

Intellectual Property
Fall 2017

Video Game Problem Memorandum

Per the instructions, this sample answer discusses only trade secret, patent, and copyright. I did not object if you also discussed trademark or design patent, but my grading focused on these three.

A combination of trade secret, patent, and copyright protections should enable LAXadaiscial to go to market with low risk of direct competition from blatant ripoffs. It probably cannot prevent other A/R sports games, but they will need to develop their own hardware (especially controllers) and write their own software for their games.

Trade Secret

LAXadaiscial currently has trade secrets in its software, hardware, and business plan. The software and hardware will be partially disclosed when the product launches. There is very little that can be done about potential reverse engineering of the controllers and headsets and the software they contain. By the time of the launch, however, LAXadaiscial should have obtained other forms of IP protection to fill the gap. In particular, (pending) patents on the hardware and copyrights on the software should prevent blatant ripoffs of LAXadaiscial's technology.

In the meantime, LAXadaiscial should continue to adhere to best practices for confidentiality, including physical and electronic security for its premises and standard NDAs with employees. When it starts testing with high-school teams, LAXadaiscial should require their members to sign NDAs. It should also inventory carefully the items given out to them. Expecting high-school students to keep careful track of each item may be too much to expect, but LAXadaiscial should be vigilant to ensure that none of the hardware, for ex-

ample, ends on eBay. It is harder to insist that reporters sign NDAs, but LAXadaisical should discuss the ground rules for disclosure carefully with them. Please have the PR people document that the reporters understand that the conversations are for purposes of enabling the *Wired* article only. I will also have conversations with PR and Engineering about appropriate levels of technical detail to disclose.

Patent

LAXadaisical has several overlapping inventions and it should consider seeking patent protection for them. The best candidate for patenting is the lacrosse-stick controller, which involves numerous innovations and is core to LAXadaisical's business strategy. I will need to obtain a more complete description of the technology and to perform a prior art search, but my initial impression is that this is a significant advance. It is less clear to me that the glasses or lidar unit involve patentable improvements. The distinctive appearance of the glasses is probably not an improvement in utility by itself, and it is likely that the combination of an existing lidar with a standard tripod is obvious under *KSR*. All three of these are clearly patentable subject matter. Because they are custom-built physical items, there is no abstract idea problem with any of them. The combination of the three of them, in particular, may be a particularly good combination to claim: one needs, at the least, the combination of controller and glasses to play A/R lacrosse effectively.

LAXadaisical may also be able to obtain a method patent on the method of playing A/R lacrosse using its equipment. The scope of a method patent would depend on how closely it is tied to the LAXadaisical hardware. A patent that claimed only using this specific hardware would not gain much in claim scope, whereas a claim to any A/R lacrosse using any hardware might not be sufficiently enabled. I think it would be worthwhile filing method claims of varying scope to see which ones we can obtain protection for. Finally,

some aspects of LAXadaisical's software may be patentable, although the scope of software patents is currently narrow and unpredictable. The fact that the software is tied to a specific physical application — A/R lacrosse — may help.

The biggest obstacle to patentability is probably the risk of public use (from expanded testing) or disclosure via printed publication (in the *Wired* article). Testing with high-school teams in public places would almost certainly be a public use that would start the one-year grace period ticking. There is a reasonable possibility that the testing might be considered an experimental use. But I would not like to count on a court agreeing because the experimental use doctrine is unpredictable in application.

A *Wired* cover story would likely be a printed publication, although the exact scope of what the article might disclose is hard to predict in advance. I strongly recommend filing provisional patent applications as soon as possible, before testing with non-employees or in public places, and before the reporting for the *Wired* story begins. I recognize that the testing is essential for a summer launch and that the reporting should coincide with the anticipated launch, but I would be uncomfortable with either taking place before the provisional applications are filed.

I believe that the development of the technology is sufficiently far along that I should be able to draft reasonably good provisional applications. I will need to follow them up with full applications within one year. The patents themselves will be expensive to obtain and may take several years to issue but they will provide extensive protection against competitors making similar controllers.

Copyright

LAXadaisical has good prospects for copyright protection for many aspects of its software. Video game software is generally copyrightable — there are famous examples including *Scramble* and *World of Warcraft* — so lacrosse software should be, too. The game of

lacrosse, of course, is both unoriginal to LAXadaisical and uncopyrightable as a method of operation, but LAXadaisical has added many original elements to it. These include its programmers' specific choices about how to write the game software and also many audiovisual elements of the displays. The game mode involving wolfmen, for example, includes substantial original graphics. It is less likely that LAXadaisical can obtain copyright protection over new game modes like hot potato. Again, these are ideas akin to an uncopyrightable sequence of yoga poses. The result is that competitors could make similar games with similar modes, but could not do so by copying LAXadaisical's code or by imitating its graphics.

To fully secure copyright protection, I will need to file registrations with the Copyright Office. Fortunately, this process is quick, easy, and inexpensive.