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The Effect of Court Rulings on Business Development

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The Effect of Court Rulings on Business Development

Moderator:

Victor Godinez, Columnist, The Dallas Morning News

Panelists:

Dr. Christopher Ferguson, Texas A&M International University

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Sean F. Kane, Counsel, Pillsbury Winthrop Shaw Pittman, LLP

Shane McGee, Partner, SNR Denton US, LLP

**Introduction by David L. McCombs, Partner, Haynes and Boone LLP
Chair, Institute for Law and Technology**

Advisory Board, The Center for American and International Law:

MR. McCOMBS: Good morning, everyone. I am David McCombs and I am the chair of the technology law practice at Haynes & Boone. I also have the honor of being the chair for the Institute of Law and Technology at the Center for American and International Law. Many of you may know about the Center, but it is one of the three collaborators for this event. Of course, Dean Attanasio and Professor Xuan-Thao Nguyen from the SMU Dedman School of Law, we thank you for being involved and helping us organize this, and for being one of the prime movers of this event; as well as Dr. Peter Raad and Ron Jenkins from Guildhall. The headquarters for the Center is right across the street from Guildhall. A few years ago, we were all sitting around and thinking about what would be a new, innovative program that would create some interest in a particular industry, and the gaming industry is one that we are all involved in. There are just so many issues, and very few organizations have been able to pull together the kinds of people that we have to learn more about the gaming industry. So there are not very many events like this around the country. After doing this now after the first year, as Peter said yesterday, we found that having it again was a great idea, and here we are for the third year. And we have a very good turnout of people that are very focused in this industry, so it is a pleasure to be here.

For those of you who do not know much about the Center for American and International Law, it is an organization that is founded in 1947, and it has had the longest running intellectual-property program in the state of Texas. It has many other programs—such as transnational arbitration—and draws from typically 130 different countries for various programs. Every summer, lawyers from all over the world convene in Plano for a six-week course, and it is very much a time when lawyers from around the country can get to know each other better and do some substantive work.

So before we begin today's session, I would like to again thank the Munck & Carter law firm for sponsoring last night's dinner and reception. We had a great dinner and a very motivating presentation by Steve Orsini, who is the Director of Athletics at SMU and their official guru on how to recruit and keep top talent. That is something that is very important across

the board for not only athletics at SMU, but for all of us in our organizations. I was sitting there at dinner last night, and Evan Hirsch of THQ and I were talking about one of the key takeaways that I got out of yesterday's program, which is that it is really all about investment. In fact, Evan teaches a course on emotional investment. How do you get people emotionally invested in the game? How do you tap in? How do you make it a sustainable game experience? We saw a lot of that with the idea of integration of the console and the mobile, so that you have an experience that is constantly tapping into the vein. How do you get people coming back for a new fix? How do you adjust the knobs and dials to keep the experience one that is sustainable? With regard to Steve Orsini, he was talking about leadership, and leadership in organizations that create an environment where you can achieve that. A lot of it is just top-down management, and believing you can succeed, and creating an environment where people in your organization set high goals and believe you can have success. The successful gaming companies that we have seen are very much following that model.

So we covered a lot of territory yesterday, and we have a lot more to cover today. Our first panel is going to be tackling some of the more high-profile cases in video games and how these issues are affecting the gaming industry overall. Our first panel is "Court Rulings and Their Effect on Business and Development." We will be hearing about cases from the *Vernor v. Autodesk* case¹ to the *Schwarzenegger* case², and what impact these cases are having on the studio and retail sales. This panel is going to be led by Victor Godinez, who is a columnist with the *Dallas Morning News*. We also have on the panel Dr. Christopher Ferguson from Texas A&M International University. We have Holt Foster—who is a partner at Thompson & Knight LLP—as well as Sean Kane—who is with Pillsbury Winthrop Shaw Pittman LLP—and also Shane McGee—who is with SNR Denton U.S., LLP. Welcome everyone, and Victor, I am going to turn it over to you.

MR. GODINEZ: First of all, thanks everyone for coming out. I will tell you really briefly about myself. I am the technology reporter for the *Dallas Morning News*. I am also a gamer. Basically, I wanted to give these guys a chance to introduce themselves and talk about what they do and how that is connected to the game industry. There is some really top-notch expertise here, and I think we will have a really good discussion. I think we also want to give you guys the opportunity to participate with any questions or comments. So I will let them go first and kind of explain where their expertise lies, and then I will kind of kick it off with some questions, and we will just go from there. Chris, do you want to start off?

DR. FERGUSON: Sure, my name is Chris Ferguson. I am a psychologist, and I guess I am the token psychologist here at this conference. Most of

1. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010).

2. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *aff'd*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

my research is actually on youth violence and I do a fair amount of research on video game violence and its effects on human behavior. Most of my expertise is more relevant to the *Schwarzenegger* case than the *Vernor v. Autodesk* case. I was involved in the *Schwarzenegger* case in the sense that I helped organize an amicus brief.³ It was an independent, pro bono amicus brief of 82 psychologists, criminologists, and media scholars that opposed the California law on scientific grounds.⁴ So that is kind of what I bring to the table for most of this.

MR. FOSTER: Well my name is Holt Foster. I am a partner at Thompson & Knight, and a big part of my law practice is the video game industry. I am based here in Dallas, Texas, and I have been in the video game industry for about 15 years—both on the legal side, as well as being one of the founders of Gathering of Developers or GOD Games, which you guys might have been familiar with. This is my second time to speak at the Game Summit, and I really encourage all of you guys to participate and ask any questions. I look forward to participating as well.

MR. KANE: Good morning, my name is Sean Kane. My practice is with Pillsbury and I focus solely on games, and I have been doing that for about a decade. I work with everything from mom-and-pop iPhone apps, up and through the largest game companies in the world. I help them with a bunch of different things, whether it is end-user-license agreements, contracts for development or licenses, all the way up to working with them on litigation matters. Again, as Holt said, I am more than happy to answer anyone's questions about any of these cases. I am fairly familiar with them because I actually teach a class on video game law as well, and we kind of discuss most of these things in there as well. So now, I will pass it over to my friend Shane.

MR. MCGEE: I am Shane McGee, and I am a partner at SNR Denton in Washington D.C. The majority of my practice is video game related. I work with large video game companies handling virtually anything in the virtual space. At heart, I guess you could say I am a privacy and security attorney. I do a lot of privacy work but also do a lot of work on customer contracts. I litigate for my clients when necessary, and get into antifraud and some of the new money transfer issues and money laundering issues that are occurring now in the video game space. And like Sean, I am happy to answer any questions that anybody has. I think we want this to be an interactive session. So if anybody has any questions along the way, please raise your hand and we will be happy to take them.

MR. GODINEZ: Okay, great. Well, I figured maybe the best place to start is with Chris, since you mentioned the *Schwarzenegger* case and I think that is a big one facing the industry, and you were actually a little bit in-

3. Brief of Social Scientists, Medical Scientists, and Media Effects Scholars as Amici Curiae Supporting Respondents at 1, Brown, 131 S. Ct. at 2729.

4. *Id.*

volved in that.⁵ Hopefully you can explain a little bit about the background of what this case is about for anyone here who might not be familiar, and your thoughts on the law. Then we can open up to these guys as well for the legal side of how game publishers are kind of reacting to and thinking about this case.

DR. FERGUSON: Sure. As most of you are probably aware, there has been concern in society about the impact or potential impact of violent video games, particularly on kids. It is all about “save the children,” and what have you. There have been a number of laws—I am not sure of the exact number, nine or ten at this point—that states or municipalities have tried to pass that restrict the sale of violent video games, however they define that—particularly to minors, or people under the age of 18. All of them have been struck down by the court system. This particular one was California’s version of this, which I believe passed through the state senate and the Governor in about 2005.⁶ Senator Leland Yee was the drafter of this thing, and then it immediately got challenged by the video game industry, struck down,⁷ went to the Ninth Circuit, continued to get struck down,⁸ and they appealed it to the Supreme Court. Now it has already been argued before the Supreme Court, and we are just kind of waiting with our bated breath and fingers crossed in terms of what the Supreme Court will decide on this. The argument behind it that the State of California is arguing for—in terms of why this law is necessary—is that there is consistent research at least correlating video game violence exposure with aggression, youth violence, or however they want to define that. It seemed to me that in reading the briefs from the State of California, and maybe the other guys can challenge me on this, but they seem to be tacitly admitting they cannot show causality. But they are still arguing that there is correlational research linking violent video game exposure to youth violence or youth aggression. Obviously there has been debate and contention, and a lot of really heated contention in the scientific community, to be very clear about that.

But some of us in the scientific community were really concerned that the State of California had taken kind of a buffet approach to the research and had cited only some studies that supported their particular beliefs and simply neglected to even mention the existence of a whole wealth of studies that not only do not show cause, but also do not show correlation between violent video game use and aggression. So that was the impetus of the amicus brief. A number of us scholars got together because we were very concerned about the way that politicians—and some other scholars—had been

5. *Schwarzenegger*, 556 F.3d at 950.

6. Cal. Civ. Code §§ 1746-1746.5 (West 2005).

7. *Video Software Dealers Ass’n v. Schwarzenegger*, 2007 WL 2261546 (N.D. Cal. Aug. 7, 2007), *aff’d*, *Schwarzenegger*, 556 F.3d at 950, *aff’d*, *Brown*, 131 S. Ct. at 2729.

8. *Schwarzenegger*, 556 F.3d at 950.

communicating the research to the general public, and using it to support these kinds of laws. Which we felt, to be quite frank, was dishonest.⁹ We thought it was important for the Supreme Court to have another view, not only the view from the industry. Of course you could very easily say: “The industry says that the research is bogus, but then of course they would.” But yet you have published scholars who have done research in this area who are saying that there is a problem with the State of California’s argument. So that was our contribution.

MR. GODINEZ: Okay, well, let’s talk to some of the lawyers here on the panel as well. What did you guys think about this law? My understanding is that up until now, every law of this type has been struck down as unconstitutional, and my understanding is that this is actually the first time the Supreme Court has agreed to weigh in on this. Where do you think this goes from here? What is the industry kind of thinking about or worried about here?

MR. FOSTER: That is a good question. There have been ten different laws that have been at various municipality levels that have been passed and struck down. This is the first one to make it to the U.S. Supreme Court. Actually, here is there is an analogous one lined up in New York ready to follow on the footsteps of this one.¹⁰ This is not only having a ripple effect in the gaming industry, but if this law was to go through, this could have a massive effect. And I am not trying to grab a bully pulpit, but it could have a massive effect on your freedom of speech. You know, one of the founding pinnacles upon which this country was founded was freedom of speech, right? For full disclosure, I kind of come from the libertarian view that the less impact the government has on your life, the better. And maybe it is the parents’ job to regulate their kids as opposed to somebody I do not know, who is collecting a check for some reason. So that is a full disclosure on the table. The scary thing is that there are limited types of speech, where throughout the history of America the Court has said: “This does not deserve super protection.” But the default is: if you say something, it is protected.

Now, if you libel someone, or if you have commercial speech on television, there are certain types of speech that the Court says: “We want to limit what you can say because of the overwhelming damage it can do when you balance it against what free speech does.” And one of those things is obscenity, however you define it. There are court lines of tests of what is defined as “obscenity.” But through the Supreme Court’s history, it said obscenity does not receive the highest protection of free speech. It is a level down. There must be some rational law that allows you to restrict obscenity. I know when lawyers talk, people glaze over, but what this case is trying to do is to say violence, effectively, is obscenity. So anything with violence in it is not really considered free speech. It is a speech that can be regulated. Then how

9. Brief for the Petitioner at 1, *Brown*, 131 S. Ct. at 2729.

10. N.Y. Gen. Bus. Law § 612 (McKinney 2008).

do you define violence? Well, somebody with this test is going to decide somewhere. There is precedent out there already that says children, or minors, can be treated differently than adults. So even if the violence may not be offensive to this group, a court or a governing body may say: "Yes, but for children it is." Obviously, that can impact the pocketbook of video game publishers and developers.

But more importantly is that if they can start saying there is a new type of language or new type of speech—violence—that is not protected, that could affect video games, art, music, books, illustrations, paintings, album covers, or whatever it might be. People are wondering why the United States Supreme Court has chosen to take this case. I am kind of sitting here crossing my fingers, hoping that the Court is not going to try to legislate from the bench, but rather put to bed once and for all that the precedent upon which California is trying to focus this violence restrictive law is limited only to obscenity, and only to those unique instances.

MR. KANE: I agree with what Holt said. There is also another element to it—that while the government can step in and regulate in certain instances, as Holt said, it also has to do it with a methodology that is very clear. So there cannot be confusion or inconsistencies in the way that the laws are actually applied. In this particular situation, there is argument that some of these things may not be clear. So that becomes a big issue.

Part of it also—which seemed to be almost ridiculous—was when the Supreme Court heard arguments on this on, I believe, November 7 or 8.¹¹ So we actually are likely to have a decision on this relatively soon. But going back for one second, one of the points that was raised was that the Supreme Court was asking about who is going to decide what violence is acceptable. The attorney for California basically was saying that if it demonstrates a human being mutilated in an extremely violent or sexually explicit way or whatnot, then that would be impacted by this new law.¹² The Supreme Court very smartly brought up: "Well, what if it is not a human?" and then, California said: "Well then it is not covered by the law."¹³ So they basically said I can make a video game with a Vulcan as the main character, and all the difference is going to be slightly-pointed ears, and all of the sudden that would no longer be a human and the California law would not be applicable. Their attorney said, "yes." So I think the Court at least pointed to one of the points by saying "this is kind of ridiculous." I mean, you could basically do almost anything to slightly change the character in a game and say they are no longer human, and, as such, not be covered by these laws.

There were also inconsistencies about the fact that, really for no particular reason, California added different sorts of labeling requirements that had to be on these packages. So you would have packages that had inconsistent

11. *Brown*, 131 S. Ct. at 2729.

12. *Id.* at 2745.

13. *Id.*

labeling. They would have the labeling that the industry puts on it, and then what California requires on top of that. And so it was another reason why the Court felt, at least in its discussions initially during the argument, that there could be some inconsistencies here and some misunderstanding of what is required in these areas.

So you really do need to look at these laws on various different levels. Is this a category that the state has a compelling interest, like obscenity, to potentially regulate? And then we have to look at how clear that language is, because the language needs to be clear enough that everyone knows how to apply it without major confusion. Those really are two of the issues that are going to be dealt with, hopefully, by the Supreme Court. I hope the reason it took the case, as well, is to kind of put this to bed—because we have seen about ten of these laws over the course of about 12 or 13 years. Every one of them has been struck down, mostly because they have just been written poorly. The people kind of jump on what another state has done, even though the other state's law got struck down too. They add a couple more words and hope, "maybe we have been clear enough now."

MR. MCGEE: I completely agree. I think that the Court has taken it for that very reason, and I think it is going to come down, and they are finally going to clarify it. I think it is a combination of just the First Amendment rights—like you said, Holt—and just the impracticality of it. You are not going to be able to apply this fairly and evenly. It is confusing, it is ambiguous, and the Vulcan example, I think, is a good one. By putting pointed ears on something, you completely gut the law. Do we want to have a law that threatens our First Amendment rights when you can get around it so easily?

MR. GODINEZ: Do you think there could be a chance where another state or California comes back and tries to bring a law with more specificity; that we would be revisiting this forever and ever? Or do you think this is pretty much the last time we will be talking about this?

MR. MCGEE: How do you do that though? I mean, how do you get more specific? Do you say, "when you eviscerate someone" and then you put a level of gore into it? How do you quantify something like violence in a video game? I do not think you can. I do not think it is ever going to work, and I do not think it should work under the First Amendment.

MR. CANE: It is also going to depend on how the Supreme Court comes down with it. The Supreme Court can come down with a very clear decision that basically says video game violence is protected speech. If that is the case, that is pretty much going to end it. Or it could come down and basically say California's law, as I said, is unclear—there is a potential for it to be applied inconsistently. Now, if something like that happens, that opens the door to somebody else trying to write what they consider to be a clearer law, and then you can have that sort of thing happening again. I know, even in Congress, there has been a particular representative who is trying to put one of these laws into debate. Really, we cannot answer that question until we see the decision that the Supreme Court writes. And also, part of it is going to be: how far has the Supreme Court gone on it? Do we have a Court

that is split? Or do we have a Court in which 9 justices come out and say “this is protected speech”? If we have a 5 to 4 split, then someone later on might say: “Well okay, maybe let’s see what happens when the next Supreme Court justice gets applied.” Are they likely to fall on one side versus the other?

MR. FOSTER: I think the gaming industry’s hope is—as Sean was saying—that it comes down with the idea that violence *per se* is protected speech, and therefore you have to have a ridiculously high and compelling reason to control the expression of that violence. To me, that is the key issue, because you are just going to keep on getting it and getting it. But the nice thing is, when we talked about the obscenity lines of cases that the Supreme Court decided, that social norms are kind of moving back from that. So the obscenity cases, for lack of a better word, may be a little obsolete. And maybe obscenity, even if they could redo time, might slide back into protected language because people are not really enforcing obscenity laws that much. Hopefully, the Court will learn from history and say violence itself is protected speech.

MR. GODINEZ: Well it seems to be, in the case that we are talking about, that Representative Baca—a Democrat from California—is looking at basically putting warning labels on games, and maybe approaching it as almost a public-health matter. Chris, what is your thought on that, and what would that entail? Are we looking at games essentially being treated the same way as cigarettes, where you have a warning like, “this could be hazardous for pregnant women”?

DR. FERGUSON: Well, that seems to be the intention of Representative Joe Baca’s proposed legislation. I think he tried it once two years ago and it did not work, and he is trying it again. I do not know if here is there is much change to it or not. But it is basically putting a warning label on video game packages, saying it has been scientifically demonstrated that there is a causal link between playing violent video games and aggression. It is very similar to cigarettes, where there is basically a demonstrated link between smoking cigarettes and death. I am not a cigarette- or lung-cancer researcher obviously, but my understanding of the science—and I am sort of familiar with it—is that it is pretty consistent. Study after study after study has demonstrated that there is a causal link there. So whether you like them or not, at least that warning message is an honest one.

But if this legislation were to pass, and we were to have to have these stickers on video game packages saying that there is there is a scientific link between playing violent video games and aggression, well, that is kind of a lie. It is not true. There are some studies that find that and there are some studies that do not. So the label in that case would not be an accurate label. The first concern is simply the dishonesty of it, of course, but the other concern is that there is a good segment of the population that knows that is not true. If you start to put warning labels that are false on one set of packages, does that water down the other warning labels on the cigarettes? You know, the consumer thinks: “They put these warning labels on video games that we

all know that I could look up literature and find that this is not true. Therefore, is it also not true that smoking causes lung cancer?

Do we really kind of defeat the purpose of these warning labels whenever they exist? If we are going to go to that extreme, the warning label has to be accurate. The one that is being proposed by Representative Baca is not an accurate representation of the science as it stands today, which is the concern.

MR. FOSTER: I guess something we could draw some strength from is that about ten years ago, Tipper Gore tried something similar for music and CD albums, and that got shot down. I think one of the reasons why it is being reintroduced, frankly, is that the video game is a very “sexy” target that hardcore conservatives can get on a bully pulpit and say bad things about. People will cheer and yell even though they may not ultimately get something through. It gets them in limelight, and it kind of furthers their political career, unfortunately.

DR. FERGUSON: It is a short-term gain kind of issue for the politicians, and I do not know what goes through their heads. I even sometimes think, cynically, that they probably know that that they are not telling the truth. For politicians, I guess that is probably not going out on a big limb, but I think that if you look historically, obviously most forms of new media kind of go through this. Back 100 years ago, you had people complaining about dime novels, and there were experts that got up and said that women could not tell the difference between reality and fiction. They were concerned that, quite literally, women would go running off with the stable boy because they read these romance novels that made it sound so attractive.

Then you had, in the 1950s, comic books, and you had experts, psychiatrists, getting up before the United States Senate and saying that Batman and Robin were secretly a gay couple. Seriously, I wish I could make this stuff up. They were a gay couple who were going to lead youth not only into delinquency, but also into the homosexual lifestyle—which, of course, in the 1950s was almost as bad as delinquency, I guess. So you see these statements that come up about new media—whether it is comic books, novels, *Dungeons and Dragons*, Harry Potter, or whatever you want to look at. And at the time, people take it very seriously, like this is going to end the world as we know it today—or at least youth as we know them today. And then 30 years later, it all looks pretty stupid. We are talking about the Batman and Robin comic book thing and we say, “That is ridiculous.” But at the time, it went to the Senate, and people took it very seriously.

That is sort of the cycle that all new media seem to have to go through, and obviously we are going through this with video games right now. It seems to be about a 20- to 30-year cycle. We are probably about halfway through it, I would estimate. Maybe I am an optimist. I see some signs that we are coming down out of it. We are not all the way out of it yet, or even close to being all the way out of it yet, but we are on the down side. But I think we are still going to have at least 10, 15, maybe 20 years of this kind of stuff—basically until the people who are in positions of power are people

who are familiar with games, and right now they are not. People who are in charge of Congress and the people who are in charge of the American Psychological Association are all aged 50 and above, or mostly 50 and above. They have never played games, do not like them, do not know anything about them, and are perfectly willing to believe that the devil created them, that the devil runs Activision, and that video games really need to be eliminated. So I think we are going to have at least 10, 15 or 20 years of that.

I can tell you, coming from the psychological community—and not that they are unified against video games—but there are certainly some well-respected psychologists who absolutely passionately hate you guys in the industry. They irrationally do not like the video game industry because they seriously believe children are made of glass, and essentially we need to bubble wrap them and protect them from these horrible industries that are setting out to corrupt their minds and make them into violent, anti-social, unproductive, non-empathic youth. There is a core group of psychologists—not necessarily representative of all psychologists—that very sincerely believes that with a very emotional passion. They are an influential group and have had a lot of influence in the past. They have a little bit less influence now, but that is also a process that we are going through in the psychological community. And again, we are not there yet either.

One of the take-home messages that I try to tell students—and everybody—is that we kind of think that when you hear a scholar say something that it is objective, but it is not always. There are personal opinions, there is ideology, and there is dogma that really fuels this quite a bit in the scientific community. The *Schwarzenegger* law could not exist, in my opinion, without there having been some scholars who irresponsibly made comments—untrue comments—about the media-violence-research field.¹⁴ They have been criticized in published literature for making those comments, and they persist in making them. That is kind of what motivated the amicus brief—that there are others of us who do not care. I was telling Victor that if the video game industry collapsed tomorrow, that would affect me because I would be sad that I would never get to play *Civilization 6*. So the big impact on me would be that I would have to get a new hobby. I have no financial interest in this, and the impact on my life would be pretty minimal. Our concern is in the dishonesty in the scientific community, which eventually hurts us as a science.

MR. KANE: Just to wrap up, Dr. Ferguson, if anyone out there wants to send out some tweets: politicians are sociopaths, women cannot tell the difference from reality, and the devil runs Activision. That is the take-away message for anyone who wants to send out some tweets today.

DR. FERGUSON: I tend to speak bluntly; I have that reputation. By the way, I personally have nothing against Activision.

14. Brief for the Petitioner at 1, *Brown*, 131 S. Ct. at 2729.

MR. KANE: But what you are saying though, is that the *Schwarzenegger* law¹⁵ is obviously impacted by the scientific community. But it is also impacted by the legal community and a lot of other communities. As lawyers, there is some aspect of this that is our fault. Jack Thompson, for instance, is basically someone who I cannot even say is a lawyer anymore because he was disbarred. But he was basically running around and going from state-to-state and from group-to-group arguing that *Grand Theft Auto*, *Bully*, and any game that he personally found to be offensive really should be stopped. And, in certain cases, he was involved in writing some of these laws that were ultimately found unconstitutional. I was actually kind of hoping that he was not going to get disbarred, because he was writing laws that did not work anyway and we were overturning them all. So now I guess the states have to go find somebody else to do it.

MR. GODINEZ: But it did seem like he at least provided a voice for that side. Does the game industry need to have a stronger voice in making its case on this topic? Are they leaving it too much up to the courts to settle? What is the role that the industry needs to have in this discussion?

MR. KANE: I think it is interesting. Obviously, the industry has bodies that try to speak for the industry—the ESA, the EMA—but personally, I almost think that the way they are handling it—to a certain extent—is a good public relations move. They are not really coming out and stepping up to the fight and going up against guys like Jack Thompson. Jack Thompson is all full of rhetoric and bad science and things like that. But if you put someone up against him to battle him on a one-to-one basis, I think you have stepped down to his level. Instead, they are taking it as more of: “We are an actual industry here. This is not like two guys on a playground sparring. We are a multi-billion dollar industry, an industry larger than the film industry. We are going to stand up like a legitimate industry and demonstrate that what this person is saying is not true, but we will do it through the use of the courts. We will do it through use of what the industry believes to be scientific evidence that kind of downplays any connections that some of these people have been trying to make.”

MR. MCGEE: This is not a debate that should happen on an emotional level. People come at it from the emotional level. If you enter the debate with them, you would be dragged down to the muck, and I think it is good to avoid that.

MR. FOSTER: Do not be confused, the gaming industry is very powerful and very active. I just think, as Sean was saying, they are taking a smart approach, letting people realize that this issue is bigger than the gaming industry. People from various groups are stepping up and taking a sword in the battle, so it is more an assault on free speech as opposed to an assault on the gaming industry. That may be more palpable for a broader group of people.

15. Cal. Civ. Code §§ 1746–1746.5 (West 2006).

MR. KANE: As Chris said, the comic-book industry has stepped up. They have been very supportive of what is going on in the video game industry because they feel a kindred spirit. Their stance is: "We have gone through this ourselves and so we are going to support what you are doing"—because they have their own self-interest in it, obviously. A lot of their characters from the comic-book industry crossed over into video games, and/or they see the way technology that is being used to create video games may be used to create the next level of media that may involve their characters. There are a lot of groups that really are supportive of what is going on here and supportive of the video game industry. I think people should realize that it is not us versus the world—it is quite a lot of media versus quite a few very loud people.

DR. FERGUSON: In the legal world, they call those knuckleheads. Our biggest concern sometimes is that the industry has not always stepped up and challenged some statements that have come out. I will give you that going head to head with Jack Thompson is kind of a waste of time. But particularly when the scientists sometimes would come out and make statements, there is a certain sense that the industry leaders maybe have not felt comfortable coming up and addressing some of the statements the scientists have made. I think they are changing somewhat and getting a bit more savvy about some of these issues. But I think that in the past—certainly five or ten years ago—a study would come out that says video games cause violence, and then there would be a kind of silence from the industry. In some cases, I wonder if they sort of over-learned the cigarette industry's mistakes. The cigarette industry got in a lot of trouble because they actually conducted their own studies that still found that cigarettes were bad and then suppressed them. As far as I am aware, the video game industry is not involved in supporting research which is good. I think it would be a waste of time if they did.

MR. FOSTER: There really is no upside to that, right? They prove that they do not cause anything, everybody ignores it. They prove that they do, and then it is true.

DR. FERGUSON: Yeah, there is really no upside. That is a fine lesson to learn but I think they also have not been as vocal as they could have been. If the industry comes out and says, "We do not like the study," that is obviously self-serving, and I understand. But not saying anything at all seems to lend a certain tacit acknowledgement to it. If a study says video games cause violence and the industry says nothing, then it is sort of a tacit admission: "Oh okay, maybe we do cause violence."

I insulted Activision a minute ago, but to its credit I think that Activision has been one of the more aggressive companies in terms of challenging that. They say: "We do not like the study but here is another study that came out last year that says the opposite thing." So they are not just saying it is our opinion we do not like this study but can point to other research that contradicts that. I think that is a powerful message that is good to get out there. We scientists are not necessarily PR-savvy people so we may publish

a study that nobody ever hears about other than other scientists. There are ways of getting that out there into the press.

MR. KANE: You just raised a point at the end that I was going to make. I agree with what you are saying—but to play the devil’s advocate a little bit, there are some of these studies that come out that do not get that much play in the media. For the ESA—or for anybody else—to come out and basically point to one study and say it is not true, potentially may bring it more to the forefront of the media. So I do like the fact that if they can basically come out and say no more than: “This study has flaws. There is another study here that says exactly the opposite.”—I think that is a great way to battle it. But I would strongly advise clients to be wary about going out and just attacking a study if it does not seem to be getting that much traction through the media and in the industry. Again, there is no reason to bring that to the forefront and bring it to the public interest or public knowledge.

MR. FOSTER: It is surprising, frankly, how little press—relative to how important the decision is—the *Schwarzenegger* case¹⁶ has gotten from the general population. I think that video gaming kind of came up strong initially. The initial big hubbub was *Doom* and *Quake* and whether they were causing your kids to blow people away. I think people stopped at that time and realized that they were kind of feeding into the frenzy and dummied up a little bit, and that storm passed. I think they learned a lesson from that.

DR. FERGUSON: I think that is a good point. There is probably a balance where you have to kind of see where things are going in a particular study. The journal *Pediatrics* tends to publish a lot of these that are anti-media. And again, they have their own dogma and stuff. That journal is very media savvy so some of those studies—again I may be more sensitive to it, because people send me these e-mails so I always hear about it—but I see some of them get covered in the media. They will end up on CNN or Fox News.

Some of them are reported—the studies that found violence in video games causes aggression in youths—and there is a silence from everybody on the other side. Nobody says anything to contradict the study. And I agree, on the one hand you do not want to call attention to it. But on the other hand, there are some people who read that stuff, and if there is silence, then there is no alternate opinion for them to look at. I agree with what you are saying. I think it is a sort of balance, a strategy. You probably have to take it on an individual study-by-study basis and look at how much attention it is getting. If it is getting attention, you might want to say something about it. If it is not getting any attention, then I agree—keep quiet.

MR. KANE: But I think you need to have your ducks in a row. Smart companies basically have access to all of these opposing studies already, and they have people like Chris, that are knowledgeable about this, ready and waiting for when something like this does come out. So if they do need to

16. *Schwarzenegger*, 556 F.3d at 950.

get ahead of it, they want to be ahead of it in advance. You do not want to basically play catch-up, and after this study comes out wonder what studies are out there and start researching them then. You want to be able to say, as soon as it comes out: "Yes, our people have looked at it, and here is another study by just as good a researcher or a better respected researcher that says completely the opposite." As much as science is used in these things, people obviously engage in junk science. Some of the studies I have seen came out and basically said video games cause violence. But really, if you looked at the study, it was a study that said, "We found some kids to be more aggressive after playing this game." And if you looked more into the study, it really said, "They are only aggressive for a little bit of time after playing the game." Aggression is different than violence. They did not leave the game, go out, and go blow up their neighborhood Wal-Mart. They were just a little more wired and roughhoused with their friends after playing. So again, that is what happens. They get blown out of proportion and then all of a sudden, you are basically saying: "But you know what, this study does not actually say everything you are saying it says." The results have been skewed, or they did not even test for the right results that they are trying to claim.

MR. GODINEZ: How do you think this discussion of violence and obscenity in games has affected the business of games or game companies? Do they think differently about what titles they green-light or how they market games to try to not stir up that hornet's nest? Has this discussion filtered down to that level in terms of how they think they make games?

MR. MCGEE: Yes, it definitely comes up at the highest levels of the video game companies in terms of what types of content they are going to have in games that have been green-lighted, and which games have been green-lighted. No one wants to be the lightning rod. Well, not no one—there are a couple game publishers out there who would love to be the lightning rod—but I think some of the bigger game companies want to avoid that if they can.

MR. FOSTER: Also—especially when you are looking at box units—realize that with downloadable content, I think the market is definitely evolving very rapidly. But with box units, certain retailers want to have a family-friendly image, so they will not sell certain games that have certain violence in them in their stores. So at the highest levels of the biggest publishers, they are very aware that those retailers move the needle on bottom lines, and they want to accommodate those retailers. Now the more we move away from AAA box units, as opposed to downloadable content, that may modify how management approaches it.

MR. KANE: I have to laugh because years ago, when things like *Bully* and *Grand Theft Auto* came out and Jack Thompson was running around going crazy, it was actually helping the sales of the games. There was someone who said to me once as a joke: "Take 2 was actually paying for Thompson's flights to go to different places to make these big statements." Now that was not true, but it was very funny because it did lead to more sales for their bottom line because people were wondering: "What is this game?"

MR. GODINEZ: Worst-case scenario for the game industry is that the Supreme Court will uphold that California law. What does that do to the game industry?

MR. KANE: You have different options. First, do not sell in California. Obviously, that would be stupid. Most likely, if it passes, people are going to have to rethink what their aspects of the game are. The law does not stop them from selling the games at all. It basically just puts requirements on them that nobody in the industry really believes are necessary, because the industry is very well self-policed as it is. What does it do? Well there are certain companies, as Shane said, that probably will not put out games that have that level of violence in it, because they want their image to be family-friendly and do not want to have to deal with it at all. So they will try to skirt underneath the level that the law requires. But others will just basically move along, put out their next game, and it will be as violent or nonviolent as they want it to be. If they have to slap nine more labels on the box, and sell it only in a brown paper bag, at midnight, from a store that is six miles from the nearest school, then that is what they will do.

MR. FOSTER: I think you will also see more lock and unlock games. You will have the PG version and the adult version. But make no doubt that when Johnny goes and buys the PG version, the first thing he is going to do is get on the Internet and get the unlock code so he can move it over.

MR. KANE: I do not think that would help, though, because likely the labeling rules will state that your label needs to be based on any content that exists in the game, whether locked or unlocked.

MR. McGEE: Unless it is downloadable later.

MR. KANE: Well if it is downloadable later, then that is a different issue.

DR. FERGUSON: I think socially—this is my perspective on things and not so much the industry—there is a Groundhog Day in terms of society's view of violence in video games. If the Supreme Court of the United States upholds the California law, there is going to be six more weeks of winter, basically. We are going to have a slightly longer period of moral panic. It is going to give some fuel to this idea. My reading of the tea leaves—if I have to put my ten dollars down—is that eventually people are going to get tired of this. People are going to get tired of blaming youth violence on violence in video games. They are going to move on to something else. It may be focusing on Sarah Palin after the Tucson shooting in Arizona, or whatever it might be next. But they are going to move on to something else, and not worry about the violence in video games. This Supreme Court case is going to determine whether, socially, that is sooner or later. Particularly if the Court very clearly strikes down the California law, I think you will see people's interest in violence in video games die faster than if they uphold the California law. I think it is going to die either way—it is just a matter of whether it will be 15 years or whether it is going to be five years. The Supreme Court's decision may have some impact on that.

MR. KANE: Maybe it is because I live in New York where you can walk outside and see violence anywhere—not as bad as it used to be—but I do not find that the general population really cares too much about this issue. It seems to be something that is more the regulators maybe trying to speak to some very vocal—but non-mainstream—groups within their party that they want to curry favor with.

I am a parent. Am I going to let my five-and-a-half-year-old son play certain violent video games right now? No, I think you should be older to do certain things like that. It will be my job as a parent to actually do that, to make that happen, and to make him understand what he should and should not be playing, and what violence even means. The definition of violence is going to differ depending on where you live and what your feelings on those things are. I do not really think we need to have regulations on something like this. I think it is something that should be dealt with on a more familial level.

DR. FERGUSON: I agree with that. I think there are groups on the outskirts of the population—not the general populace—but there are certain groups of people who are just ready to be upset about something. There is an article that came out yesterday explaining that there is a book coming out where apparently the author is upset about Disney's princess line. Basically, the characters from *The Little Mermaid* and *Beauty and the Beast* and the dresses and the merchandise are teaching little girls not to be self-sufficient, but to wait for some man to rescue them. There is always going to be something that they are upset about, but they will move on.

MR. GODINEZ: Turning a little bit to another issue that I would imagine a lot of people do care about, do we own our games? What are we allowed to do with our games? There are some recent court decisions out there such as *Vernor v. Autodesk*¹⁷ and the *MDY* case.¹⁸ Can you guys talk a little bit about some of the thought that is going on out there, and explain this issue of licensing versus owning? When you go to the store and you buy a title, what are you actually buying? What are you allowed to do with that? And what is that going to do specifically for companies that buy and sell used games?

MR. MCGEE: I have spoken with Sean several times and we both have the same refrain here; we have both been telling people for a long time that you do not own the games. You have a limited license to use the game in a manner consistent with the end-user license agreement in the terms of use that comes with the game. That is our mantra. I think that the new *Autodesk* case¹⁹ and some of the other cases that have come out in the Ninth Circuit—which I expect to be followed by other circuits—have now confirmed that. Just because you buy it does not mean it is yours. It does not mean you

17. *Autodesk*, 621 F.3d at 1102.

18. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010).

19. *Autodesk*, 621 F.3d at 1104.

necessarily have a first-sale right. You need to comply with the license agreement that you technically agreed to when you “purchased the software,” when you really just purchased the licensing to the software.

MR. KANE: To the extent that people do not know, the first-sale doctrine basically means that under copyright law, once the product is sold the first time—and once the creator or the copyrighter has gotten their money out of it—you are free to resell that product to someone else. But when dealing with software and what-not, the argument that we are making is that nobody ever owns it. Just because it is on a disk does not mean that it is a product that you have purchased. Really, that disc is just a mechanism of delivery for the code that is on it, and you only have a license to use that code. Here is the thing about the *Autodesk* case,²⁰ basically, the main point of it was that if you have a license in these products, and if you put in language that says that the license is non-transferrable and you restrict that license in other ways, then we are going to consider that this is truly not a sale—it is truly a license. But if you are offering software without an end-user license agreement, or with an end-user license agreement that is very limited in its terms and scope that does not really contain these non-transferrable or other restrictions, well then it is a sale of a “product”—in which case the first-sale doctrine would then apply and you could resell that product.

I know what Shane’s end-user license agreements look like because I know who some of his clients are. I am sure he knows who mine are. The type of limitations and license language that *Autodesk*²¹ talked about are already in almost all of our clients’ end-user license agreements. What they basically did is what Shane said: they basically backed up everything that we have been saying already. These things are not products. You do not sell a game, you basically rent it. You have the right to use it for just the purposes and for the limitations that I, as a seller, decide you have.

MR. GODINEZ: So, what does that mean for the average user out there? When I put a game in my Xbox, there is no click-through screen saying, “I agree to this and I agree to this.” Is that going to change? Am I going to have to start agreeing to various licensing terms before it will boot up in my PS3 or my Xbox? How are publishers thinking of using that authority assuming it gets upheld either on a full review of the Ninth Circuit or ultimately the Supreme Court? Where is this going?

MR. KANE: I will have to say, I was very impressed with the Ninth Circuit for getting this right. The Ninth Circuit, to say the least, can be inconsistent. It is not necessarily true that if you get a disk and put it in your Xbox that there is not a license. There are what they call shrink-wrap licenses which, once you open the box, you are agreeing to the terms of use that exist for that game. So it already exists. Could you have to click “I agree” on your opening screen later? Maybe. Some clients come to me and

20. *Id.*

21. *Id.*

say: “We want to be bullet proof.” So I advise: “Okay, let’s make certain that you are e-mailing a license to them, and they scroll down and they click on ‘I agree,’ then you have to mail them one afterward.” You can go through all of these steps so that later you can make the argument if you are ever in court: “I sent them 97 different licenses. They had the opportunity every time to read them and/or not read them.” Other clients basically take the position that: “As long as we arguably can say that they have agreed to this—so just put it on the box—once they have opened up the shrink wrap, they have agreed. That is fine with me. We will take a little more risk involved in when someone says they did not read it. Well you know what, you still got it.”

MR. FOSTER: What may happen is, a subsequent line of the Supreme Court, or Ninth Circuit cases may start saying that in order to make sure that the purchaser really got their mind around what this is—and that it is a license and not just a first-purchase doctrine item—you have to go through some sort of wizard and scroll down and say “yes” or “no,” and you cannot just click “go.” I think what you are going to see, though, is similar to what is happening in downloadable books. One of the big arguments right now is that downloadable books have moved pretty much to what hardback books are. They sold you on the platform, and now they are going to jack up the prices. So people are saying: “If I bought your hardback book, I could read it and then I could give it to Chris, and he could read it and can give it to Sean, etc. Why can’t I do this with my downloadable book?” I think you are starting to see that the industry itself is wising up to that and saying: “We do not want to upset our purchasers. We do not want to black out there and allow one of our competitors to be the first one out there to say: ‘Hey, we will let you exchange downloadable books.’” I think that is probably what you are going to have in the video game industry. Downloadable content really minimizes the impact of this versus over-the-counter boxes because there is some sort of way to police this, right? In the laws that we are talking about, we are talking about some piece of software that is \$500,000 as opposed to something that you buy for \$50. How is Activision or EA going to know if I play my game and then give my box to him? So there are some practicalities in enforceability as well.

MR. KANE: Actually, more and more, some of the companies are trying to avoid resale of games through different methodologies, whether by using unlocked codes, or using other sorts of software that is checking back and forth to see what this is being run on. So those things do exist. Some work better than others. Then you have some where it is literally something that happens on the sideline and was never intended to work that way. There was a great example—*Pokémon* had a game called *Pokéwalker*, which is a pedometer you attach when you are going out during the day. Your *Pokémon* gets “leveled up” by different things you are doing. Some of those games got resold, but nine times out of ten, they were never resold with the pedometer. *Pokémon*, however, refused to sell those pedometers individually. Therefore, people ended up not wanting to buy the game because it did not have that aspect of the game they might have wanted to use. But it was never

intended to do that. It led to more direct sales of the games because the players wanted to have the full experience.

MR. GODINEZ: Obviously, there are a lot of publishers and developers who have been very outspoken about the impact they feel that used games have on their industry. Do you think the game publishers are looking at how they can restrict or halt sales of used games? Is that the end game here?

MR. MCGEE: I know for a fact they are looking at it. But it goes back to Sean's sentiment that no one wants to be the first to go out there and be the unpopular company that says: "Look, you are trying to crush the whole used game industry. Your games are so expensive, that this is the only option I have." No one wants to be that company. So they are using these other methods. For example, when you sell a console game to a friend, you have already used the code that allows you to unlock the multiplayer version. When you sell it to a friend, he or she might be able to play the single-player version, maybe just one map or so. But in order to get the full benefit of the game, they have to basically pay for it again. There are other ways to do it, and I think manufacturers are exploring that. There are a lot more options there, as opposed to the nuclear option of going to the courts.

MR. KANE: I think the industry as a whole, if it can, will try to get its piece of the used game market. They'll try to get their piece of the pie. They are going to want to try to get something. They do not want to see all of that money going to third parties. If they can get a piece of it as well, it behooves them to do so. Again, there is no additional cost of goods. It has already been manufactured. It has already been sold. If it is resold, what do they potentially lose? They lose a full sale of a complete game. But, again, you may be talking about a section of the market that was not going to buy the game to begin with. This segment is willing to buy it at \$10 but was not willing to buy it for \$50. You are better off at that point getting your \$5 out of them versus getting 100% of the "nothing" that they were going to spend.

MR. GODINEZ: Holt, you mentioned downloadable games. Is this spurring the industry to get technology to the point where buying and selling used games is not an option?

MR. FOSTER: I think they are well aware of what the benefits are for downloadable games. On one hand, it allows major publishers to put the kibosh on the resale of games without being the "bad guy." On the other hand, it allows for more competitors because there is a lower barrier to entry, which takes the kingdom that they have had and opens it up to a lot of people. They are crystal clear with respect to unlocked codes, etc. I think they are excited about it. They are trying to keep up with it. It takes a lot of money and time to do something like EA or Activision. They are very up on the technology, and they like the idea.

MR. KANE: I think downloadable content is a great methodology. Even if it is downloadable content based on a game that originally did sell in a box, you can add more episodes. You can sell a game that is a really stripped-down version of what it ultimately could become, and see what happens. You can see whether or not this is going to be a successful game. If it

is successful, that is great. Keep feeding the line, and every six months keep releasing new maps, new characters, and new abilities. Send that down, and it keeps your players interested in that game, and keeps it relevant to them until the next iteration of the box comes out. My clients know and they are looking at these things and are saying: “We can make great things out of this.” We are well aware of what those things are. And we are well aware of what technology is needed to make it happen.

MR. GODINEZ: Are there any other major legal or court issues that you are paying attention to? Are there issues that have not come to the forefront yet?

MR. MCGEE: We talked about whether you are going to own the software or not. The Ninth Circuit decided in *Vernon v. Autodesk, Inc.*²² that the license agreements are going to be enforced. Now the question is, to what extent are they going to be enforced? I think the *MDY Industries, LLC v. Blizzard Entertainment, Inc.*²³ case is a good example. This case involved a recent decision at the appellate level in the Ninth Circuit about contractual restrictions versus license restrictions, and how companies are going to be able to use the end-user license agreements and terms of service to enforce the provisions of those agreements. The Ninth Circuit said—to the extent you want to claim copyright infringement—with regard to a breach of a term of one of these agreements, the term you are trying to enforce has to have a nexus to the exclusive right of copyright that the company has in the software. I think we are going to see a number of additional cases going forward that talk about this. Now that the courts have acknowledged these agreements have this level of power that can be enforced, they are going to have to decide exactly to what level. I think that is a good example of one of these cases.

MR. KANE: I do not know if everyone knows about the *MDY* case,²⁴ but you may want to give a little background on it.

MR. MCGEE: Yes. I actually argued with my partner at the district level for *MDY*.²⁵ This was a case actually brought against Blizzard for declaratory judgment by an individual that thought his software bot was legal and should be declared by the courts to be legally usable.²⁶ How many people here play *World of Warcraft* or have played it? There are people who use bots when they play and when they are not playing—when they are at school, at work, or when they are sleeping. These bots are going through *World of Warcraft* when the user is not playing, and the bot is increasing the characters level, trying to accumulate wealth, experience, and everything else. That had a major negative impact on other users inside the game, and also on

22. *Autodesk*, 621 F.3d at 1115-16.

23. *MDY*, 629 F.3d at 928.

24. *Id.*

25. *Id.*

26. *Id.*

Blizzard Entertainment. So we approached an individual who had the most popular bot and asked him to shut down. Instead he filed a declaratory judgment in Arizona to try to have the court declare that his program was legal. At the district court level, we won on the Digital Millennium Copyright Act (DMCA), we won on copyright—which is the issue that I am focusing on now—and we also won on tortious interference. The copyright issue was: if you break the user-license agreement that says you cannot use bots and other programs like that, then this is copyright infringement.

Now, at the appellate level, the Ninth Circuit said that it is not copyright infringement just because they are loading a piece of unauthorized software into RAM, because there is no nexus between that conduct and exclusive right of copyright—be it the right to control copying—in this case for Blizzard. It is kind of technical, but it does get to a very important issue that is, whether these companies can get damages for copyright infringement in their lawsuits, which have very substantial statutory damages. Or whether they have to go after their users for contractual damages, which in the case of *MDY*²⁷—the recent decision at the Ninth Circuit level—the Court found that there was no nexus between this conduct of loading the bot into RAM and the exclusive right of copyright for Blizzard Entertainment, and thus would have to go after the users for contractual damages, which are very minor in comparison.

MR. GODINEZ: Do you all have any closing arguments on the topics we discussed?

DR. FERGUSON: I guess the lesson learned from the *Schwarzenegger* case is that just because a scientist said something, does not mean it is true.²⁸ We are all human and we all make mistakes. We all have our personal biases, as well. I think that has been the issue that has come up with video games. You have some scholars—not all, but some—making statements with numbers behind them. It is like the old quote: “Lies, damn lies, and statistics.” Statistics say, “x, y, and z,” but if you look through literature, you hear that statistics are nonsense. That is the take-home message, not just for video game research, but for science in general. We really must be critical consumers. We must look a lot deeper into what is actually going on. This happens a lot in psychology in general. For example, a scientist may say: “I found X cause of Y.” But after reading scientific results, you have to ask yourself what that is based on. You must ask yourself if they measured aggression along with everything else. Be aware that the sound bites that come out on science in the news media are often inaccurate. This is sometimes due to journalism, but, it sometimes is also due to the scholars who have an advocacy message they want to get across. And sometimes going through the science is just pro forma—the scientist always knew what message they wanted to disseminate.

27. *MDY*, 629 F.3d at 928.

28. See *Schwarzenegger*, 556 F.3d at 950, *aff'd*, *Brown*, 131 S. Ct. at 2729.

MR. FOSTER: I would encourage everyone to follow the *Schwarzenegger* case²⁹ and see what the Supreme Court is going to do. That could have a profound impact—either positive or adverse—on the gaming industry, as well as people’s rights to free speech generally. I feel very comfortable the law will be struck down because there are just so many ways to puncture holes in it. On one hand, you can argue it is vague and unenforceable on an equal manner. But hopefully the Supreme Court would say that violence is protected speech. And that would give everybody a sigh of relief. Because if the Supreme Court does not take that perspective, you will see more and more cases that try to further and further define what violence is, or whatever element of free speech that they are trying to address or restrict.

MR. KANE: I am definitely going to have to agree with what Chris and Holt said. In general, I think it is important to follow the cases that exist in video game space. So often, they have a bigger impact than they seem to. I advocate that no matter what side your client is on, make certain that, if you are involved in a suit, you are properly representing yourself, because in the United States we base things on case law. So just because you are a small company, if you do not properly defend a case and decision comes out, that decision could then be used against many other people. That could be very dangerous and damning. I tell everybody to keep an eye on these things. For whatever reason, as compared to other industries, we do not actually have that much case law. Not that many cases come out every year. So it is very easy to keep them on your radar and to pay attention to what is happening.

MR. MCGEE: That is what makes it very difficult, but very entertaining when you get to court and do not have a lot of cases to rely on. And the cases you do have—for example the *Autodesk* case³⁰—need to be reconciled because they are all inconsistent. I agree with the comments on the First Amendment portion. I think now that it is very clear that license agreements are going to be enforced by courts as license agreements. There is not going to be this sentiment of, “you purchased it, it is yours,” that Electronic Frontier Foundation (EFF) has been promoting.

I believe there is going to be more focus on the license agreements themselves. You should, just for fun, look at some of the stuff you are signing off on once in a while and watch the cases. See what they say. We are all going to have to go back to law school and reevaluate the meeting of the minds, because these are contracts we are talking about. It is interesting to see the different ways that the video game companies present these agreements to the users and assume that they are going to be enforceable. I think we are going to see a lot more cases on these issues.

29. *Id.*

30. *Autodesk*, 621 F.3d at 1102.

AUDIENCE QUESTION: I was wondering what the panel thought about the case involving Sony and the person who hacked the PS3.³¹ Where do you think that case is headed?

MR. MCGEE: This gets into the anti-circumvention issues with the DMCA, if you look closely.³² I am not too familiar with details of the case, but I know the courts are embracing the DMCA and anti-circumvention provisions more and more. I think that I would not want to be in the defendant's shoes at this point. The DMCA is a very serious statute—it has very serious statutory damages, and has a criminal element as well. That is not some place I want to be.

MR. KANE: I think the courts are really starting to understand the DMCA more now. When it first came out, people almost thought of it as RICO—thinking they could claim anything under the DMCA now and try to make it stick. I do not think the courts really understood that, and they kind of had to live with it for a little bit to understand what the scope of it really was intended to be. When you are getting into any area of hacking, there are a lot of protections under the DMCA to deal with anti-circumvention actions. So I really would not want to be in anyone's shoes on that. There are people who have gone to jail for that sort of thing, in addition to receiving large fines.

MR. MCGEE: I just want to mention one more point on the DMCA. One of the holdings in the *MDY* case at the appellate level was that, to violate the DMCA,³³ there does not have to be a copyright violation. Cases are going both ways. Some said that there has to be a copyright violation underlying for DMCA. That is not the case now. The Ninth Circuit made that clear in the *MDY* case.³⁴ So you can, without violating anyone's copyrights, be held liable under the DMCA.

AUDIENCE QUESTION: Can you talk about some of the cases involving the use of real-world products in virtual worlds, and what cases and the law reveal about that? For example, the use of a design or trademark or object that is used in the real world and is replicated in a virtual world setting. Perhaps you could discuss whether or not that is a violation of copyright or if there is a defense for that use.

MR. KANE: Up to this point, the cases dealing with this issue have not gone very far. There have been a few situations where it never really became a case. For example, in *Second Life* there was a Herman Miller chair. Instead of actually going after anyone, Herman Miller told *Second Life*: "These are infringing chairs, and this design is infringing. But come to us, say you will delete your chair, and you can have an official Herman Miller chair." So

31. *Sony Computer Entm't Am. LLC v. Hotz*, No. cv110167, 2011 WL 347137 (N.D. Cal. Jan. 27, 2011).

32. Digital Millennium Copyright Act, 17 U.S.C.A. § 101 (1998).

33. *MDY*, 629 F.3d at 928.

34. *Id.*

Herman Miller took the position that they were going to protect their mark, but they were not going to go after anybody. The company essentially decided it was going to authorize this use.

There were a few other similar suits. For example, there have been in-world designs knocked off by somebody else, and the companies settled very quickly. These companies have basically been supportive of the fact that use in the virtual world for violation purposes is no different than use in the real world.

There was also a Taser lawsuit based on a few different aspects, including its mark being infringed.³⁵ Again, that went away very quickly. So we have not really had that issue decided by a court. As an intellectual-property attorney, I do not see why use in a virtual world, or infringement in a virtual world, is going to be less prosecutable than it would be in the real world.

MR. MCGEE: I will say that, having been involved in some settlements, the assumption is that people are paying money for infringement. The assumption is that those rights are going to be upheld in virtual space.

AUDIENCE QUESTION: I was reading the oral argument in the *Schwarzenegger* case, and Justice Kagan asked this very interesting question: "Is playing a video game even speech at all?"³⁶ She used the example of *Pong*. If you dumb down the game, at what point is it no longer speech? And the lawyer had a great answer, which is, at least in this type of law we are talking about—violence in a narrative context—it becomes like a play and plays are speech. This made me think, because it was not actually argued in the briefs. Everyone was looking at this from the perspective of the creator of the work expressing the speech. And no one was thinking about it from the player of the work, acting out the speech like an actor in a play. I was wondering if you have given any thought to whether the law gets struck down on the basis of this being like kids acting in a play, and the video game is just a prop in the play. And also whether that could be, in your opinion, a basis for striking down a law on speech.

DR. FERGUSON: I may be misremembering, but I think the amicus brief by the Eagle Forum more or less raised the same argument. Essentially it said we are not really regulating speech—we are regulating behavior of the youth and therefore that is an okay thing to do. Which, I am not a lawyer, but it seems like a valid legal tactic, coming from a non-expert point of view. But I think the counter argument is exactly what the lawyer said: "Well, that may be true for *Pong*. But in the majority of these games, the state of California did not show us *Pong*, they showed us *Postal*." *Postal* is a narrative game that has these elements of speech for the youth, and if youth are playing it, that is the whole other issue with *Postal*. But the people who are

35. Complaint, Taser Int'l, Inc. v. Linden Research, No.09-cv-00811, 2009 WL 1203457 (April 16, 2009).

36. Transcript of Oral Argument at 39, Video Software Dealers Ass'n v. Schwarzenegger, No. 08-1448, 556 F.3d 950 (9th Cir. 2009).

playing it are contributing to how the story unfolds, and therefore—to my non-lawyerly mind—that constitutes speech. The other issue with *Postal*, which did not come out, is that there is actually a database with about 2,500 kids who report on what games they play. The state of California kept arguing over *Postal* and not one of these 2,500 kids has ever played *Postal*. So the State of California is spending money to restrict kids from playing a game they already do not play.

MR. KANE: That is actually a big issue in the law and in cases. You need to demonstrate an actual compelling state interest that you are trying to alleviate. In this case, there is the argument that if you cannot demonstrate that people are playing this violent video game, you cannot then say that we need a rule to regulate it.

To address your question, the original case law dealing with video games—and going back to earliest cases back in the 1980s—raised part of that issue about whether or not video games were protected speech at all. Cases discuss games like *Pong* that really do not have a narrative and really do not have a story involved. The court determined that, while protected by copyright, this is really not a First Amendment issue. As that changed, and games got more complex—and not even necessarily that much more complex than *Pong*—this is when cases started saying that of course these are protected speech. So I think those issues kind of have been dealt with a little in some of the case law. This even includes the idea of a player creating part of that speech itself. Because no matter what you do, there are a limited number of things you can do within these games. Obviously, that number gets larger and larger every year. But it is something that has been prepared in advance for you.

MR. MCGEE: That touches on one of my favorite issues, and that is: if it is a combination of the publisher's content in the game, and the players playing that game and making the decisions as to what is displayed, who owns the copyright in the performance of the game? So that is another issue arising out of that question.

MR. FOSTER: By the way, we are all very nervous about end-user license agreements getting litigated. We are nervous about how far we can go with these end-user license agreements. Because when you are in it, the only thing that can hold you back here after these end-user license agreements is what the outcry will be in the gaming community. We need to protect our client's interest, but we also do not want to upset our client's clients. I think that will be the next set of cases to look for—cases that let us know how far we can go to enforce a license.

MR. KANE: I thought Sean's argument was very creative about the idea that violating the end-user license agreements means you are violating the copyright. I think it was very creative, maybe even too creative, for the Ninth Circuit.

AUDIENCE QUESTION: To the psychologist: you talked about the amicus brief you worked on debunking the junk science on the other side of

the *Schwarzenegger* case.³⁷ Could you talk just a little bit about the science that formed the basis of your argument?

DR. FERGUSON: Very quickly, the arguments we had were these: if you take science as a whole and look at the qualities and differences between individual studies, two main things become apparent. One is this issue of measurement validity. When you hear these things coming out in the media that video games cause aggression, ask yourself: “What does aggression mean?”

Some of these studies are using measures that involve having children fill in the missing letters of words. For example, a child would be given: “K N__V__S.” If the child fills in the blanks to spell out “knives” instead of “knaves,” then that is deemed aggressive.

Another study may involve giving a child a story, such as: “A little bunny goes into the woods and meets a bear and the bear assaults him. What does the bunny do?” If the child says: “Well, the bunny probably pushes the bear,” that is deemed aggressive behavior. They are thinking aggressively. So in these studies, aggressive behavior is not necessarily about stabbing people, shooting them, yelling at them, or anything else.

There are other studies that use what are more valid measures of aggression. In other words, these are measures that are shown to predict actual violence in the real world. They are not perfect, as there is no such thing as a perfect predictor of violence. But these tests do a much better job of that. These are mainly correlation studies—the children who score high on these measures are those who are more likely to commit real-world acts of violence. If you look at the literature on the whole, the studies that use those better valid measures, almost universally do not find any effect from video games. There is no correlation between children who play more violent video games and higher scores on those well-validated measures of youth violence.

The second thing that arises is, technically, is there a correlation between video game playing and aggression? Yes, but basically because males play more video games and males are more aggressive. Therefore, that correlation can be explained simply by male behavior. Any two male-dominated behaviors can be correlated. So there is a correlation between video game playing and aggression. There is also a correlation between wearing pants and aggression, dating women and aggression, having a penis and aggression, growing a beard and aggression, and so on. If you control for other variables, gender being one of them—but also things like family violence, mental health history, peer delinquency, and things like that—the correlation between video game playing, video game violence exposure, and youth violence vanishes. It is gone, it is zero. We argue that the best studies out there are the ones that do this—that take care to use well-validated measures, and control well for other variables. These are used in the studies that do not find

37. Transcript of Oral Argument at 39, *Video Software Dealers Ass’n v. Schwarzenegger*, No. 08-1448, 556 F.3d 950 (9th Cir. 2009).

effects for video game violence. It has been pointed out that there is a group of researchers who are known for delivering “bad news.” If you hear of “bad news” studies, the same names of individuals who conduct these studies pop up. Those researchers have been told to use better techniques, and they persist in not doing so. We pointed this out, told them they needed to start using better measures, and they persisted in not doing so. Those are some of the issues that we raised in the amicus brief, with the hope that the Supreme Court judges would actually read them and take them into consideration.

MR. GODINEZ: And with that, we will end our discussion.

