mathematical methods or algorithms as such. Nor are they available for rules and methods for performing mental acts, playing games or doing business. All of these are excluded from patentability by statute. However, technical inventions which are nevertheless implemented by computer software are protectable by patents. Computer code is protected by copyright.

Some patents have been granted in Europe which protect computer games in their capacity as software-implemented inventions. Since patents are granted separately in each country, whether a software-implemented invention can or can’t be covered by a patent is dependent upon the country in which that right is sought. A software-based invention which would not be patentable in Europe might be protectable in the US by a US patent because the exclusion from patentability for software is narrower in the US than in Europe. There are, therefore, vastly more patents granted in the US in relation to computer games (including on-line gambling) than there are in Europe and the UK.

The UK/Europe
While the test for patentability of software is slightly different in the UK compared to at the EPO, the analyses generally lead to the same result. The question to be considered is broadly: Is the program creating a technical effect going beyond the normal interactions of the program and the computer?

For example, a European patent was granted for a video football game in which the player in control of the ball was marked with an indication of the best direction to pass the ball, when “zoomed in” on the player.
While the fact that the team mates’ locations should be known by the user may be regarded as a direct consequence of the game rules (non-technical, not patentable), the technical realisation of how such locations are made known is not related to the game rules (technical effect, patentable).

Other examples of patentable subject matter in Europe include the ‘slide to unlock’ feature used on smartphones, and computer simulation to optimise the design of drill bits for oil fields. A method for navigating a television programme listing was deemed unpatentable. Whether an invention implemented by software falls inside or outside the exclusion is a complex one and can be difficult to determine.

As well as patents relating to features of the games themselves, there are, of course, patents covering the apparatus used for playing games. In a recent decision of the English High Court in June this year, Nintendo Wii apparatus was found to infringe two patents held by Philips. The Philips patents concerned are directed to remote control more generally and were not only applicable to gaming. It is important to be aware that patents having more general scope and not specifically relating to gaming, can, nevertheless, cover gaming features.

The US
In the US, methods of organising human activity that do not involve manufactures, machines, or compositions of matter are excluded from patentability. One applicable test applying to software and business method patents is known generally as the “machine or transformation test”: Does the program transform any article into a different state or thing?

U.S. Patent No. 6,200,138 protects a video game concept in which the player drives a car around a map and where a target destination is highlighted for the user.

A similar concept was used by Fox Entertainment and Electronic Arts in a game called The Simpsons: Road Rage. Sega sued Fox/EA in the US for patent infringement and the case settled out of court.

US patents in social gaming and on-line gambling
There are many examples of patents and patent applications covering aspects of social gaming and on-line gambling and, for the reasons discussed, these are substantially in the US rather than in Europe. For example, US patents have been granted in relation to chat capabilities for multiplayer gaming, game-based incentives for commerce and virtual currency management. Again, many relevant patents are not directed at gaming alone and patents applying more generally to social networks and to e-commerce may, in fact, also be applicable to gaming.

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