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Legal Issues in Digital Distribution

GAME::BUSINESS::LAW

International Summit on the Law and Business of Video Games

January 27, 2010

MODERATOR:

Andrew S. Ehmke, Partner, Haynes and Boone, LLP

PANELISTS:

Jennifer Archie, Partner, Latham & Watkins, LLP

Jason Kee, Director of Policy and Legal Affairs, ESA

Shane McGee, Partner, Sonnenschein Nath & Rosenthal, LLP

P.J. Putnam, Vice President and General Counsel, Gearbox Software, LLC

Introduction by Professor Xuan-Thao Nguyen, SMU Dedman School of Law:

PROFESSOR NGUYEN: Well, good afternoon. I am professor Xuan-Thao Nguyen, from SMU Dedman School of Law. Thank you so much for coming. This morning we heard a lot from Jay Cohen and also from the wonderful panel.

Well, if you liked the conference so far, you are going to like what I tell you even more. A couple of months ago, Peter Raad and I had a discussion. We thought it would be a good idea if SMU law school began a database of litigation and cases that have no legal opinion out there yet. We wanted to analyze complaints, to analyze venue, transfer of venues, we want to know the cost of action—to identify trends. So, what I have in my hands is essentially the work product that my team did: a group of law students under my supervision went through all the filings of last year. All of the U.S. filings relating to games, patenting, trade secret relating to games, bankruptcy relating to games, licensing, breach of contracts relating to games. What they did was summarize and analyze each of those complaints, and they also created a chart as well. So these are the documents here; I did not make a lot of copies because I did not know what your reaction would be—whether you would be interested in having copies of them or not. I hope you do because it is free. We have the copies available right here on the right hand side at the end of the podium, and there are copies outside by the registration desk as well. Those of you that would like a copy—unfortunately we did not make enough—if you want a soft copy we would be happy to e-mail one to you.[1]

And something else that we want to do in the future is make a database of all the deals—contracts and licensing contracts—so we are going to be

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1. Professor Nguyen refers to Kent Workman, *A Review of 2009 Video Game Litigation and Selected Cases*, 13 SMU SCI. & TECH. L. REV. 197.

compiling these and we want to make them available. Obviously we are going to need people to help in this process, as well to create this kind of database.

With that, I would like to introduce Andrew Ehmke. He is a partner at Haynes and Boone. I asked him, "What is so famous about you?" He said that he is a patent killer. I said, "What is exactly is a patent killer?" He said that he essentially files a lot of reexaminations to kill patents. What does it mean to kill patents? Are you talking about killing trolls? Are you talking about creating and increasing innovation? What exactly does this mean? Andrew Ehmke is with a group of IP lawyers at Haynes and Boone. It is a growing group with respect to games and IP issues.

So, I am going to turn the microphone over to Andrew Ehmke. He is going to moderate this panel. He will introduce the panelists. We are going to have two wonderful legal-related issues. And hopefully they will be able to address some of the legal issues raised by Jay Cohen and the previous panel. And again, thank you so much for being at SMU.

MR. EHMKE: And I would say, if you have not done patent killing, it is a lot of fun. One thing we learned this morning from the speakers is just how tough the game industry is, how competitive the landscape is becoming. If you did not see, a new game device came out today. Apple introduced the iPad. I would imagine that a lot of people are looking at it already. If you have not seen it yet, the price is $489-$899. It is going to be out in 60 days. AT&T is going to charge you another $30 per month. It is ten inches, a half inch thick, and one and a half pounds. Several game developers showed their games on it already, including EA, with a first person game shooter and a driving game. The reasons why I bring that up are: first, I did not have the pull that Keith did to move the conference around—I was afraid that theirs would interfere with ours. But second, to show how important digital distribution is becoming. I think with the iPhone and this new digital device, a lot of attention is being paid to digital distribution. I am very excited about our panel. Rather than me introducing them, let's go down the line and I will let them introduce themselves.

MS. ARCHIE: Hi, I am Jennifer Archie; I am a partner in the Washington office of Latham and Watkins. I don't kill patents, but I came close to killing spammers. I took their money away, and their Hummers, and their gold coins. I am delighted to be here. I think that my particular contribution has to do with the intersection of activity in Washington—regulatory oversight and foreign government and those interests. What is the user experience and what terms are going to govern that experience? And when is the government going to get involved, whether it has to do with "under thirteen" or "teens" or the "age of the community?" Is there an actual binding agreement with them? Are users being given enough notice and choice about what is being done with their information? I would say that half of my professional days have to do with the tracking of user-behavior and how that experience is going to be customized through direct delivery of ads. How is the experience going to be customized— through direct delivery of ads, through

every type of platform and device that you can have to deliver the content to users? I think that there is a revolution coming in that permissioning.

MR. KEE: Hi, everyone. My name is Jason Kee; I am the director of Policy and Legal Affairs with the Entertainment Software Association of Canada. It is a long name, and it did not quite make it on to my placard. As that name would suggest, we are actually the sister association to the ESA (Entertainment Software Association), as I am sure that many of you know. We represent publishers and distributors in Canada who publish and distribute games for consoles, handhelds, PCs, some mobile, as well as for the Internet. We deal with a fairly wide array of policy issues. Intellectual Property is a priority, but we also deal with trade issues and technology issues. And because we are a fairly significant development hub, *vis-a-vis* the size of our market, there are a lot of developer side issues, such as tax and labor issues. As a trade association, I will preface all of my comments with the following statement: the views expressed are my own. They do not represent my organization or my sister organization or the views of any of our members, or this station.

MR. MCGEE: You also have to say that nothing that you say is legal advice—do not forget that. My name is Shane McGee. I am a partner in the Washington, D.C. office of Sonnenschein Nath and Rosenthal. I do a lot of data protection work, both on the privacy and the security side. Jennifer Archie and I have a lot of overlap, so this should be interesting. Most of my clients are video game clients. I also do some transactional work, licensing, and some litigation. I was recently trial counsel, along with my partner Christian Genetski, in the case of *MDY Industries, LLC v. Blizzard Entertainment, Inc.* How many people have heard of that case?

MR. PUTNAM: Hi, I am P.J. Putnam. I am Vice President and General Counsel of Gearbox Software. I have been very fortunate to be with Gearbox in some capacity for seven out of the ten years of its existence. Some of the titles I worked on are the *Brothers in Arms* franchise, *Borderlands*, and our upcoming *Aliens: Colonial Marines.* In the next 6-8 weeks, we are going to have some more exciting news coming out. Working for one of the larger independent developers is a lot of fun and if you have the opportunity, I highly recommend it.

MR. EHMKE: Great, thank you. As we talk legal issues with respect to distribution, I would start in a space outside of digital distribution. The granddaddy issue is the End User License Agreement—the EULA. I would ask the panel in total of where we are at in the offline distribution arena with respect to the EULA and what are we seeing out there these days.

MR. MCGEE: EULAs are an incredibly important portion of your legal protections if you are a software developer. It sets out the rights and responsibilities of both the developer and the customer in the end user license agreement. And the other side of that is that the terms of service really govern the services that go along with so many games right now on the subscription side. They are an excellent opportunity for developers to limit their

liability, disclaim all the warranties, and put in indemnifications for misbehavior of the customers.

MR. EHMKE: And how are you getting agreement from the customer—and again, we will stay away from the digital side—from the standard form of distribution?

MR. MCGEE: Most of the games now are available digitally. Even the boxed games that you can buy retail—like *World of Warcraft*, for example—are also available for digital download. I think that it is important for everybody—even those that are distributing those in the boxes—to make sure that there are electronic versions of their EULAs and their terms of service embedded in the installation for the games so that you can have that interaction with the customer: and make sure that there is meeting of the minds—make sure that there is affirmative consent or assent to the agreement, just to make sure that it is going to be enforceable.

MR. KEE: And just in terms of the market—and some of you may be aware of this—the nature of the EULA will vary significantly depending on the nature of the product that is being distributed. EULAs on PC-based games have always been very extensive and will also give various use-based rights in terms of "multiple installs and multiple machines" and that kind of thing. The "EULA," and I use the word in quotes, that one finds with the typical console game is not necessarily so involved, at least with the typical Microsoft X-Box game. It is literally a couple of lines on the back of the package. Because it is fairly apparent, there would be a pretty strong argument to make—depending on where you happen to be—that that is actually enforceable as the terms of the sale. But it is very much part of the package, as opposed to anything digital or something that requires installation; which tends to be much more robust, lengthy, with more detail in terms of disclaimers, warranties, and all that kind of thing.

MR. EHMKE: And P.J., what are you guys doing with respect to your disc distribution versus online distribution with the EULA?

MR. PUTNAM: Well, this is a challenge that we face in trying to make a EULA that is readable for the average person or average consumer without insulting them. When we try to make the words readable, they do not necessarily fit what we are trying to say. The challenge and the trade-off is the brevity. We are finding that a lot of our customers do not want to scroll through 5-6 pages, or even anything more than a page. We tried to keep the digital and the retail versions as close to the same as possible. That way, if they have seen one version on a *Borderlands* game, for example, they will know that that is the same EULA if they installed it again.

MR. EHMKE: And I think Jason raised the issue of the box that it is being played on, so the PC versus the console, maybe versus a web-based game. Are we seeing a dichotomy occurring within the EULAs based on the box that the game is being played on?

MR. MCGEE: Yes, we are seeing that. And again, the console-game EULAs are generally smaller and they are presented in a different way. You have "box real estate" to worry about if you are going to actually put the

terms on the box, which is an ongoing issue. The second part of that answer is that they should not be different. You have the same issues with console games that you have with PC games. Certainly there are more protections in terms of decompiling the program and there is more control with the console games, but there is still the same risk.—it is just a different level of risk. For my clients that have both PC and console-based businesses, I recommend that they use the same EULA. We need to think about creative ways of expressing the EULA to the consumer in such a way that is going to be enforced by a court.

MR. KEE: And on a similar note, and it goes to P.J.'s point, often the issue of complexity of EULAs will come up in conversations that I have both on the consumer side and the developer side. The challenge is that even in the course of the language that is used with respect to the EULA, there is a legal shorthand and these are terms of art that actually have distinct legal meaning that have weight with a court. As much as it might be nice to reduce it to a one-page agreement—in plain language that anyone can understand—that may not be enforceable, because it is using terminology that is so vague and ambiguous that it is impossible to actually pin down what is actually meant.

MR. MCGEE: I think that is exactly right, but I also think that enforceability comes from a clear agreement that people can understand. So what I try to do when I draft these agreements is I try to use the terms of art that you have to use to limit liability effectively, disclaim the warranties, and things like that; but for the rest of the language, you try to be as clear-cut as possible. So, when you bring this in front of a judge he or she does not look at you and say, "Did you really expect your consumer to understand this? Where is the meeting of the minds?" Because this is written in legalese that customers cannot understand.

MR. EHMKE: I will ask this as a consumer—well, let me ask the audience: Who has read a EULA outside of their job? Right, so [to the panel]: if you are faced with the knowledge that people are not reading the document, does that make it effective, ineffective or "their problem, not mine"?

MR. MCGEE: You give them every opportunity you can. You put it in front of them—and again I will use *World of Warcraft* as an example—they do a great job. And I say "great job" because in the case that we just finished with, the court held it enforceable to put the agreement in front of the user every time it changes. They do not just click a box that says they "accept," but they have to actually scroll through the *entire* agreement. It does not mean they have to have necessarily read every word, but they have to scroll through it before they are even allowed to click "accept"—or they cannot play the game, they cannot log on to the service, they cannot do anything until they click "accept." I mean, it is a reasonableness test: Did you give the consumer a reasonable opportunity to read it and to go through it? If the answer is yes, I think that you are going to have a much stronger chance of enforceability.

MS. ARCHIE: I think that there are some markets within the gaming industry where that level of "take your time and present it" is not consistent with the overall casual nature of the business model, where someone has experienced this game as an offshoot or ten minutes that they spend as part of a general social networking. How many times are you going to pop up and remind them that they are actually on someone else's game or that you are not at your social networking site anymore? I think that there are a lot of business drag-on presenting terms when you get out of that heavy, IP-intense market where people are traditionally coming from the shrink-wrap world.

MR. EHMKE: So you mentioned that if you have the different platforms—a different box, or maybe even different types of games—that your EULA should be the same across them all. But are we seeing that there is a business set of issues that are driving different positions?

MR. MCGEE: I think that is what Jennifer is saying, and I completely agree. It is really an internal battle between the promotional people and the business people within the company who team up against the legal team and say: "One, we cannot have this volume of language to put on the box (since sometimes it is required that you put it on the box); and two, we do not want to put another hurdle between our customer and enjoying the services or the game that we are providing. And they want to make it a clear hurdle from A to B with as little legal "mumbo jumbo" as they possibly can. I think that my role as outside counsel is sometimes to play the bad guy and to get on the phone with marketing, to get on the phone with the business people and back up general counsel at the company and say, "Yes, you really do need to do this, here are some horrible examples of people who have not and they have paid the price."

MS. ARCHIE: I like to think of it like, look, "What if I have a class action and it is a big day as a litigator and I am going to take the deposition of the class representative, the plaintiff, and he needs to last more than six minutes." So, if it is just me and a box and I am saying, "But you bought the box, you saw the box, you agree it came in a box, you saw the writing on the box . . . ." At some point, it is not that reasonable. Give me a story to tell with multiple presentations of terms. This whole conversation is happening, by the way, in privacy policies too—because the Federal Trade Commission in the United States (and it is going on in other countries) is kind of done with the old model that you can "bury terms," generally speaking. And courts, increasingly, are done with "buried terms" because the basis of the FTC's view is, "What does a reasonable consumer think?" So, if all of us know that in *our* lives, we have not devoted an hour to reading privacy policies—and yet we are members and have visited thousands of sites. No one is reading it; they are done with that. So they want alternative means to communicate consumer expectations and having a formal document is part of that, but you need to have a story that says, "We are trying to put it out there every way we can." We do have a master document, but the master document should not be the beginning and the end, I think. You are trying to work with consumer expectations.

MR. KEE: In addition to that—something to which I am very sensitive, being from Canada—there is a regulatory issue because many jurisdictions (with Canada being one and Europe definitely being another one) have much more robust, consumer-protection regulatory requirements in terms of what the minimum requirements are. Most of our provinces actually have minimum requirements for notice period if there are any changes, what the format of those notices of changes are, and so on. And these are the minimum requirements of what one must do to play in the jurisdiction. Obviously most publishers—especially those who are multi-national entities—will typically try to comply with all jurisdictions—and do so simultaneously. And this feeds into the debate of business marketing versus legal. It is not just a matter of whether or not it will be enforceable because it is a spectrum of where your EULA can fall, but there is actually a practical punishment: sanctions, fines, or loss of licenses if one is found to have violated the regulations.

MR. PUTNAM: As in-house counsel, I take a lot of what you are hearing here, and I balance it with what our marketing and our PR teams are saying. We try to come up with the best answer that we can. At Gearbox, we realize that first and foremost, we are storytellers. We want to tell a good story; we want to present an entertaining experience for all of our consumers. How do we take that experience from the time that they open the box or the disk or download the product to the time that they are actually immersed in the story? Yes, the EULA has to be a part of that and there has to be a break. We want to minimize the break in the story as much as possible, but then we want to get them into the games. I agree with what we are saying up here. However, we have to temper that with the business side and how difficult is it for the consumers to get past it.

MR. EHMKE: So, as digital distribution is starting to take off and we are starting to see not just downloadable content, but entire games being distributed through a third-party mechanism. So you have Apple apps—I will go back to the iPad—an entire game is downloaded through a third-party intermediary. What issues are you seeing with how to resolve the fact that it is a third party that is standing between you and the customer—in terms of getting the EULA in place?

MR. MCGEE: It is a real question about, among other things, privity of contract. Who are you actually in privity of contract with? Certainly with the portal—and I am calling the iTunes store or things like Steam just a game portal—because there is a terms-of-use agreement or user agreement between you and them. But what is the nature of the relationship between you and the developer of the software? That is the real question. I think that different companies are handling it differently. I think that consumers need to be aware of what their responsibilities and their obligations are, too. So I really think that this needs to be cleared up and I am looking forward to seeing it.

MR. EHMKE: Oh, the lawyer "non-answer answer." I am familiar with those. (Laughter) I would second that; I mean, that is why I posed the question. I think that it is an interesting scenario: where you have a third party

handling your distribution mechanism and you are talking about how you get your EULA in front of the user to address the legal issues? Is that third party supposed to handle it for you? Are you going to go around that third party? Do you agree with that third party? They might get in the way.

MR. MCGEE: And some of the time, these portals are saying in their agreement that "you agree to the terms of whatever program you are downloading." So you are agreeing to terms you have not seen yet, because you do not even know what programs you are going to be downloading! Is that enforceable? Is it enforceable for you to agree? I think the answer to that is probably "no," and I think that is why it needs to be cleared up as soon as possible as to how that is going to work. I think standing in the way of that is the "usability factor" that we were talking about. The portals do not want to put more legal hurdles between users and their experience with their service, so I really do think that it will be interesting to see how it works out.

MR. PUTNAM: Until it does get totally ironed out, our method is more like that of the typical attorney: belt and suspenders. We will go ahead and anticipate that the "portals," if you will, will have their EULAs for the customer, but we also do include our EULA with the download. So we make sure that even if there is not a privity of contract issue. Even if there is some mechanism in the portal's EULA that says, "Look at what the software is doing", we are covered.

MR. EHMKE: All right, I am going to ask a terribly loaded question that has many different answers. Thoughts on first-sale issues, EULAs, and digital distribution? How about a really broad question?

MR. MCGEE: Is the GameStop guy still here? (Laughter) No, he took off. First sale is—in my opinion and this is what I counsel my clients—a waivable right. And there are a lot of people who would disagree with that, and the EFF (Electronic Frontier Foundation) has come screaming about that position. It goes back to the EULAs. I think that you need to pay a lot of attention to the customer agreements and make sure that things like "for sale" are addressed; section 117 is addressed. These are rights that consumers would have in the absence of waiver—but you can waive those rights and I would suggest that you get your customers to waive them. Really—no argument from the audience? Usually that causes an uproar.

MR. EHMKE: Ok, we have this segmented a bit, and I was going to roll off of EULAs. But if there are questions on EULAs that you would like to ask the panel I thought that I would open it up to that right now. You there, in the back.

AUDIENCE QUESTION: I have a question regarding "waivability." How do you claim that it is waivable? Do you claim that the language in the EULA would waive it? I mean, it is a contract of adhesion by its nature, sanctioned by case law. How are you arguing waiver?

MR. MCGEE: Contracts of adhesion are enforceable, so long as they are not unconscionable—and I do not think that it is unconscionable, and neither does the Ninth Circuit at the moment. There are some cases on appeal, and we will see where those go, but I do not think that it is unconscion-

able to ask people to voluntarily waive a right—which is what you are doing throughout the agreement. In a confidentiality agreement, for example, you are waiving your right to talk about something. That is your First Amendment right that you are waiving right there. So in these agreements you do that all the time, and I think that it is just another right that people should have the opportunity to waive, if they so agree. And these are agreements—you do not have to agree to these agreements. They are contracts of adhesion, but there are other products on the market and you are welcome to go and purchase one of those products.

MR. EHMKE: Yes, sir?

AUDIENCE QUESTION: I guess that this is mostly for Shane. So, in your view, is there really no enforceable action that can be taken . . . (Inaudible)?

MR. MCGEE: Not always. And I have argued, and will continue to argue in some situations, that the "passive implementation" of a terms-of-service agreement, for example, on the websites that you go to are enforceable and the courts have generally upheld that. I think that the more unusual the terms in your EULA or terms-of-service agreement, the more interaction and assent you need to have from the user. I think that there is an inverse proportionality—they are inversely proportional, one to the other. So if you are going to have provisions in there waiving your for-sale rights, I think that you need to get the user to scroll through and to click accept because when you stand up in front of a judge and have that argument—like Jennifer Archie said, you want to have a story to tell. You know: this person purchased the product; the terms were there; they installed it; the terms were displayed to them; they had to scroll through the whole thing. This was not tiny text, this was not a provision buried in the bottom of the agreement or anything like that. They agreed to this; this was a voluntary waiver of their rights.

MR. EHMKE: Yes, sir?

AUDIENCE QUESTION: Is there a way to summarize the EULA in plain language that a user can understand without sacrificing the stability?

MR. MCGEE: No. (Laughter) I have seen a lot of people try that, and the problem is that what you end up with are two agreements—two legal agreements. And whichever one fits the needs of the consumer better when they come to sue you is the one that they are going to use. It is better to have it in one so that you do not have that issue.

MR. PUTNAM: How do you deal with a situation where you have a minority user?

MS. ARCHIE: Well, there are enforceability issues there, for sure. In some of the online cases, where it is very clear that they have taken on the benefits and now they want to avoid the burdens of the relationship, I have seen courts—such as the Eastern District of Virginia—enforce the agreement. The courts are going to look at the facts very carefully. It is clearly a risk. There is a question whether you have a binding agreement. It is a creature of state law, whether a minor can contract, and in what circum-

stances, so it is hard to predict, even within a company, what is going to happen. I think that it is helpful if there is any kind of a screening mechanism where you say, "Look, we do not want to contract with minors." And then they blow right through that somehow, and they find themselves on the system. There are certain equities—and sometimes that can help you under state law—arguing that the minor should be held to the EULA, and they are stuck with those terms, under whatever theory it is. It is definitely a huge risk. And maybe we will come to this later, but "neutral age screening" is something that you can do as a business to say, "We tried to keep them out." And certainly for all kinds of CAPA and advertising rules, for various reasons, I think that the best practice for everyone is to do it. Even the FTC has accepted that there really is no technological fix to keeping children from entering into agreements that they might not be legally competent to enter into or from going into environments that may not be safe for them. So you end up dealing with it after the fact.

MR. EHMKE: I think that is a great segue to the next topic. What are the issues that the gaming industry should be aware of with respect to children, privacy, and the FTC? You touched on it a little bit.

MS. ARCHIE: I would love to hear what my brothers-in-arms think.

MR. PUTNAM: We are very fortunate, because *Brothers in Arms* and *Borderlands* and our Aliens game—just about everything we produce—is an "M-rated" game. So they should not be purchasing it at GameStop or any of the other places where you get it. However, we understand that not everybody who buys the game plays the game. Or vice versa: not everyone who plays a game actually purchased it; they may have obtained it from family members or friends. We are very concerned with what we can do for children with the content of the games and also the enforceability of the EULAs.

MS. ARCHIE: I think that the Federal Trade Commission just issued a report that maps the risks, and people have probably seen it: "Virtual Worlds and Kids." And most of the recommendations are fairly innocuous, but there are a lot of "best practices" in there. And the usual pattern with regulators is that there is a drum beat down the road, and it is getting closer, and if things do not get safer, maybe they will formalize and take action. The game publishers do not have that much control in what the experience is in any of these. Almost all of them have some interactive component that is user-generated, so the Commission seems to be focused on what your story is going to be—in terms of moderating and reporting and dealing with unwanted behaviors as they arise in the course of playing the game and chatting about it, or whatever it is. Also, there is the option of whether you want to consider having kids-only environments. Many of these games are visually appealing to kids, and I am positive that the FTC-types that enforce CAPA would think that they are out there. They just look like they are made for kids. So, is there going to be a move toward making "kids-only" areas? That is one thing that they mention in the report: Are you thinking about siphoning off children so that they can have a game experience that is a smaller, more tightly moderated environment? You just do not have a lot of control over

what happens in those communities. If you think about the millions and millions of users that are in there every day, how could you police that?

MR. KEE: And something from a policy perspective—and more particularly from a government relations perspective—because this is one of those areas where all of our members are very proactive, simply because this is such a hot-button issue. It is one of those subjects where, absent proactive action by industry, there is a very good chance that government will step in. We have seen all of this discussion that is going on with the FTC, and the FCC has been making noises about online stuff as well. Up in Canada, we actually are in a bit of a different situation, insofar as most of the provinces actually already regulate game ratings. Our American brethren have a hard time understanding it, but it has already been done, so it is a matter of maintaining the relationships with the government officials so those do not expand any further. As a consequence—especially when you compare us to other entertainment industries—we are actually quite a bit beyond some of the programs that they have in place. This is both with respect to working proactively with retailers so M-rated games are not getting into the hands of children and also, on the content side, parental controls built into consoles or games for Windows that prevent you from getting access to the downloads. Also, in terms of proactive privacy controls, make sure that information is held very carefully, especially from the younger ages that you get. Again, there is this overarching concern about the nature of regulations that exist in other jurisdictions. Particularly on the privacy front, Canada has a fairly robust privacy legislation that has been in place for a number of years. Europe is even stronger than that, and you make sure that you are complying with all the regimes simultaneously, which is pushing any global, national, digital industry to kind of push toward a single standard.

MS. ARCHIE: In China—obviously a very dominant player in gaming—you have to write down if someone has been playing—I love the threshold—for "three to five hours." That can be fatiguing. I think that seems anti-American to think about that level of control, but it could be coming. And another thing they are concerned about is any level of content where you are "adver-gaming." They are very concerned with advertising directed at children, and that is just another easy area to get that. If you think about consoles, you realize that this is going to now become more of an interactive two-way communication. You have a game, and it is totally targeted to kids under thirteen. How are you going to collect verifiable parental consent under CAPA before you start emailing to that email address or doing anything else? It is definitely an area where there is a big lag between the advances of technology and what the law says you literally have to do. CAPA was written for an online web environment and *not* for a console-based environment. A lot of companies just want to do it right—just tell us the way—but it is awkward to think: "How am I going to collect verifiable parental consent, in one of the approved ways, with a console game?" And you want to email and interact with other players.

MR. EHMKE: Just to help me understand the issue, I heard two things: one is the issue of selling games and making sure that the ratings match who

gets their hands on the game and the content of the game. Then there is second issue of collecting information from your player. Maybe I do not have a follow-up question to that, but that sounds to me like there is a distinction of the attention being paid in the industry right now. Are those two separate issues? Is that a fair assessment? What do you think is the bigger issue right now?

MR. MCGEE: I think the second issue: the ongoing collection of information. Because I think that that is going to get more "invasive" for a lack of a better word as time goes on, and there is going to be more information collected. So, I think that is where the focus is, and certainly where the FTC's focus is right now.

MR. EHMKE: Going back to one of our earlier questions of dichotomy between the type of game/type of console: the "free-mium" games—the online games—versus the console. Are we seeing different types of information being collected to facilitate that? And what actions from the legal side are being taken to help or hinder that? Is there an international flavor that we need to address with that?

MR. MCGEE: I think that you see more information collection in the "free-mium" games because that is their model: collecting information and selling it to advertisers who then do targeted advertising.

MR. KEE: My sense is, yes, it has to do with the nature of the model, and when you are downloading content to your console, the nature of the information that is being collected is going to be very different than when you are engaged in social gaming. A lot of the privacy concerns that are being raised, particularly in the United States, are not about gaming. It is about the web. It is about online. The Web 2.0 actually, because the fundamental business model of anything that is Web 2.0-like has to do with offering free services in return for something—and that is marketing, data collection, Google-tracking all your movements. And that is what is raising a lot of these concerns. They are trying to impose regulatory models, and as you said, the technology does not exist to do what they want, which is part of the main challenge. So the more web-based your game happens to be, or the more the web is used as your delivery platform, the more likely you are to start running into these issues because you are running into the more "free-mium": free to play, adver-gaming types of models where the collection of information is more intrinsic in terms of the value of what your are providing.

MS. ARCHIE: In terms of global compliance, it is not something where your clients come in and say, "Well, this is how we are going to do it in Bolivia; and this is how we are going to do it in Canada; and this is how we are going to do it is Asia." They need you to "bottom line" it and give them a lowest common denominator that allows the broadest possible Internet action and use of an identical platform. So you can have something like last year—where Canada's privacy commissioner got a very detailed letter from a college professor just taking down Facebook's privacy practices from top to bottom. Downloading of apps and games was a huge part of what he was

complaining about, and that was a precursor to the major—I mean every person in here has had to accept and reset their Facebook preferences as the domino effect of that conversation that happened in Canada. That changed the whole platform worldwide, and it caused a lot of business discussion about "What are we going to do with this? How are we going to re-package it? How are we rethinking ourselves?" It all started with one country, so you cannot simply say, "Well, these are our rules for Canada."

MR. KEE: And as that establishes, clearly as sort of an international component—and on the web it is going to be global—one will also measure the likelihood of there actually being an issue. One component of that jurisdiction that may have very stringent requirements versus how much of that represents your market and the likelihood of you running into an issue. Clearly that is all about calculating how this is going to happen, which will inform individual company decisions about how they address these issues.

MR. EHMKE: Are you seeing business people caring about these issues, the international side of it? Or it is that they just want to comply with the United States and will let the chips fall where they may?

MR. MCGEE: I certainly see a combination.

MR. PUTNAM: It depends on what you determine your market to be. For us, we see the world as our market and we want to be the best stewards of that information for the entire world, as opposed to just targeting one particular country.

MR. EHMKE: Staying in the realm of data, now that people have collected the information, let's talk about some high-level legal issues of "you have had a breach." What should folks think about a breach of security with respect to some of that data?

MR. MCGEE: The new "breach-notification laws" are the first things that you need to worry about after you stop the leak and go through all the steps that you need to from a breach side. Forty-something states have breach notification laws, with different types of requirements for notifying people that certain information has been lost. It depends on the nature of the information as to whether it is going to fall within the breach notification scope. That can be absolutely miserable. I mean, how many people here have received a letter saying that your data has been lost within the last year? Only one person shaking her head "no" It surprises me that there is *anyone* in here that has not, because I have gotten four just in the past couple of months. Maybe people are just after my data specifically. A lot of the state statutes apply mostly to financial information, but not all of them. So if you have a breach of anything relating to consumer data, you need to talk to someone who knows a lot about those statutes.

MS. ARCHIE: I think that more and more, as you get into micro-payments and some of the other things that are going on, everybody wants that solution of how are they going to accept the credit cards and who is going to give them the micro-solution. But whatever it is, security is job one. PCI compliance—I have clients who say that they are PCI compliant, and want me to stop "diligencing" this issue, but I think that is only question one.

Whether you have actual decent security is so far beyond that, I do not think PCI is some kind of magic bullet for having the kind of security that is going to avoid follow-up. Where the intrusion is malicious and there is any evidence of misuse, then that is where the liability is going to really tumble. The basic "it fell off the back of a UPS truck and now we do not know where your data is" is a very manageable notice. It is kind of a notice—you can offer credit monitoring and then you are done. But I think that the databases in this industry are very appealing. It is a hacker world out there, and especially as they start accepting credit cards online, that should escalate that up to the Board level—have a written plan and put a lot of attention on it. I do—I know we all do. In our business if you know something, they come to you when they are going to go public; and you can be astonished at the lack of sophistication that has been put on security because they think: "Well, IT does that." It is really important.

MR. MCGEE: It is more than just IT. When you get into some of the security statutes, they talk about administrative safeguards, technical safeguards, and physical safeguards. Only one-third of that is the responsibility of your IT department. You need to make sure that there is proper training, proper policies in place, and make sure that physical security is in line, too, so people can not walk in and walk out with a hard drive, which happens all the time. That hard drive can contain millions of records. I just want to put an explanation point behind something you said: you said that "especially in this industry"—just a little data point here—a valid *World of Warcraft* account sells for *twice* on the black market what a valid credit-card account does.

MR. KEE: In some cases, it can be a one to ten ratio. Depending on the market, you can sell a credit card for a dollar and you can get at least ten bucks for the other account.

MR. MCGEE: Yeah you can get a lot more for these accounts—because the accounts are worth a lot more to "gold farmers" and other people that would go in and liquidate their virtual properties and then sell them in a third party site, like IGE, and get a lot more money than they could from abusing a credit card.

MR. PUTNAM: One of the issues that Jay brought up, which pertains directly to us, is who owns the customer? Is it the developer? Is it the publisher? Or is it a third party? I see those lines now blurring quite a bit. As an independent, we work very closely with our publishers to create downloadable content—to create some of the micro-transactions. So, my answer to my own question is that we now have to be very careful and we have to look at it. Contractually, it is not as difficult to tell who owns them, but in practice, it is a lot more difficult.

MR. EHMKE: Given that the game industry might be a ripe target for hackers, are you seeing the game industry being less the same or more protective than everyone else of the data? Are they paying attention to the issue? Are they implementing the safeguards? Are they any different than anyone else in terms of not paying attention to the issue?

MR. MCGEE: With the exception of my financial clients and my healthcare clients —which comprise half of them—they are very careful and have to be very careful for several reasons. Game companies generally—and there are some exceptions—are very careful with their data. A lot of them are very careful with their data because they have learned the hard way that they are targets.

MR. EHMKE: Really briefly, because we are running out of time, some of our last issues: I think we mentioned virtual worlds and data ownership in virtual worlds. What are folks seeing about some of the legal issues in owning assets in connection with a virtual world?

MS. ARCHIE: I think everyone knows the Second Life case, but it has not been handled as a matter of licensing. Just to say ,"You have a license to be online and you have these assets, but they have no real world value or meaning." And if you have a robust secondary market online for that virtual property, it can get blurred. I think the virtual worlds need to have a big story to tell about why that secondary market has nothing to do with them and they shut it down every single chance they get. So there is no "wink and nod" and a blanket policy that this is in fact property and they all know it. And that goes to gambling and things that might come up with that business model.

MR. MCGEE: I agree, and I think that the story you tell starts with this: There is no magical sword. You do not have rights in this fictional object because it does not exist. All it is is a flag in my database next to your name in the column that says magical sword. That is what it is. It does not exist in any other fashion. Just from that standpoint, virtual property is not property. I think the exception is the "Linden Lab-Second Life Exception," where Linden Lab purports to give those property rights to its users, but the rest of the time it is a matter of licensing. And not even a license to the object itself—you have a license to play the game and this is an incidental part of your game play. "There is no spoon," as Neo said.

MR. KEE: On a similar vein, I would concur exactly with Shane that it has been a subject which has been tremendous fodder for law-review articles—but on the business side of it, there is not much of a question. If there was an actual question, if there was a case that came down and said that it was a question—then there would be attention given to some of the stuff that is going on in Asia, which is actually the subject of some concern. The kind of liability that it is opening folks up to is tremendous, and the obligations that it opens them up to is tremendous, and it would have a negative impact on the industry because of those kinds of concerns.

MS. ARCHIE: And that is the direct property case. I think that there is another consumer protection element of it that says, "You said you were going to run the game like this." And "I had ten pets; I did not have two pets." And "My pet was this special pet." And "You said you would run a fair game." I mean, game integrity is huge in this business, if you want to do what I do: IPO game integrity is so important to your brand, to your value. You cannot be the website that can not keep track of magic swords and pup-

pies and run a game on that. I think if the complaints skyrocket—if you go to Better Business Bureau and various places that are the early warning indicators that you might have a consumer protection problem—people complain about this stuff and they could probably get a foothold in there. I think they could end up being able to say that you had unfair or deceptive trade practices by not following the rules. So it is easy to say, "Just do the rules," but when you think about the scale of it on some of these platforms, I mean, how many people are there to prevent stealing and "This guy whacked me?" If you go on the message boards that go along with these games, there is so much user-on-user abuse and hate that you can see the potential for concern about consumer protection and complaints.

MR. MCGEE: That argument scares me; it does. And I think that that is where the risks are. Another argument that scares me is the "sweat-of–the-brow" argument: "I spent two hundred hours on this game over the past two weeks and I deserve this, this was mine. Even if it is not my property, I deserve the benefits of the time that I have put into it." I have heard this argument so many times. I think the way to solve both of those problems is going back to the EULA, going back to the terms of service. Make it very clear to people that this is your world; you are the benevolent dictator of this world; and you can do what you want for whatever reason you want and you do not need their sign-off on that. I think that that is the only way to handle that, other than making sure that eight out of your ten puppies do not disappear.

MS. ARCHIE: And I think that customer service is huge. You want them to hear from you first: have an eight hundred number. Every time somebody is complaining, that is a gift, so answer it, even if they are complaining about stupid stuff. I hear that from clients coming to me. The FTC sent them a letter, and they want to know how they got here. I want to tell them, "Because even though you think that you are right and you have a great story to tell, you did not tell it to those 2,432 people who got mad enough to email the FTC first." So you have got to manage that. You cannot ignore it, even if you are not impressed with the merits of their gripe.

PROFESSOR NGUYEN: With respect to the user database, if you do not sell the database, you are not violating any privacy issue here. Can I use the game's user database as collateral in financing? Am I violating privacy if I use the game's database in collateral financing?

MR. EHMKE: I expect a "lawyer non-answer" on this one.

MR. KEE: It depends. Again, speaking from the Canadian perspective, in order to have obtained that information in Canada, unless you fall under one of a series of exceptions, generally you would have had to have obtained consent in the first instance. Those who have collected the information—because they do have to obtain consent—will often make sure that the consent is robust enough to sustain certain permissive uses, which may be a permitted use. Absent that kind of consent—if you manage to collect it somehow, but the consent was limited to that collection—then only if you can essentially guarantee that they would not have access to the data. Be-

cause it is entirely possible that they will end up taking possession of that data if they end up seizing collateral. If they do that, then that is a disclosure. That would be the concern. If you basically say, "Well, you can take a security interest in this data, but I will not disclose it to you under any other circumstances," then the bank is going to go, "What am I taking security in?" That would be the issue, at least from the Canadian standpoint.

AUDIENCE QUESTION: What would be the United States perspective?

MS. ARCHIE: I would think that it is similar. It depends on how you collected the data. If you collected it all online, then the rules are less restrictive. But if it was collected via the Internet and it was subject to a posted privacy policy—and there is a 99.9% chance—then you have to go read what they said about that. It is a very common item in diligence for transactions. Someone comes running along and says, "Wait a minute, we are buying this data from this company." The whole reason you are buying it is for this database, or it is at least essential, and you will have to re-permission the whole database. You could always re-permission it and then they would be like, "No, do not use my data for that." You would not get anything, but it is an often-overlooked topic and I think a lot of people have been getting away with it. I think a lot of databases change hands—either through secure transactions or through sales and mergers—and nobody has bothered to tell the user anything about what might happen. The other point I want to make on that is that people want to write placeholders: "We might do *anything*." And the FTC is pretty fed up with that and the online trust organizations. Say what you do *now*, and do not put out something that says "in the future, we might place this as collateral to a third party and it could be auctioned off and blah, blah, blah." You can not just have a big cloud of possibilities as your policy.

MR. MCGEE: That being said, I always include a provision in the privacy policy that says, "We may sell the company or engage in a merger, so that the database would change hands." In that circumstance, we would require the buyer to follow the privacy policy.

MR. PUTNAM: I would like to just address what Jennifer Archie said. Sometimes this goes on: transactions with the collected information that you as a consumer may not know about or may not be included in. As a company, you are only as good as how trustable you are, so you have the opportunity maybe only once. Once you violate the consumer's trust, do not plan on getting that privacy information ever again from the consumers. So it is a very tight line that you use. And when Professor Nguyen said, "Can you use it for your financial transactions?" Well, as you heard, the answer is probably, maybe, but if you do, be very careful and realize that one mistake on it, you have hurt yourself for the long term.

MS. ARCHIE: And a lot of times, these are material contracts, and if they are public companies, those terms are available to be reviewed. People love to be the one that "found that" and "blogged that" and "started the fire."

AUDIENCE QUESTION: Can you address some legal issues of distribution of a game that is designed specifically for an institution? Say, for example, a university: you really do not know who all is going to be accessing it through the university's website or portal. What type of agreements would you suggest be put in that?

MS. ARCHIE: I guess I would say, have a universe of permitted users that have gone through some interface where they have told you their identity, through an email or something. You stamp it and store it. You present something to them that gains their agreement that is different from the main. People say, "We should have a privacy policy. Let's link out to SMU's privacy policy." Well, what does that have to do with what this little thing is? So you stop and say: for this "user experience," design a process that takes them through a path and to "assent and click."

AUDIENCE QUESTION: So you would still go through the same basic process?

MS. ARCHIE: Yes, there are so many things that we could know or ask to give specified advice—but generally speaking, users should know whose website they are on. I saw this the other day. A hospital was offering a service, a really cool service, but not at all related to what the rest of their website was up to. They are clicking out to this stuff, and you go see it, and realize that that has nothing to do with that user's experience. There is something there that you might be able to point to if you were defending yourself in some lawsuit or inquiry, but I think generally to have a tailored description of what is happening there, it is very easy to write. It can be five sentences sometimes.

AUDIENCE QUESTION: (Inaudible)

MR. MCGEE: In the absence of a clear agreement, that might create some liability. Somebody might get creative and say that there is liability for Sony or for Live Gamers running their station exchange now. But, I think that again you have to go back to your contract with the user and you have to disclaim that type of liability as clearly as possible in that contract. You have to make sure that the contract is displayed—as clearly as possible—and that there was clear assent and a meeting of the minds there so that when people come back and say: "Look what you did to me. I have property rights X, Y, and Z," you can point to the agreement that they "signed" and say, "Well, you said here that you did not; and it was a very clear agreement."

MS. ARCHIE: And I think that some of them collect and store credit cards, but there is going to be an e-commerce component to some of that, at least if it is an online world. Just think, "What are all my opportunities to get this out in front of them again?" You have to start with the agreement and the assent, but do not stop. So if there is some way to remind them again that "this is part of your license." "*Your license.*" Get those words out there.

MR. MCGEE: And just play with the language. It is a license to use that piece of virtual property that does really exist—no matter what attributes we assign to it—and those attributes may change going forward. Make it

clear that these things can happen; these things can be downgraded; they can be upgraded.

MS. ARCHIE: Your emotional attachment to this sword does not make it real.

AUDIENCE QUESTION: I actually was the architect of Station Exchange, so I know all about trying to legalese your way out of certain things, but I have two questions. How do you think that differs when you are dealing with first-party, direct micro-transactional stuff, where it is not pay-to-play and it is not a secondary market, it is a primary market? Secondarily, as a comment to this, one of the things that is very interesting as we start to look at these rights that developers maintain, it makes it very hard for developers to design. If you can not change something once it goes in, and it ends up being bad for your game—but you have collected money, you then have to have refund systems. There are far more complex design and legal issues, and you are forced to have lawyers in the room.

MR. MCGEE: It is not a bad idea to have lawyers in the room when you are talking about issues like this.

AUDIENCE QUESTION: We were very fortunate that the lawyers we had—some of them—were hardcore gamers. In fact, the general counsel of Sony married someone that he met at EverQuest. So they are very in touch with the issues that they are focused on. But I think that it is becoming more and more important for people who do this work, particularly in these online transactional worlds and conduct micro-transactional business. You guys did not talk too much about "spiritual rights" of user-generated content, but that is another can of worms. Basically, in Europe, if you create something, you have an invested copyright to that—with a disclaimer. There are some very, very complicated issues to this that I think lawyers do need to be involved in at some high level. But please address, if you could, what you think about first-party micro-transactional business versus peer-to-peer, and is it harder to disclaim it out if that is your bread and butter?

MS. ARCHIE: First, as lawyers we want to say, "Well, in the Ninth Circuit they are trending this way." But there is a case coming up in the Eighth Circuit, so you know we do not have that as a foothold, so we are kind of out there in "judgment land." I think the best you can do is continually present it and not bury the issue. Have disclaimers, avoid legal vocabulary generally, and be mindful of that in all the communications. So there is all this marketing to people that goes on. Products get promoted all the time. Make sure the marketing function is talking to the e-commerce function, and that function is talking to the lawyers, and the lawyers are talking to everybody. And they are constantly thinking, "We do not talk about this as property, guys". We are not going to have a box of exhibits that we hand over to the other side that shows all the ways in which we talk about it, as property, and how valuable and important it is—except when we are talking about it in the license agreement. I think there are always the facts. I really believe in facts and narratives and writing them in real time, you know; and not just having the litigators cut them later and try and make it out. Clients in other

businesses—like the medical industry, where it is incredibly important to them that they are correctly collecting data about people's personal medical condition—they want to have lots of conversations about it and you just do like organizational discipline around the vocabulary that is correct for our business. And you have to train, and it is expensive and a pain in the neck, but that is going to be a big cutting issue. As far as I can tell the micropayments people are minting money. In my experience, when you mint money, the lawyers can get a little bit of traction in the conversations about engineering and some things in that they might need to protect the bank.

AUDIENCE QUESTION: I had a question about the taxation of virtual property. There is a story from about a year ago where they talked to the head of Barter Systems for the IRS and the fact that there is an actual currency and a secondary market for virtual property, that means that you should be getting a 1099 for your income. The IRS has not gone after anybody like that, but is there any other taxing authority, to your knowledge?

MR. MCGEE: Congress has a committee and has held hearings and is talking about instituting taxes for virtual property. I think that it is ridiculous for the reasons that I have said before—like I said, "There is no spoon." You have this check in a database somewhere that says you own it. Where the heck that is going to turn out is anybody's guess, really.

AUDIENCE QUESTION: I guess my question is: other than the IRS, you have all sorts of state jurisdictions; you have income tax; you have foreign jurisdictions where the games are played. Has any other taxing authority actually tried to go after this?

MR. MCGEE: Not that I am aware of. We have a public policy group at my firm, and I spoke to them about this, and nobody is aware of this, other than the federal discussions.

MR. KEE: There are things that are going on in Asia—again, because so much of it is online and the entire market is so fundamentally different—so that has been happening there. Also, it is important to note that if you end up selling your virtual property, regardless if it is in defiance of the EULA or not, and you end up pulling cash out, that cash pulled out is income, right? It is taxable, but there is nothing special that you need for that. That is just as if you had sold anything.

AUDIENCE QUESTION: If it was recognized as taxable, if there was a tangible property that was sold and the federal government recognizes that, does that change the outcome?

MR. MCGEE: I do not think so. They will tax anything. I do not think that they care about characterization. Can somebody use that as an argument to say, this is property? Sure, they could try to use that, but I am sure that taxation is broad and you could come up with other examples of things that are not property that are being bought and sold. At the same time, use that as a counter argument.

MR. EHMKE: I think that we have already indirectly asked this question, but I am going to ask it again. Do we think that digital assets should be

property? Should they be an asset? Should they be tradable? I think we just mentioned that it might create some business issues.

MR. KEE: Well, I would just go back to the same discussion that we just had; that it just opens up such a legal can of worms if it were regarded as such. It is fairly safe to say, at least from the business perspective, because of the concerns that would be at issue. What does it do to liability? What obligations do you have? Do you have to maintain the property on your servers forever, even if someone decides to shut down their account? All of those flow from the question.

MR. EHMKE: Let's talk about some in-game legal issues that can happen. Jason, can you talk a little bit about the ASCAP (American Society of Composers, Authors, and Publishers) and performance issues going on?

MR. KEE: This is an issue that is starting to come about in a variety of jurisdictions. Canada is actually far ahead of this, and it is actually subject to ongoing litigation—which is why I am somewhat constrained in terms of how much I can discuss, but I can certainly talk about it as a policy basis. Essentially, you have a variety of collection societies. Typically, they represent authors, music, composers and music publishers that will correct royalties for usage of music. In the US, it is ASCAP that collects for a variety of reasons, but one of these is the public performance rights. In Canada, we have SOCAN (Society of Composers, Authors, and Music Publishers of Canada), which collects for both the performance rights and the communication–to-the-public rights. The communication–to-the-public right, is something Canada has for broadcasting, but it has traditionally been interpreted to be a little broader than that. Essentially, they are trying to utilize these as tools to go after anyone who owes them a royalty for any uses of their product, whether it was via the internet or any other method, regardless of whether they have actually cleared the right or not. One of the recent targets—because of the profile that the games industry has received over the past couple of years—has been the games industry. In Canada, this litigation has been ongoing since 1996. First round, it went to the Supreme Court and they were actually trying to get them to pay the freight and our Supreme Court basically said, "No," they are acting as 'mere conduits.' They are not liable." SOCAN went back to the drawing board and introduced a new tariff, and they basically broke it out into every single conceivable online service that uses music—including game sites. So, if you download a game and that game has music in it, SOCAN is alleging that they are owed a royalty. Even if you went and bought that same game at retail where there is no royalty owed because there has been no "communication." Because the games industry is very good at clearing all the rights, they will often actually own the rights because they will "work for hire." They have had someone compose the music that is used in the games. This is a basis for considerable concern because it ends up that as a publisher, you are paying yourself—minus the administrative fees that the collection society will lift. It is a matter of huge concern and again, recently, ASCAP has been arguing similarly that they are actually owed for public performance. If you happen to have a game and it happens to be played at a pseudo-public venue, which would be anywhere

outside your living room, then you would owe them for a public performance. So, as a matter of policy it is a huge concern, because it essentially would operate as a "download tax." It would impose an additional cost on digital distribution, and to the extent that one of the trends we are seeing is movement towards digital distribution, it is a major concern. Again, this is internationally. And in Europe, again, they have very advanced collective societies that will sort of push for this, and also the music industry—at least come component of it—is getting more aggressive about it, as they are seeing some of their revenue stream from the sale of recorded music diminish and they are pursuing other options.

MR. EHMKE: So let me see if I have got it straight. You might have a developer or a publisher that actually goes to the clearinghouse, pays the fee to use a song in the game, goes out to brick and mortar retail space and sells the game, and they would be fine. That same game, when downloaded—according to the Recording Institute—they get another fee for the song that is included in the game.

MR. KEE: Yes.

MR. EHMKE: That is the policy, then. It is a good business model. (Laughter) Okay, just a quick laundry list of potential issues. What about gambling within an online game? What should people be aware of in that regard? Don't do it? Don't have it?

MR. MCGEE: Don't do it. Really, really, don't do it.

MS. ARCHIE: Have a story for why you are not doing it, is what I would say. Have someone look into gambling laws, have someone look at where enforcement has been, and at the elements of the game and the experience and say "It is not like that because . . . ."

MR. EHMKE: Define gambling in this instance. Is it gambling to use virtual money to obtain a virtual asset or does it have to be real money?

MR. MCGEE: I think it depends on whether there is a secondary market that is sponsored by the developer. I think that generally, it has to be real money—unless it is something like Second Life where you can turn that fake money into real money on their own exchange. I think that is the exception.

MR. EHMKE: I am going to ask the same exact question, but I am going to rephrase it. Is there a hidden way that you might actually have gambling occurring in your game without realizing it?

MR. MCGEE: Like a drop, for example? Where you kill a monster and a different type of thing drops for different people? Is that gambling? Is that relying on luck?

MR. EHMKE: Is that a slot machine? I am paying a monthly membership to play the game.

MR. MCGEE: I sure hope not, because my clients would be going to jail.

MR. EHMKE: Remember the test, right? I am paying a fee to play the game. There is a chance of randomness, and I get a prize.

AUDIENCE MEMBER: The prize does not exist.

MR. EHMKE: The prize does not exist. Oh, I think . . .

MR. MCGEE: I think that is one of many reasons that people do not have exchanges—where they exchange their virtual currency into real currency. That is one of the many factors that goes into that decision.

AUDIENCE MEMBER: I know that when I was there, the position they took was that "it requires skill to get the drop, so therefore, it is actually a game of skill as opposed to a game of chance."

AUDIENCE QUESTION: Can you generally talk about the Zynga issues that are going on right now? What is happening with those issues and the currency?

MR. MCGEE: Two up here of us do work for Zynga, so I think that we are out of that one.

AUDIENCE QUESTION: There was an issue that started going on about a month ago, two months or maybe longer, with Zynga poker on Facebook. People were taking those coins and turning them into real currency, trading them in. The government is now looking at that and asking if that is really gambling, because it is no longer just virtual. You can actually go online and there is a lot more detail, and it is a lot more eloquent.

AUDIENCE MEMBER: There was an item in EverQuest II that was literally a poker machine. You put in ten cents, and it would randomly generate something, and the player could win coins based on what came up. Because the exchange station was operating and you could redeem that for cash, we could not operate that system on the service which allowed cashing out.

MR. MCGEE: And that is the distinction right now. If you are running an exchange—or if you are supporting an exchange that allows you to turn that virtual currency into real currency—you should absolutely not have any gambling *at all* with regard to the virtual currency.

AUDIENCE QUESTION: Would it be different if you used point cards in the U.S.? So someone gives the money and receives points that you can use in the game?

MR. MCGEE: Can you take those point cards and put points back onto them?

AUDIENCE QUESTION: Would it be different if you used point cards so you do not take the money and you do not have an exchange yourself?

MR. EHMKE: Would the points be convertible back to cash?

AUDIENCE MEMBER: (Inaudible)

MR. MCGEE: I think as long as the player—because the player is the one who is gambling—does not get any financial benefit out of it in the form of an exchange or anything else, then you have a strong argument that it is an enclosed economy. Anything that looks like gambling within that closed economy is not translatable into real wealth and, thus, it is not gambling.

AUDIENCE QUESTION: Look at the system?

MR. MCGEE: Yes, I think that you would look at the system and see if there is a potential for somebody to cash that in. Even if there is the potential for someone to cash that in—for example, you could go on IGE and buy *World of Warcraft* gold and sell *World of Warcraft* gold, but that is not a

Blizzard-approved exchange. So just because there is not an exchange out there, that does not necessarily mean that the answer is not still going to be that you should not have gambling.

MS. ARCHIE: And I think that you have to have a story to tell on what is the separation between that unauthorized secondary market and the business. What are the steps that you take to make sure that does not happen? Because it is not going to matter to law enforcement or regulators, if they care or if they see it as a "welcome appendage" to the business.

AUDIENCE QUESTION: One of the biggest issues that we faced is money laundering. People would take a credit card, illegally buy someone else's gold, sell that gold, and redeem that for cash. That happens a lot through these player games. One of the biggest controls that we had to address was how to circumvent and prevent this. And it was done by all varieties of people: Russians, Chinese, and Americans too. It is a global problem.

MS. ARCHIE: Stored value raises issues of banking, so we are definitely doing a lot of thinking about that for various clients. There is state registration—you know, PayPal got into this with state authorities over whether they were supposed to register as a bank. That is a global issue as well.

MR. EHMKE: Okay, I will throw out another grenade then: international issues with respect to distributing content digitally. Are there issues that people should be aware of other than "international issues?" Maybe that is the extent of the answer.

MR. KEE: Essentially, it is something that comes up, mostly when I am having discussions with developers. It actually goes with the point that Christian was making earlier, with respect to "What value-add did the publisher add?" A lot of developers decided to start self-publishing, because "they don't need this publisher anymore" and they can get their own financing. But they often do not actually realize what the publisher is doing for them. Just with respect to regulatory compliance and the connections that they have with the distribution networks that actually take care of all the basic requirements. They say, "This is it." The minimum sort of consumer protection, the minimum issues of contract, the distribution. We have a host of them locally in Canada with respect to localized language. You have to have French language schemes if you are distributing into Quebec, and we have a number of jurisdictions, including our provinces. Some European countries legislate game ratings. If you are self-publishing, and especially if you are doing it online, then people do not bother even going through the ESRB (Entertainment Software Rating Board). Or even realizing that the ESRB is North America, but you have to do PEGI (Pan European Game Information) if it is somewhere else. There is also a variety of standards that go across the board. Then there are the standards compliances—if you are distributing your game in Germany, you can not have red blood; you have to color it green. All of these localization issues that the smaller guys especially do not realize. That would be the biggest challenge from a legal-regu-

latory perspective is that they be aware and cognizant of these challenges, so they are not running afoul of local laws in terms of their distribution, when they decide to self-publish.

MR. MCGEE: And not just laws, but cultural restrictions.

MR. KEE: Yes.

MR. MCGEE: You do not want to have panda bears getting killed in China; you do not want to have skeletons in China. These are real issues. From country to country, it is incredibly expensive if you are going to take the approach where you are trying to get it approved for distribution inside those countries. Sometimes people take the approach, and I think this was one of your questions earlier: Do you just throw it out there for US users? And if someone from another country downloads it, then they did it in violation of the terms of use that said "you warrant that you are a US citizen who is downloading this from the United States." It is sort of "see no evil, hear no evil." Clients have taken that approach.

MS. ARCHIE: If you have an IP address model, then you do not really have that luxury. A lot of companies are surprised, "There are countries I cannot take money from?" Yes, there is a whole list of countries that you need to block. Because of the internal messaging and community formation—these components in the social networking games—you cannot ignore the fact that people in Cuba, or Iran,or maybe Iraq might be organizing and having fun playing these games and you are taking money from them.

MR. MCGEE: And letting them communicate inside the game. Securely.

MS. ARCHIE: Exactly.

MR. PUTNAM: You mentioned digital distribution, but a lot of the same issues that you are talking about are apparent even on the physical distribution. Take, for instance, Gearbox, with our *Brothers in Arms* shipping into Germany. That was a bit of an interesting thing. Now, for *Borderlands*, we are doing our digital distribution and Gearbox is the distributor on the PC. And we do have to look at where the IPs are and we have to block them. We have to make sure that we are not selling into those areas. Every once in a while, we will get an email from somebody who says that "I tried to buy the world version and even though I live in Germany, my real address is in Switzerland so can you send me the non-German version?" And we reply, "No, it was based on the IP that you tried to buy it from, sorry". Will the German or the Australian or the Chinese versions, which are different because of the regulatory schemes, be able to work on a multi-player platform with non-restricted areas? So, can a German player with a German code play with a North American? Our answer is no, because they are separate SKUs.

MR. EHMKE: Well, I was told that one thing I needed to do as moderator before we started—and it wasn't "keep the discussion moving;" it wasn't "stay on time"—it was hand out the goodies. (Laughter) So I would like to thank our panel very much. It was excellent.