

Doing Business with Europe – a Survivor's Guide

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Lecture Overview

- Time allocation – 60 minutes
- 45 – 50 minutes of me
- Question and Answer
- Don't forget the feedback form



Lecturer Overview

- Attorney with the computer games team at Osborne Clarke in London, England
- Founder member of TIGA, the UK games developers' trade association
- Former in-house counsel at a games publisher; has worked in the games industry for 6+ years
- Specialises in international games contracts, particularly:
 - Games development and publishing agreements;
 - Licensing IP for games; and
 - Games distribution agreements



Barriers

This lecture is about barriers to doing business with Europe, understanding why they exist and how to overcome them.

Two types of barriers:

- Barriers connected to games – intellectual property rights and moral rights
- Barriers connected to transactions – contracts

Why is this important?

International co-operation has produced some of the greatest games and most commercially successful relationships in recent history:

- Rare and Nintendo
- Rockstar North and Take 2
- Ubisoft and Red Storm

Europe can create ...

Many of the most successful games (and films) are based on properties which originated in Europe:

- Harry Potter
- The Lord of the Rings
- James Bond

Structure of this Lecture

- What is "Europe" ?
- Cultural differences underpin legal differences:
 - Rights in games
 - Contracts for games
- Solutions
- Current state intervention strategies

"Europe"

- Geographical Europe
- EFTA and EEA
- European Union
 - Now
 - Soon
- Eurozone

Geographical Europe

- A geographical union of 3.8m square miles
- 730m inhabitants in 46 countries:
Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia/, Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxemburg, Macedonia, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia/Montenegro, Slovakia, Spain, Sweden, Switzerland, Turkey, UK, Ukraine and the Vatican

EEA and EFTA

- EEA: an economic area comprising:
 - 15 member states of the EU; plus
 - 3 member states of EFTA:
Iceland, Liechtenstein and Norway
- EFTA: another economic area comprising:
Iceland, Liechtenstein, Norway and Switzerland

European Union

- A political union
- Now – 15 countries, 375m people:
Austria, Belgium, Denmark, Finland, France, Germany, Greece,
Ireland, Italy, Luxemburg, Netherlands, Portugal, Spain, Sweden and
UK
- Soon – 25+ countries, 500m+ people:
Confirmed (May 2004): Cyprus, Czech Republic, Estonia, Hungary,
Latvia, Lithuania, Malta, Slovakia, Slovenia and Poland
Later candidates: Bulgaria, Romania, Turkey

Eurozone

- A political and monetary union
- 12 Countries, 300m people, one currency (the Euro):
Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain

Complex Relationships

A recipe for complexity and conflict:

- Different ethnic groups
- Different languages
- Different religions
- Different nationalities
- Different political systems

Resulting in different cultures, customs and laws

Cultural Differences

- Culture is tied to history
- Cultural drivers include:
 - Revolutions
 - Empires
 - Political movements
 - Inventions and new technology
 - Wars
- Each of which has had an impact on Europe, including on the business of games in Europe

Some Examples

- The Roman Empire brought us Roman Law, underpinning the civil law system
- The Enlightenment and the French Revolution brought the high tide of authors' rights, particularly moral rights
- The printing press and the emergence of capitalism brought the Statute of Anne and copyright law
- Marxism denies individual ownership of the fruits of an essentially social act



Part I:

Intellectual Property in Games

Why is "intellectual property" important to game creators and game publishers?

- underpins the economics of the industry by providing monopoly rights to exploit a game
- underpins the creativity within the industry by protecting creators and rewarding creators with the ownership of their creations



"Game Rights"

- Rights connected directly to individual games, including the code, artwork, characters, worlds and storylines
- Not addressing:
 - trade marks (game titles); or
 - patents (inventions used within games)

Different Game Rights

- Rights in games include a mix of many different and overlapping concepts of rights recognised to varying degrees by different systems within Europe, including:
 - Copyright
 - Authors' Rights
 - Moral Rights
 - Personality Rights
- There are two essential types at work ...

Moral Rights and Economic Rights

- Moral rights are personal to the individual author, and focus on the author and her link with her work
- Economic rights have to be freely transferable. They are more closely connected to the work than to the author

The Rights of Man vs. the Profits of Man

- The Enlightenment and the French Revolution
 - (The bond of creation, natural law and the rights of man)
- English authors and the Stationers' Company
 - (Possessive individualism, Locke and the profits of publishers)

Common and Civil Law

A brief note about the different legal systems within Europe and the EU:

- Common Law – "judge-made" with piecemeal legislation; e.g. UK, US ?
- Civil Law – single unified code of laws, accessible to all. The role of the judge is to apply it, not to make it; e.g. France

Civil Law Intellectual Property Rights

- A heady fusion of Roman law, Enlightenment philosophy and revolutionary fervour underpins the law in much of Europe
- Based on the profound personal connection between a creator and his or her work; the work as an extension of the individual personality of the author
- "Authors' rights" focus on the *individual author*, with equal treatment of moral rights and economic (or "patrimonial") rights

Civil Law Moral Rights

- Rights:
 - Public communication, or "divulgation"
 - Paternity
 - Integrity
 - Withdrawal
- Perpetual and inalienable
- Public policy, so cannot usually be derogated from under a contract

Civil Law Economic ("Patrimonial") Rights

- Also known as "pecuniary rights"
- Can be transferred
- Rights include core commercial right of reproduction (copy right ?)
- No present assignment of future work

Common Law Intellectual Property Rights

- Based on the individual's act of appropriation from the state of nature
- Focus on the *work*:

"Copyright is a property right which subsists ... in the following descriptions of work: original literary, dramatic, musical or artistic works ..." (Section 1(1) of the UK Copyright, Designs and Patents Act 1988)
- Show a strong commercial influence: to be able to profit fully you have to be able to sell absolutely, free of adverse claims from your staff and contractors



Copyright in the Common Law

- Includes the exclusive right to copy a work, adapt a work and issue copies of a work to the public. The emphasis is on mass-production and profit
- Fully transferable and licensable, any way you like
- Employers own their employees' contributions
- Contractors can assign rights to work not yet created (almost "work for hire", but not quite)



What about moral rights ?

Article 6 *bis* of the Berne Convention (first introduced in 1928):

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation

But moral rights were only expressly officially incorporated into the UK system in 1988

Common Law Moral Rights (I)

- Express Moral Rights
 - To be identified as the author;
 - To object to derogatory treatment of the work;
 - Very limited right of privacy (photographs and films); and
 - Not to have a work falsely attributed to oneself

Common Law Moral Rights (II)

- Can be waived (but not transferred)
- May need to be expressly asserted
- May not apply to computer programs or "computer-generated works" (although these do not necessarily include computer games)



But other "moral rights" have been with us for much longer

- Defamation
- Trades description
- Passing off
- Misrepresentation
- Exclusive right (under copyright law) to issue copies of the work to the public



... and also already exist in a similar form in the US

- Unfair competition, the Lanham Act (prohibiting a "false designation of origin"), misrepresentation, defamation and copyright can each have a "moral right effect"
- Visual Artists Rights Act 17 USC § 106A (1990) created limited new moral rights:
 - Certain rights of attribution; and
 - Certain rights of integrity(But solely granted to authors of visual art, e.g. paintings, photographs or sculptures)

Some more exotic rights?

- *Personality rights* – authors' rights in Germany, where the publisher is considered to enjoy a "personal right" to speak in the name of the author
- *Equitable remuneration* – inalienable right to additional payment in return for giving up certain types of right (such as the "rental right") in relation to sound recordings or films

Are (im)moral rights a barrier to business ?

- Moral rights do not apply to all "authors": the "stamp of personality" test
- Even the most extreme rights, such as the French right of withdrawal, are circumscribed by law
- Moral rights cannot be asserted in "bad faith" or in order to force further payment. Counterclaims exist against authors seeking to misuse their moral rights
- Contracts can limit the impact of moral rights, even in the countries with the strongest level of author protection



Addressing moral rights and related rights in contracts

- Some European countries permit a contractual waiver of moral rights
- The protection of moral rights is sometimes not afforded to computer code (even in France)
- Remember *who* has the right – it is not usually the developer, but its key employees



So ...

- Verify employee or contractor agreements and / or obtain suitable warranty and indemnity protection
- Expressly refer to equitable remuneration in agreements with authors of sound recordings or films
- Specify in detail the way in which the work is to be exploited and adapted – this limits the author's right to complain later, even in author-centric regimes

Contractual Wording

Waiver of Moral Rights (contracts of employment, consultancy agreements and the like):

"The Author waives absolutely and agrees never to assert any moral rights in or relating to the Game that the Author may have in [the United Kingdom] and, so far as it is legally possible, any broadly equivalent rights that the Author may have in any other country of the world."

Contractual Wording (continued)

Equitable remuneration (contracts with individual authors of film, including FMV, and sound recordings)

"The Author acknowledges and agrees that the Fees include adequate and equitable remuneration to the Author for any exploitation by the rental or hiring of any product containing all or part of the Work insofar as such remuneration is or will be payable by the Company or its assignees by statute or otherwise"

In any case ...

- European moral rights rules do not just apply to works made in Europe. European courts may apply their moral rights rules to foreign works first published abroad
- The film industry has had to deal with moral rights for many years
- The US already recognises quasi-moral rights and is a signatory to the Berne Convention

Part II: Contractual Barriers in International Games Contracts

- Applicable law and jurisdiction clauses
- Penalty clauses
- Copyright licences and assignments
- Local laws relating to illegal or unenforceable provisions

Applicable Law

- I.e. the law which governs the contract, including
 - what the contract means (interpretation); and
 - how to keep each party to its bargain (enforcement)
- The parties can choose, but this exercise should not become a test of contracting strength

Jurisdiction

- I.e. the courts in which legal action is to be taken
- The parties can accept the jurisdiction of the courts of more than one country
- Again, whilst the parties are free to choose, this exercise should not become a test of contracting strength

Jurisdiction (continued)

You may prefer to be able to sue abroad:

- Cost
- Availability of contingency deals
- Recovery of legal fees
- Ease of enforcement of judgment

Compromises

There are at least three types of compromise to jurisdiction and applicable law differences:

- A third country provides the applicable law and / or venue;
- One party has the applicable law, the other has the venue; or
- Applicable law and jurisdiction will be settled later (if at all), depending on which party sues the other

Mixed jurisdiction and law clause

Governing Law. In the event that a party to this Agreement ("the Enforcing Party") initiates or pursues any legal action against the other party pursuant to or in connection with this Agreement, the Enforcing Party shall initiate and pursue such action in the courts of the jurisdiction in which the other party is located as set out on page one of this Agreement and this Agreement shall be construed in accordance with and governed by the laws of that jurisdiction without regard to the conflicts of law rules thereof.

Penalty Clauses

- For example, a clause requiring the developer to pay the publisher a fixed sum for each week of delay in delivering a game
- Based on freedom of contract – the parties are free to agree their own sanctions
- Many jurisdictions will not enforce penalties unless they are a genuine and realistic pre-estimate of actual recoverable loss (as opposed to a "fine")
- Many parties are instinctively suspicious of penalties



But penalty clauses can benefit both parties

- Publisher benefits from certainty as to compensation due for delay;
- Developer benefits as publisher cannot rely on unproven, speculative loss in order to withhold substantial royalties
- Developer benefits from a liability cap



And penalties can be introduced in other ways

- Adjustment of royalty rates or final advance payments in case of delay; or
- Bonus payments on timely or early completion; but
- The parties should always remember the importance of ensuring that the developer is financially motivated to make a great game and finish it on time

Copyright licences and assignments

Local expertise is necessary, as the form of a licence or assignment may vary in different jurisdictions. For instance:

- Assignments must be in writing in the UK;
- France does not recognise a present assignment of future work; and
- Europe does not recognise the "work for hire" concept.

Conflict ?

Where a French developer creates a game in France for a US publisher under a US contract, provided that the game is *first published* in the US, a French Court may (and a US court would) apply US law to the contract, including the sections dealing with the transfer of intellectual property

Illegal or unenforceable provisions

- Moral rights waivers are void according to public policy in many European countries
- Exclusions and limitations of liability
 - are not always enforceable; and
 - even if enforceable, often require special wording in order to succeed
- Local state social security laws (for employees and even commercial agents) will usually supersede contractual provisions

As a result

Local law advice is necessary even where the contract is governed by your own legal system

Future Trends ?

- Harmonisation throughout the EU (e.g. intellectual property rights including copyright and database rights)
- Enlargement of the EU, bringing more countries within an increasingly harmonised regime
- Increasing recognition of the games industry in Europe

State Aid ?

- The French "cultural exception" is not dead, Mr Messier
- International obligations prohibiting protectionism or state aid will be overturned in the name of promoting culture in Europe
- Games are now becoming accepted as a new form of culture, rather than a menace to society
- This *cultural* shift may result in net *commercial* benefits to games companies in Europe

Recent example:

- State funded pre-production fund (France, 2003)

Possible future examples:

- Extending the favourable tax regimes for films to games (UK, France – already extended in Germany ?)
- Fries report (France, 2004)



Fries Report:

- Import tax credit to encourage foreign publishers to engage French developers
- Creation of a new production fund (30m Euro, summer 2004)
- Adjustment of social security law to allow for short term employment for games developers
- State guaranteed low cost, short term loans to publishers to fund high up-front cost of manufacturing console games
- Extend availability of research and development tax credits to games companies



Do you want to do business in Europe ?

- A branch or subsidiary in the EU will provide access to the whole market
- Choose the best country to suit your needs – countries still vary on social security and employment issues, tax, support for the games industry, IP creation and transfer, use of stock options, etc.



Questions

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