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## A Review of 2010 Video Game Litigation and Selected Cases

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# A Review of 2010 Video Game Litigation and Selected Cases

*Jesse L. Adkins*

Video game litigation in the first year of the new decade was especially noteworthy. For the first time, the Supreme Court heard a case involving video games.<sup>1</sup> The case, *Schwarzenegger v. Entertainment Merchants Association*, has become a cause célèbre for video game industry organizations, civil liberty groups, and politicians nationwide. The Court affirmed the lower courts' application of First Amendment protection to video games in *Brown v. Entertainment Merchants Association*.<sup>2</sup> In another constitutional case, an Illinois district court ruled that the Chicago Transit Authority could not prohibit the advertising of mature video games.<sup>3</sup> Constitutional issues litigated in the year ahead are most likely to arise in the context of privacy and intellectual-property cases. Most video game cases in 2010 addressed the usual trademark, patent, and breach-of-contract claims, but courts also heard antitrust suits, right of publicity claims, and even a novel criminal matter. The following cases represent some of the more significant and interesting developments in video game litigation in 2010. The cases are organized in reverse chronological order within each section according to the date of filing or disposition; disposed cases precede those that are still pending.

## I. CRIMINAL/CONSTITUTIONAL

### A. *United States v. Crippen*, No. 2:09-cr-00703-PSG (C.D. Cal. dismissed Dec. 3, 2010).

In 2009, federal prosecutors secured a grand jury indictment against a California man for allegedly circumventing anti-piracy measures in Xbox 360 devices by modifying their optical disc drives.<sup>4</sup> This was the first prosecution under the Digital Millennium Copyright Act (DMCA) for the unauthorized modification of a game console, which carries criminal penalties of a fine of up to \$500,000 or five years imprisonment.<sup>5</sup> But the government unexpectedly dropped its charges against the defendant in December 2010

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1. *Schwarzenegger v. Entm't Merchs. Ass'n*, No. 08-1448, 130 S. Ct. 2398 (U.S. cert. granted Apr. 26, 2010).
2. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (U.S. 2011).
3. *Entm't Software Ass'n v. Chicago Transit Auth.*, 696 F. Supp. 2d 934, 950 (N.D. Ill. 2010).
4. Grand Jury Indictment at 1–3, *United States v. Crippen*, No. 2:09-cr-00703 (C.D. Cal. filed July 24, 2009).
5. Digital Millennium Copyright Act, 17 U.S.C.A. §§ 1201(a)(1)(A), 1204(a)(1) (1998).

during trial.<sup>6</sup> As a result, it is still unknown whether prosecutors will prevail in an anti-circumvention game case.

**B. *Entertainment Software Association v. Chicago Transit Authority*, 696 F. Supp. 2d 934 (N.D. Ill. 2010).**

The Entertainment Software Association (ESA) challenged the constitutionality of a Chicago Transit Authority (CTA) ordinance prohibiting the advertising of video or computer games rated “Mature” or “Adults Only” in CTA facilities or vehicles.<sup>7</sup> The District Court for the Northern District of Illinois granted a preliminary injunction on the ordinance, finding that CTA’s ban would likely not survive strict scrutiny and that ESA’s claims likely would succeed on its merits.<sup>8</sup> Further, the court determined that imposing the injunction served the public interest.<sup>9</sup> CTA agreed not to appeal the decision.<sup>10</sup>

**C. *Schwarzenegger v. Entertainment Merchants Association*, No. 08-1448 (U.S. petition for cert. filed May 19, 2009).**

It seems ironic that the “Terminator”—Governor Arnold Schwarzenegger of California—has the leading role in the epic Supreme Court battle over whether the First Amendment allows a state to regulate the distribution of “violent” video games. The California legislature enacted a prohibition on retailers to rent or sell “violent video games” to minors.<sup>11</sup> The State appealed the Ninth Circuit Court’s decision to declare the statute unconstitutional.<sup>12</sup> At oral arguments, some of the Supreme Court Justices believed that the

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6. Judgment of Discharge at 1, *Crippen*, No. 2:09-cr-00703.
  7. *Chicago Transit Auth.*, 696 F. Supp. 2d at 939–40 (N.D. Ill. 2010).
  8. *Id.* at 941.
  9. *Id.*
  10. See M.H. Williams, *ESA’s Injunction Against Chicago Transit Authority Ban Here to Stay*, INDUSTRY GAMERS (June 2, 2010), <http://www.industrygamers.com/news/esas-injunction-against-chicago-transit-authority-ban-here-to-stay>.
  11. *Video Dealers Software Ass’n v. Schwarzenegger*, 556 F.3d 950, 953 (9th Cir. 2009), cert. granted sub nom. *Schwarzenegger v. Entm’t Merchs. Ass’n*, No. 08-1448 (U.S. petition for cert. granted Apr. 26, 2010) *aff’d*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (U.S. 2011).
  12. *Entm’t Merchs. Ass’n*, 130 S. Ct. 2398 (mem.) (2010) *granting cert.* *Video Dealers Software Ass’n*, 556 F.3d at 952. The California Civil Code defines “violent video games” as those “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being . . . .” Cal. Civ. Code § 1746(d)(1) (West 2005), ruled unconstitutional by *Video Dealers Software Ass’n*, 556 F.3d at 967. A video game cannot be prohibited for minors simply because it meets the “violent” definition. It also must: 1) be found to be deviant or morbid by a reasonable person, 2) defy community standards of suitability for minors, and 3) lack any

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statute might be too vague for video game manufacturers to interpret properly. Justice Sotomayor asked how the law would address “a video game that portrayed a Vulcan as opposed to a human being, being maimed and tortured.”<sup>13</sup> The State’s argument that video-game violence is analogous to obscenity and not afforded First Amendment protection troubled Justice Scalia.<sup>14</sup> He worried that upholding the statute would be “a whole new prohibition which the American people never—never ratified when they ratified the First Amendment.”<sup>15</sup> However, Justice Breyer found it puzzling “that the child . . . cannot go in and buy a picture of a naked woman, but the 13-year-old child can go in and buy one of these video games.”<sup>16</sup> The Court affirmed the Ninth Court’s holding, but if the Court had upheld the statute, the current video game industry rating system would have required revamping to consider the effects of various state statutes. Further, retailers likely would have reduced the number of violent video games sold or rented in order to limit their potential liability. Consequently, the industry would likely have developed fewer violent games.

## II. PATENT INFRINGEMENT/FALSE MARKING

Patent infringement suits in the video game industry in 2010 included cases about game-controller technology, game-console systems, and video-coding patents. While the technology at issue in the patent-infringement suits should not be surprising, the plaintiff in one of the cases seems anomalous. Microsoft is usually defending itself against patent suits, but last year the company went on the offensive. In October, Microsoft initiated a series of patent-infringement suits against Motorola relating to phone technology and the Xbox 360.<sup>17</sup> Motorola quickly responded with its own patent-infringement claims against Microsoft.<sup>18</sup> The video game industry will closely watch for the outcome of this unexpected standoff in the year ahead.

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“serious literary, artistic, political or scientific value for minors.”  
§ 1746(d)(1)(A)(i)–(iii).

13. Transcript of Oral Argument at \*57, *Entm’t Merchants Ass’n*, 130 S. Ct. 2398 (2011) (No. 08-1448) 2010 WL 4317136, at \*57.

14. *Id.* at \*15.

15. *Id.* at \*15–16.

16. *Id.* at \*31.

17. See Mary Jo Foley, *Motorola Retaliates with New Patent Suits Against Microsoft*, ZD NET MICROSOFT BLOG (Nov. 10, 2010), <http://www.zdnet.com/blog/microsoft/motorola-retaliates-with-new-patent-suits-against-microsoft/7944>.

18. *Id.*

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The rise of *qui tam* suits for the false marking of patents increased significantly in 2010.<sup>19</sup> The great majority of false-marking claims allege the use of expired patent numbers.<sup>20</sup> Currently, federal law allows any person to file a false-marking suit without demonstrating injury.<sup>21</sup> But new legislation is afoot in Congress which would require competitive injury for standing.<sup>22</sup> The proposed statutory amendment would prevent disingenuous plaintiffs from pursuing costly litigation against unwitting defendants, who often prefer to settle rather than put up a fight.<sup>23</sup>

**A. *Anascape v. Nintendo of America, Inc.*, 601 F.3d 1333 (Fed. Cir. 2010).**

Anascape filed US Patent No. 6,906,700, “3D controller with vibration,” in 2000 as a continuation-in-part of the application that ultimately became US Patent No. 6,222,525, “image controllers with sheet connected sensors,” initially filed in 1996.<sup>24</sup> In 2008, Anascape sued Nintendo in the Eastern District of Texas, alleging infringement on Patent 6,906,700 in the development of Wii Classic, Nintendo GameCube, and Wavebird.<sup>25</sup> The jury found Nintendo guilty of the allegations;<sup>26</sup> however, the Court of Appeals for the Federal Circuit reversed the lower court’s decision in April 2010, concluding that the district court improperly related Anascape’s patent application for Patent No. 6,906,700 to Patent No. 6,222,525.<sup>27</sup> The court determined that Anascape was not entitled to relief because the subject mat-

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19. Joe Mullin, *Patent Litigation Weekly: Who is Driving the False-Marking Frenzy?*, CORPORATE COUNSEL, (May 31, 2010), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202458966077>.

20. *Id.*

21. 35 U.S.C. §292(b) (1994).

22. Justin E. Gray, *False Marking: Senate Proposes to End False Marking Onslaught*, GRAY ON CLAIMS (March 4, 2010), <http://www.grayonclaims.com/home/2010/3/4/false-marking-senate-proposes-to-end-false-marking-onslaught.html>.

23. *See id.*

24. *Anascape, Ltd. v. Nintendo of Am., Inc.*, 601 F.3d 1333, 1334 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 520 (mem.) (2010).

25. *Anascape, Ltd. v. Microsoft Corp.*, 2008 WL 160546, at \*1 (E.D. Tex. Jan. 11, 2008), *rev'd sub nom. Nintendo of Am.*, 601 F.3d 1333 (Fed. Cir. 2010), *cert. denied*, 131 S. Ct. 520 (2010); Business Wire, *Federal Circuit Court Vindicates Nintendo in Patent Lawsuit*, BUSINESS WIRE (Apr. 13, 2010), <http://www.businesswire.com/news/home/20100413006956/en/Federal-Circuit-Court-Vindicates-Nintendo-Patent-Lawsuit>.

26. *Nintendo of Am.*, 601 F.3d at 1334.

27. *Id.* at 1341.

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ter of the patents did not relate to each other.<sup>28</sup> In addition, Sony had distributed intervening art, the *DualShock* controller, in 1998 during the interim period between the two Anascape patent filings.<sup>29</sup>

**B. *Hochstein v. Microsoft Corporation*, 730 F. Supp. 2d 714 (E.D. Mich. 2010).**

Plaintiffs Peter Hochstein, Jeffrey Tenenbaum, and Harold Milton sued Microsoft for infringement of Patent No. 5,292,125, an “Apparatus and Method for Electrically Connecting Remote Video Games.”<sup>30</sup> Basically, the technology enables players to compete against each other remotely.<sup>31</sup> Microsoft allegedly incorporated the patented technology into the Xbox.<sup>32</sup> The proper construction of the claim term *electrically connected* was at issue in this case.<sup>33</sup> Previously, the court ruled against the plaintiffs, finding that *electrically connected* excluded *electromagnetic induction*.<sup>34</sup> The patentees moved for reconsideration of the court’s decision.<sup>35</sup> But the court denied reconsideration and dismissed the case because of the Special Master’s conclusion that the patent used the term *electrically connected* narrowly and never actually referenced the term *electromagnetic induction*.<sup>36</sup>

**C. *Patent Compliance Group, Inc. v. Activision Publishing, Inc.*, No. 3:10-cv-00288 (N.D. Tex. dismissed June 1, 2010).**

Patent Compliance Group (PCG) filed a *qui tam* suit against Activision Publishing for wrongfully marking its games, *Band Hero*, *Guitar Hero 5*, *DJ Hero*, and *Guitar Hero Smash Hits* as patented.<sup>37</sup> PCG argued that Activision’s games obviously fell well outside the scope of the patents purported to cover the games.<sup>38</sup> Thus, the company could not have had a reasonable be-

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28. *Id.*

29. *Id.*

30. *Hochstein v. Microsoft Corp.*, 730 F. Supp. 2d 714, 715 (E.D. Mich. 2010).

31. *Id.*

32. *Id.* at 716.

33. *Id.*

34. *Id.* at 724-725.

35. *Hochstein*, 730 F. Supp. 2d at 716.

36. *Id.* at 735.

37. Complaint for False Marking at 6, *Patent Compliance Group, Inc. v. Activision Publ’g, Inc.*, No. 3:10-cv-00288-B (N.D. Tex. dismissed June 6, 2010).

38. *Id.*

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lief that its games were appropriately marked.<sup>39</sup> The court voluntarily dismissed the case without prejudice in June 2010.<sup>40</sup>

**D. *Microsoft Corporation v. Motorola, Inc.*, No. 2:10-cv-01823 (W.D. Wash. filed Nov. 9, 2010).**

Microsoft claimed Motorola broke promises to the Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA) and members of the International Telecommunications Union—which includes Microsoft.<sup>41</sup> According to Microsoft’s complaint, Motorola promised the IEEE-SA in a Letter of Assurance that the company would license any of its “essential” WLAN and video coding patents “under reasonable rates, with reasonable terms, and under non-discriminatory conditions.”<sup>42</sup> Microsoft claims Microsoft’s Xbox game consoles used the WLAN interface.<sup>43</sup> Microsoft claims, however, that Motorola refused to license any of the promised patents.<sup>44</sup> Thus, Microsoft alleges that the IEEE-SA relied on Motorola’s assurances in releasing the current WLAN and H.264 (video coding) standard.<sup>45</sup> Microsoft states that had Motorola not made its promises, IEEE “would have either revised the standards, employing alternative technologies instead, or stopped working on the protocols.”<sup>46</sup> Consequently, the day after Microsoft filed this case, Motorola launched a patent-infringement suit against Microsoft, claiming unauthorized use of six Motorola patents in the development of different models of the Xbox 360.<sup>47</sup>

**E. *IA Labs CA v. Nintendo Co.*, No. 8:10-cv-00833 (D. Md. filed Apr. 2, 2010).**

IA Labs, a computer interface technology company, sued Nintendo for infringement of two patents: U.S. Patent Nos. 7,121,982 and 7,131,226,

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39. *Id.*

40. Notice of Voluntary Dismissal Without Prejudice, *Patent Compliance Group, Inc.*, No. 3:10-cv-00288-B. (N.D. Tex. dismissed June 1, 2010).

41. Complaint at 1, *Microsoft Corp. v. Motorola, Inc.*, No. 2:10-cv-01823 (W.D. Wash. filed Nov. 9, 2010).

42. *Id.* at 1–2.

43. *Id.* at 5–6.

44. *Id.* at 16.

45. Complaint at 14, *Microsoft Corp.*, No. 2:10-cv-01823 (W.D. Wash. filed Nov. 9, 2010).

46. *Id.* at 12.

47. Second Amended Complaint for Patent Infringement at 1, *Motorola Mobility, Inc. v. Microsoft Corp.*, No. 3:10-cv-00700 (W.D. Wisc. filed Jan. 19, 2011).

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which pertain to Computer Interactive Isometric Exercise Systems.<sup>48</sup> IA Labs acquired ownership of the patents from Interaction Labs in 2009.<sup>49</sup> Nintendo allegedly included the patented technology of IA Labs in the development of its Wii game systems—specifically the Wii Fit and the Wii Balance Board.<sup>50</sup> IA Labs pointed to Nintendo's communications with Interaction Labs between 2007 and 2008 regarding force-feedback technology as proof that Nintendo willfully infringed the patents.<sup>51</sup> Nintendo admitted similarities between its Wii products and the patented technology, but it denied any wrongdoing.<sup>52</sup>

### III. COPYRIGHT/TRADEMARK INFRINGEMENT/RIGHT OF PUBLICITY

Video game copyright suits last year primarily concerned the Digital Millennium Copyright Act (DMCA).<sup>53</sup> Since its promulgation in 1998, the DMCA has had few exceptions to its ban on circumventing digital records management (DRM) systems.<sup>54</sup> Consumers often complain that the inability to circumvent these systems for legitimate use thwarts efficient use of technology and hampers innovation.<sup>55</sup> In July 2010, the Library of Congress ruled that circumventing CSS encryption on DVDs and modifying the operating systems on phones is permissible.<sup>56</sup> While none of the present exemptions expressly apply to video games, it is arguable that there is an increasing willingness by the Library of Congress and courts to allow the fair use of circumvented software.<sup>57</sup> Therefore, the video game industry should closely watch for more DRM circumvention exemptions in the near future.

Another critical issue that has developed recently in the video game industry is the intellectual property rights of property owners in online "vir-

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48. Complaint for Patent Infringement and Jury Demand at 1-2, *IA Labs CA v. Nintendo Co.*, No. 8:10-cv-00833 (D. Md. filed Apr. 2, 2010).

49. *Id.* at 5.

50. *Id.* at 11.

51. *Id.* at 8-11.

52. *Nintendo Co., Ltd. and Nintendo of America Inc.'s Answer and Counterclaims* at 7, *IA Labs CA*, No. 8:10-cv-00833 (D. Md. filed Apr. 2, 2010).

53. *See, e.g., MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. Dec. 14, 2010); Complaint for Copyright Infringement at 1, *Blizzard Entm't, Inc. v. Marshall*, No. 8:10-cv-00450 (C.D. Cal. filed Apr. 12, 2010).

54. *See* Nate Anderson, *Apple loses big in DRM ruling: jailbreaks are "fair use,"* ARS TECHNICA (July 26, 2010), <http://arstechnica.com/tech-policy/news/2010/07/apple-loses-big-in-drm-ruling-jailbreaks-are-fair-use.ars>.

55. *See id.*

56. *See id.*

57. *See MGE UPS Sys., Inc. v. GE Consumer and Indus., Inc.*, 622 F.3d 361, 366 (5th Cir. 2010) (concluding that using software already modified to bypass security measures is not circumvention).



tual worlds.” In 2010, Linden Labs, the developer of the massively multiplayer role-playing game *Second Life* battled contentious claims pertaining to virtual-property purchases.<sup>58</sup> In addition to property sales, virtual worlds also allow players to develop exclusively virtual product brands.<sup>59</sup> Virtual-world user agreements usually allow the brand creators to retain sole rights in their created brands.<sup>60</sup> What is unclear, however, is to what extent users may enforce the rights to their brands under existing trademark laws.<sup>61</sup> This uncertainty will likely to lead to an increase in litigation relating to virtual worlds in the years ahead.

Unsurprisingly, many video game trademark cases litigated last year alleged misuse of a trademarked name in the marketing of a video game.<sup>62</sup> However, as game locales and characters become more realistic in form, there has been an increase in trademark claims filed by plaintiffs with no relationship to the video game industry.<sup>63</sup> Legal commentators have argued that perhaps courts ought to examine some future video game trademark claims under the First Amendment rather than the traditional likelihood-of-confusion test.<sup>64</sup>

Also of note, right-of-publicity lawsuits continued to plague Electronic Arts (EA) in 2010. EA allegedly used the unauthorized portrayals of current and former NCAA and NFL players in its games.<sup>65</sup> EA has asserted that its depictions were in the public interest and sufficiently transformative to ban

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58. See, e.g., *Evans v. Linden Research, Inc.*, 763 F. Supp.2d 735, 738 (E.D. Pa. 2011); Complaint at 1, *Eros, LLC v. Linden Research, Inc.*, No. 4:09-cv-04269 (N.D. Cal. filed Sept. 15, 2009), 2009 WL 3007766.
  59. See Barry Werbin, *Trademarks in Virtual Worlds*, 64 INTA Bulletin 22 (Dec. 1, 2009), available at <http://www.herrick.com/siteFiles/Publications/0139E59283169AC381750F3F790B55AC.pdf>.
  60. *Id.*
  61. *Id.*
  62. See, e.g., Complaint for Damages and Injunctive Relief at 7, *Zuffa, LLC v. Ubisoft, Inc.*, No. 2:10-cv-02144 (D. Nev. Dec. 9, 2010), 2010 WL 5339551; Complaint Seeking Damages and Injunctive Relief at 2, *Digital Chocolate v. Zynga Game Network*, No. 3:10-cv-03758 (N.D. Cal. Aug. 24, 2010), 2010 WL 3355714; *Edge Games, Inc. v. Elec. Arts, Inc.*, 745 F. Supp. 1101, 1105 (N.D. Cal. 2010).
  63. See Russell Frackman & Joel Leviton, *Trademarks, Video Games and the First Amendment*, WORLD TRADEMARK Oct/Nov 2010, at 64-65, available at <http://www.fr.com/files/News/8703b99e-9539-4236-b3ff-e67b1e6b6a93/Presentation/NewsAttachment/8cd64adb-b48e-4338-b3f1-ecfcb32d80fa/levitonarticle.pdf>.
  64. *Id.* at 65.
  65. See Class Action Complaint at 1-2, *Davis v. Elec. Arts, Inc.*, No. 3:10-cv-03328 (N.D. Cal. July 29, 2010), 2010 WL 3141136; *Keller v. Elec. Arts, Inc.*, No. C 09-1967, slip op. at \*2, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

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the right-of-publicity claims.<sup>66</sup> Incidentally, the video game giant was embroiled in many trademark and copyright actions filed last year.<sup>67</sup>

**A. *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, Nos. 09-15932, 09-16044, 2010 WL 5141269 (9th Cir. Dec. 14, 2010).**

MDY Industries (MDY) distributed the bot software *Glider*, which allowed users to easily advance to the later levels of Blizzard's *War of the Worlds* by automatically playing the game's early levels.<sup>68</sup> Blizzard sued MDY, alleging copyright infringement, violations of the DMCA and tortious interference with a contract.<sup>69</sup> The district court found MDY liable for all of Blizzard's claims.<sup>70</sup> The Ninth Circuit Court of Appeals reversed the lower court's ruling on the copyright-infringement claim but upheld its judgment that MDY violated the DMCA.<sup>71</sup> The court remanded the tortious-interference claim for trial.<sup>72</sup> The Court of Appeals concluded that the copyright-infringement claim was unsustainable because—while *Glider* users are limited licensees of *War of the Worlds*—the anti-bot provisions in the terms of usage were only covenants, not conditions.<sup>73</sup> But the court determined that *Glider* conflicted with the DMCA's prohibition on trafficking in technology because MDY distributed and marketed the product as a circumvention of the security program for *World of Warcraft*.<sup>74</sup>

**B. *Blizzard Entertainment, Inc. v. Reeves*, 2010 WL 4054095 (C.D. Cal. Aug. 10, 2010).**

Video game developer Blizzard Entertainment sued Allyson Reeves, owner of a private server company, for over \$85 million due to repeated violations of the DMCA, claiming that 427,393 users made use of Reeves's private server to circumvent Blizzard's *World of Warcraft* server protection

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66. See *Keller*, 2010 WL 530108, at \*3.

67. See Complaint for Declaratory Judgment, Accounting at 1, *Direct Techs., LLC v. Elec. Arts, Inc.*, No. 8:10-cv-01336 (C.D. Cal. Sept. 7, 2010); Complaint at 1, *Active Network, Inc. v. Elec. Arts, Inc.*, No. 3:10-cv-01158 (S.D. Cal. May 28, 2010), 2010 WL 2320046.

68. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 935 (9th Cir. Dec. 14, 2010).

69. *Id.* at 929.

70. *Id.*

71. *Id.*

72. *Id.*

73. *MDY Indus.*, 629 F.3d at 954.

74. *Id.* at 953.

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features.<sup>75</sup> The court found Reeves liable for the violations and ordered her to pay Blizzard the full amount sought.<sup>76</sup> This decision follows separate litigation from 2005, in which Blizzard successfully argued before the Eighth Circuit Court of Appeals that the development of a server that provides users with alternative, unlicensed access violates the DMCA.<sup>77</sup>

**C. *Nintendo of America, Inc. v. Serrano*, No. 5:10-cv-01563-PSG (N.D. Cal. dismissed June 11, 2010).**

Nintendo developed and copyrighted the video game series *Legend of Zelda*.<sup>78</sup> In 2009, BMB Finishes distributed a movie, *The Hero of Time*, which closely paralleled the storyline and characters from Nintendo's *Legend of Zelda: Ocarina of Time*.<sup>79</sup> Nintendo claimed that BMB Finishes subsequently ceased marketing the movie in late 2009 because of "apparent recognition of the fact that the film infringed . . . copyright and trademark rights in the Zelda materials."<sup>80</sup> But Nintendo claimed that in March 2010, the defendant used the alias "Aleece3775" to illegally upload clips of *The Hero of Time* onto YouTube.<sup>81</sup> Nintendo almost immediately sent a notice to YouTube advising it to remove the video due to alleged copyright and trademark infringements.<sup>82</sup> YouTube complied with the request.<sup>83</sup> The defendant sent a counter-notice claiming "a good faith belief that the material was removed due to a mistake or misidentification of the material to be removed or disabled."<sup>84</sup> Nintendo agreed to the voluntary dismissal of the suit in June 2010.<sup>85</sup>

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75. *Blizzard Entm't, Inc. v. Reeves*, No. CV 09-7621, 2010 WL 4054095, at \*3 (C.D. Cal. Aug. 10, 2010).

76. *Id.*

77. *Davidson & Assocs. v. Jung*, 422 F.3d 630, 642 (8th Cir. 2005).

78. Complaint at 2, *Nintendo of Am., Inc. v. Serrano*, No. 5:10-cv-01563 (N.D. Cal. Apr. 12, 2010), 2010 WL 2116909.

79. *Id.*

80. *Id.* at 3.

81. *Id.*

82. *Id.*

83. Complaint at 3, *Nintendo of Am., Inc.*, No. 5:10-cv-01563 (N.D. Cal. Apr. 12, 2010), 2010 WL 2116909.

84. *Id.*

85. Notice of Voluntary Dismissal Without Prejudice at 1, *Serrano*, No. 5:10-cv-01563.

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**D. *Nintendo of America, Inc. v. Niu*, No. 2:10-cv-00791-MJP (W.D. Wash. filed May 11, 2010).**

Nintendo is the developer of Game Boy, Nintendo DS, and Wii.<sup>86</sup> Nintendo sued Kevin Niu, operator of NXPGAME, Inc. of Little Neck, New York, alleging he violated the DMCA by importing, marketing, and trafficking Game Copiers, which are illegal devices that mimic the game cards used on systems like the Nintendo DS.<sup>87</sup> Nintendo further alleged that the defendant infringed upon its registered trademarks and copyrights by displaying them on his business websites and by using the trademark “Wii” within the URL for his website, *www.wiiloveds.com*.<sup>88</sup> In an attempt to stop the alleged infringements, Nintendo sought to have all Game Copiers seized, bar the defendant from using Nintendo trademarks and copyrights on its websites, and have the *www.wiiloveds.com* domain name transferred to its possession.<sup>89</sup> The parties reached a settlement in October 2010.<sup>90</sup>

**E. *Zuffa, LLC v. Ubisoft, Inc.*, No. 2:10-cv-02144-KJD-PAL (D. Nev. filed Dec. 9, 2010).**

Zuffa, a promoter of mixed martial arts competitions and holder of the Ultimate Fighting Championship (UFC) trademarks, alleged that Ubisoft used the phrase, “Ultimate Fighting,” without authorization in the marketing of its video game *Fighters Uncaged*.<sup>91</sup> According to the complaint, the back cover of Ubisoft’s game “invites players to ‘Become the ULTIMATE FIGHTING weapon!’”<sup>92</sup> Zuffa argued that this language leads consumers to believe wrongfully that there is an association between *Fighters Uncaged* and the UFC brand.<sup>93</sup> The game’s back cover also encourages users to “[c]harge head first into the vicious world of illegal fighting.”<sup>94</sup> According to Zuffa, because Ubisoft has given the impression that *Fighters Uncaged* relates to its trademarks, consumers might logically link UFC fighting to illegal

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86. Complaint for Injunctive Relief and Damages at 4, *Nintendo of Am., Inc. v. Niu*, No. 2:10-cv-00791-MJP (W.D. Wash. May 11, 2010), 2010 WL 2033138.

87. *Id.* at 2–3.

88. *Id.* at 8.

89. *Id.* at 19–20.

90. Notice of Settlement, *Niu*, No. 2:10-cv-00791 (W.D. Wash. Oct. 18, 2010).

91. Complaint for Damages and Injunctive Relief at 2, 6, *Zuffa, LLC v. Ubisoft, Inc.*, No. 2:10-cv-02144 (D. Nev. Dec. 9, 2010), 2010 WL 5339551.

92. *Id.* at 6.

93. *Id.*

94. *Id.*

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street fighting.<sup>95</sup> Thus, Zuffa is seeking relief for dilution of its trademarks in addition to its claims of unfair competition and trademark infringement.<sup>96</sup>

**F. *AMI Entertainment Network, Inc. v. MTV Networks*, No. 2:10-cv-06848-LP (E.D. Pa filed Nov. 22, 2010).**

AMI Entertainment Network holds the registered Trademark No. 2,308,666, “Photo Hunt” trademark for “computer and electronic game programs, computer and electronic game software, computerized video table games, [and] downloadable electronic games via the internet and wireless devices.”<sup>97</sup> AMI sued MTV Networks for trademark infringement for using “Photo Hunt” in the name of some of its online games.<sup>98</sup> MTV allegedly offered the games *Hundred Dolla Bill Photo Hunt*, *Scott Baio Photo Hunt*, and *What Perez Sez Photo Hunt* on its websites.<sup>99</sup> AMI claims that MTV’s use of the term “Photo Hunt” diminishes its registered mark and confuses the public about AMI’s endorsement of the product.<sup>100</sup>

**G. *Reece v. Show & Prove LLC*, No. 1:10-cv-02901-JSR-DCF (S.D.N.Y. filed Oct. 15, 2010).**

Daniel Reece, a New York artist, sued Mark Ecko, Atari Video Games, Sony, Microsoft, and other defendants for copyright infringement in the development of the video game *Mark Ecko’s Getting Up: Contents Under Pressure*.<sup>101</sup> *Contents Under Pressure* depicts city graffiti artist Trane, who seeks fame by “tagging” various urban areas in the fictional city of “New Radius.”<sup>102</sup> Reece alleged that scenes used in the game appear “substantially similar” to his copyrighted artwork,<sup>103</sup> and thus, the fictional artist character Trane actually represents Reece.<sup>104</sup> Reece, acting pro se in this suit, seeks \$900 million in damages, which he determined by loosely approximating the

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95. *Id.*

96. Complaint for Damages and Injunctive Relief at 1, 10-11, *Zuffa, LLC*, No. 2:10-cv-02144 (D. Nev. Dec. 9, 2010), 2010 WL 5339551.

97. Complaint at 3, *AMI Entm’t Network, Inc. v. MTV Networks*, No. 2:10-cv-06848-LP (E.D. Pa. Nov. 22, 2010), 2010 WL 4855482.

98. *Id.* at 4, 6.

99. *Id.* at 4.

100. *Id.* at 5.

101. Second Amended Complaint at 1–3, *Reece v. Show & Prove LLC*, No. 1:10-cv-02901 (S.D.N.Y. Oct. 15, 2010).

102. *See Marc Ecko’s Getting Up: Contents Under Pressure for PS2*, MOBY GAMES, <http://www.mobygames.com/game/marc-eckos-getting-up-contents-under-pressure> (last visited Sept. 5, 2011).

103. Second Amended Complaint, *supra* note 101, at 3.

104. *Id.* at 3A.

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number of video game units distributed or downloaded worldwide since 2006.<sup>105</sup>

**H. *Digital Chocolate v. Zynga Game Network, Inc.*, No. 3:10-cv-03758-WHA (N.D. Cal. filed Aug. 24, 2010).**

Digital Chocolate, a mobile and PC game developer, has distributed the video game *Mafia Wars* since 2004.<sup>106</sup> In 2008, social gaming developer Zynga launched a game also titled *Mafia Wars* for use on Facebook.<sup>107</sup> Digital Chocolate is now suing Zynga for trademark infringement, claiming senior rights to the “Mafia Wars” mark.<sup>108</sup> In addition to using the name *Mafia Wars*, Zynga allegedly incorporated Digital Chocolate’s player objectives and virtual locales into its game.<sup>109</sup> In support of its claims, Digital Chocolate pointed to evidence of a letter sent by Zynga to Digital Chocolate disclaiming any trademark rights in *Mafia Wars*.<sup>110</sup> Interestingly, Digital Chocolate showed that Zynga later sued Playdom, Inc. for infringing upon the mark “Mafia Wars” and filed a trademark application purporting to be “the senior user of the ‘Mafia Wars’ mark.”<sup>111</sup> Zynga claimed that “Mafia Wars” is not a protected trademark, but that “Mafia Wars” refers only to the game genre.<sup>112</sup>

**I. *Blizzard Entm’t v. Marshall*, No. 8:10-cv-00450-DOC-RNB (C.D. Cal. filed Apr. 12, 2010).**

Blizzard, developer of such games as *Diablo*, *StarCraft*, and *WarCraft*, sued six individuals for circumventing copyright-protection systems in violation of the DMCA.<sup>113</sup> According to the complaint, Blizzard utilized a closed beta-testing program during the development of its new *StarCraft II* game, whereby select users sampled the new product before its official release in

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105. *Id.* at 4.

106. Complaint Seeking Damages and Injunctive Relief at 2, *Digital Chocolate v. Zynga Game Network, Inc.*, No. 3:10-cv-03758 (N.D. Cal. Aug. 24, 2010), 2010 WL 3355714.

107. *Id.* at 5-6; see Maria Dinzeo, *Trademark Battle Over ‘Mafia Wars,’* COURTHOUSE NEWS SERVICE (Aug. 25, 2010), <http://www.courthousenews.com/2010/08/25/29856.htm>.

108. Complaint, *supra* note 106, at 2, 6, 10.

109. See Complaint, *supra* note 106, at 5.

110. Complaint, *supra* note 106, at 6.

111. Complaint, *supra* note 106, at 6-7.

112. Answer to Complaint at 12, *Digital Chocolate*, No. 3:10-cv-03758 (N.D. Cal. Nov. 11, 2010).

113. Complaint for Copyright Infringement, Circumvention of Copyright Protection Systems, Breach of Contract, and Tortious Interference with Contract at 1-2, *Blizzard Entm’t v. Marshall*, No. 8:10-cv-00450 (C.D. Cal. Apr. 12, 2010).

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return for providing feedback to Blizzard.<sup>114</sup> Prior to gaining access to the game client, beta-testing participants had to accept Blizzard's "Beta Test Agreement," prohibiting users from developing servers for unauthorized play.<sup>115</sup> Blizzard never included the defendants in the beta-testing group.<sup>116</sup> But the defendants allegedly gained unauthorized access to the game client prior to its release.<sup>117</sup> Blizzard claims that the defendants are members of the "SC2 Pirate Community," a group that effectively sidesteps the *StarCraft II* beta test anti-piracy mechanisms through the development of rogue servers that host pirated versions of the game.<sup>118</sup>

## J. The Electronic Arts Cases

### 1. *Edge Games, Inc. v. Electronic Arts, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010) (No. 3:10-CV-02614).

Video game developer Edge Games sued EA for allegedly infringing upon its family of "Edge" trademarks by releasing the game *Mirror's Edge*.<sup>119</sup> Edge claimed to have sent a cease-and-desist letter to EA in anticipation of the launch of *Mirror's Edge*.<sup>120</sup> According to the complaint, rather than complying with the letter, EA proceeded to market and release the game despite the fact that the USPTO had refused to register the mark "Mirror's Edge" because of the likelihood for confusion with Edge's registered trademarks.<sup>121</sup> EA argued in a countersuit that Edge obtained its registered trademarks through fraudulent misrepresentation because a company official wrongly attested in the trademark applications that the marks were already used in commerce.<sup>122</sup> The District Court entered a final judgment in favor of defendant EA on the claims and counterclaims and ordered the cancellation of Edge's disputed marks.<sup>123</sup> The court also ordered EA to make all parties

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114. *Id.* at 4.

115. *Id.*

116. *Id.* at 10.

117. *Id.* at 9.

118. Complaint for Copyright Infringement, Circumvention of Copyright Protection Systems, Breach of Contract, and Tortious Interference with Contract at 8, 9, *Blizzard Entm't*, No. 8:10-cv-00450 (C.D. Cal. Apr. 12, 2010).

119. First Amended Complaint for Trademark Infringement, False Designation of Origin, Unfair Competition, and Unjust Enrichment at 6, *Edge Games, Inc. v. Elec. Arts, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010) (No. 3:10-CV-02614).

120. *Id.* at 3.

121. *Id.* at 4.

122. Counterclaim of Electronic Arts, Inc. and EA Digital Illusions CE AB at 1, *Edge Games, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010) (No. 3:10-CV-02614).

123. Final Judgment at 2, *Edge Games, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010) (No. 3:10-CV-02614).

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with knowledge of the supposed fraudulent misrepresentation available for depositions in a fraud investigation.<sup>124</sup>

**2. *Direct Technologies, LLC. v. Electronic Arts, Inc.*, No. 8:10-cv-01336 (C.D. Cal. filed Sept. 7, 2010).**

Direct Technologies (DT) sued EA to determine the authorship of a copyrighted work.<sup>125</sup> EA intended to release its 2009 video game *Sims 3* along with a three-dimensional Plumbob USB drive.<sup>126</sup> In the *Sims* series, a Plumbob is a green jewel that identifies a user's computer character.<sup>127</sup> EA asked Lithomania, a broker of business "swag," to develop a proposal for the promotional Plumbob USB.<sup>128</sup> In turn, Lithomania contacted DT, a third-party vendor, to prepare a design submission.<sup>129</sup> DT claims that after spending hundreds of hours developing a USB prototype, it was suddenly cut out of the project by Lithomania.<sup>130</sup> DT alleges that Lithomania, with the approval of EA, then forwarded the developed prototype to another vendor—Trek 2000—which ultimately mass-produced the USB drive.<sup>131</sup> DT and Lithomania have already reached a settlement.<sup>132</sup> DT sought a declaratory judgment stating that it is a joint author of the Plumbob USB drive, a copyrighted work, and is requesting an accounting of profits of around \$6 million.<sup>133</sup> The district court granted EA's motion to dismiss,<sup>134</sup> and DT has appealed to the Ninth Circuit Court of Appeals.<sup>135</sup>

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124. Order Regarding Depositions Pertaining to Fraud Allegations, *Edge Games, Inc.*, 745 F. Supp. 2d 1101 (N.D. Cal. 2010) (No. 3:10-CV-02614).

125. Complaint for Declaratory Judgment, Accounting at 1, *Direct Techs., LLC. v. Elec. Arts, Inc.*, No. 8:10-cv-01336 (C.D. Cal. Sept. 7, 2010).

126. *Id.* at 2.

127. *Id.*

128. *Id.*

129. *Id.* at 3.

130. Complaint for Declaratory Judgment, Accounting at 3, *Direct Techs., LLC. v. Elec. Arts, Inc.*, No. 8:10-cv-01336 (C.D. Cal. Sept. 7, 2010).

131. *Id.* at 4.

132. *Id.* at 6.

133. *Id.*

134. Order Dismissing Case, *Direct Techs., LLC. v. Elec. Arts, Inc.*, No. 8:10-cv-01336 (C.D. Cal. Sept. 7, 2010).

135. Notice of Appeal to the Ninth Circuit Court of Appeals, No. 8:10-cv-01336 (C.D. Cal. Sept. 7, 2010).



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**3. *Davis v. Electronic Arts, Inc.*, No. 3:10-cv-03328 (N.D. Cal. filed July 29, 2010).**

Michael Davis, a retired running back for the Tampa Bay Buccaneers, sued EA in a class-action suit, alleging that the video game maker violated the rights of publicity of retired NFL players by using their likenesses without authorization in the *Madden NFL* game series.<sup>136</sup> The wildly successful *Madden NFL* games allow users to play football seasons using current NFL teams as well as “historic teams.”<sup>137</sup> The complaint avers that the players comprising these “historic teams” have strikingly similar characteristics to the retired players of the NFL.<sup>138</sup> The suit further alleges that EA sought to artificially distinguish the game characters from the retired NFL players by changing slight details, such as a player’s weight and uniform number, in order to avoid paying royalties.<sup>139</sup>

**4. *Active Network, Inc. v. Electronic Arts, Inc.*, No. 3:10-cv-01158 (S.D. Cal. filed May 28, 2010).**

Active Network markets integrated technology platforms that encourage physical fitness.<sup>140</sup> Active owns various registered trademarks related to the online registration and scheduling of fitness activities.<sup>141</sup> Active uses the marks on its online fitness websites.<sup>142</sup> Active alleges in this suit that EA’s new online game, *Sports Active 2.0*, is a replica of Active’s online trademarked programs.<sup>143</sup> Additionally, Active claims that EA’s use of “active” in the marketing of its game is trademark dilution.<sup>144</sup> In response, EA counterclaimed, arguing that the “Active” mark should be cancelled because it is “merely descriptive” and “lacked acquired distinctiveness” at the time of registration.<sup>145</sup>

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136. Class Action Complaint at 1–2, *Davis v. Elec. Arts, Inc.*, No. 3:10-cv-03328 (N.D. Cal. July 29, 2010).

137. *Id.* at 4.

138. *Id.* at 5.

139. *Id.*

140. Complaint at 2, *Active Network, Inc. v. Elec. Arts, Inc.*, No. 3:10-cv-01158 (S.D. Cal. May 28, 2010), 2010 WL 2320046.

141. *Id.* at 3–4.

142. *Id.* at 4–5.

143. *Id.* at 5.

144. *Id.* at 6.

145. Defendant Electronic Arts, Inc.’s Answer to Complaint and Counterclaim for Cancellation at 7, *Active Network, Inc.*, No. 3:10-cv-01158-BEN (S.D. Cal. June 18, 2010).

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#### IV. BREACH OF CONTRACT/FRAUD

Breach of contract and fraud claims proved to be some of the most contentious, high-stakes litigation to play out in the courts in 2010. Litigation last year included a showdown between two of the industry's most accomplished game developers and their former bosses, a case involving allegations of dubious advertising practices by a social media game developer, and an examination of privacy issues surrounding the user agreements of social media games.

**A. *MumboJumbo, LLC v. PopCap Games, Inc.* No. DC-07-12157 (Tex. Dist. Ct. Dallas County Mar. 1, 2010).**

MumboJumbo—developer of such games as *Luxor Adventures* and *Midnight Mysteries: The Edgar Allan Poe Conspiracy*—sued its former business partner, PopCap Games (“PopCap”), for breach of contract, fraud, and tortious interference in a Texas district court.<sup>146</sup> A jury awarded MumboJumbo \$4.6 million in the lawsuit, finding that PopCap had wrongfully cut MumboJumbo out of a contractual joint-sales agreement and compromised a strategic business relationship between MumboJumbo and a retailer.<sup>147</sup> The court added an additional \$2.7 million for attorneys' fees to the jury's award.<sup>148</sup>

**B. *Swift v. Zynga Game Network, Inc.*, No. 3:09-cv-05443-EDL (N.D. Cal. filed Nov. 17, 2009).**

In September 2010, a District Court for the Northern District of California rejected a Motion to Dismiss in a case where Zynga allegedly perpetrated fraud against consumers through deceitful advertising ploys.<sup>149</sup> The class-action suit claims that Zynga enticed *Farmville* users through lead generators to provide their cell phone numbers in exchange for virtual currency.<sup>150</sup>

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146. Plaintiff's Original Petition at 3, *MumboJumbo LLC v. PopCap Games, Inc.*, No. DC-07-12157 (193rd Dist. Ct., Dallas County, Tex. Mar. 1, 2010).

147. *Dallas Jury Awards Casual Video Game Publisher MumboJumbo \$4.6 Million in Lawsuit Against PopCap*, PR NEWSWIRE, (Jan. 25, 2010), <http://www.prnewswire.com/news-releases/dallas-jury-awards-casual-video-game-publisher-mumbojumbo-46-million-in-lawsuit-against-popcap-82605912.html>.

148. David Radd, *MumboJumbo Extracts \$2.7 Million in Attorneys' Fees from PopCap*, INDUSTRYGAMERS (Feb. 3, 2010), <http://www.industrygamers.com/news/mumbojumbo-extracts-27-million-in-attorneys-fees-from-popcap/>.

149. Order at 1, *Swift v. Zynga Game Network, Inc.*, No. 3:09-cv-05443 (N.D. Cal. Sept. 1, 2010); Class Action Complaint for Violations of the Unfair Competition Law, the Consumers Legal Remedies Act, and Unjust Enrichment at 2, *Swift*, No. 3:09-cv-05443 (N.D. Cal. Nov. 17, 2009).

150. Class Action Complaint for Violations of the Unfair Competition Law, the Consumers Legal Remedies Act, and Unjust Enrichment, *supra* note 149, at 2–3.

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Zynga then subscribed the unknowing *Farmville* users to an SMS service that billed them each month automatically.<sup>151</sup> Both Zynga and Facebook are defendants in the suit.<sup>152</sup>

**C. *Graf v. Zynga Game Network, Inc.*, No. 5:10-cv-04680-JW (N.D. Cal. filed Oct. 18, 2010).**

Nancy Graf, a registered user of Zynga's *Farmville* Facebook application, filed a class-action suit against Zynga for sharing users' personally identifiable information with advertisers and marketing companies.<sup>153</sup> Graf asserts that because Facebook's terms and conditions prohibit third-party application developers like Zynga from distributing personal user information, she and other users may sue as beneficiaries of the contractual agreement between Facebook and Zynga.<sup>154</sup> Zynga allegedly employed "Referrer Headers" on its Facebook games, sending specific information like a user's last visited webpage, Facebook ID, and name to marketing and advertising companies.<sup>155</sup> Facebook is not a defendant in the suit, although the plaintiff stated that she "is unaware at this time whether Facebook takes any or reasonable steps to enforce its terms and conditions against third-party developers like Zynga."<sup>156</sup> A similar suit was filed in May 2010 against Facebook for allowing the "Referrer Headers."<sup>157</sup>

**D. *Ventura v. Sony Computer Entertainment America, Inc.*, No. 3:10-cv-01811-RS (N.D. Cal. filed Apr. 27, 2010).**

This case is a class-action suit brought against Sony on behalf of all Sony PS3 purchasers between November 2006 and March 2010.<sup>158</sup> The named plaintiff alleges that instead of purchasing alternative game consoles, he chose to buy the Sony PS3 because of its advertised "Other OS" feature.<sup>159</sup> The "Other OS" feature enables PS3 users to install other operating systems on the console in addition to the PS3 software, allowing owners to

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151. Class Action Complaint for Violations of the Unfair Competition Law, the Consumers Legal Remedies Act, and Unjust Enrichment, *supra* note 149, at 3.

152. Class Action Complaint for Violations of the Unfair Competition Law, the Consumers Legal Remedies Act, and Unjust Enrichment, *supra* note 149, at 1.

153. Class Action Complaint at 1–2, *Graf v. Zynga Game Network, Inc.*, No. 5:10-cv-04680 (N.D. Cal. Oct. 18, 2010).

154. *Id.* at 3–4.

155. *Id.* at 4.

156. *Id.* at 3.

157. Complaint at 2, 5, *In re Facebook Privacy Litigation*, No. 5:10-cv-02389 (N.D. Cal. May 28, 2010).

158. Class Action Complaint and Demand for Jury Trial at 2, *Ventura v. Sony Computer Entm't Am., Inc.*, No. 3:10-cv-01811 (N.D. Cal. Apr. 27, 2010).

159. *Id.* at 5.

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use the PS3 like a personal computer.<sup>160</sup> On March 28, 2010, Sony announced that its PS3 software update 3.21 would disable the “Install Other OS” feature on its consoles if downloaded by users.<sup>161</sup> While conceding that PS3 users are not required to update their game consoles using Update 3.21, the plaintiff avers that it is impossible to watch new Blu-ray discs, play new PS3 games or access the PlayStation Network without Update 3.21.<sup>162</sup> Accordingly, he claims Sony breached its sales contracts between customers, breached its covenants of good faith and fair dealing, and perpetrated unfair and deceptive trade practices on millions of its customers.<sup>163</sup> Sony’s stated purpose for removing the previous “Other OS” feature was to obviate apparent piracy “security concerns.”<sup>164</sup> The console gaming industry will eagerly watch this case because while game console users might be entitled to the full range of features available when they initially purchased the units, companies such as Sony likely have at least an equal right to counter piracy threats so that game developers will continue to make games for their game consoles.

**E. *West v. Activision Publishing, Inc.*, No. SC107041 (Cal. Super. Ct. L.A. Cnty. filed Mar. 3, 2010).**

Video game developers Jason West and Vince Zampella sued Activision for breach of contract, claiming Activision wrongfully terminated them to avoid paying royalties for their work on the game *Modern Warfare 2*.<sup>165</sup> West and Zampella founded Infinity Ward Studios, which developed the *Call of Duty* and *Modern Warfare* game series for Microsoft’s Xbox 360.<sup>166</sup> Infinity Ward’s successes led Activision to acquire the studio in 2002.<sup>167</sup> Activision offered West and Zampella employment agreements to stay on as the co-heads of the studio.<sup>168</sup> In addition, Activision gave West and Zampella a Memorandum of Understanding that gave them creative direction over Infinity Ward and provided them with additional compensation in exchange for

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160. *Id.* at 3.

161. *Id.* at 6.

162. *Id.* at 7–8.

163. Class Action Complaint and Demand for Jury Trial at 1-2, *Ventura v. Sony Computer Entm’t Am., Inc.*, No. 3:10-cv-01811 (N.D. Cal. Apr. 27, 2010).

164. *Id.* at 6–7.

165. Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Wrongful Termination in Violation of Public Policy, and Declaratory Relief at 2, *West v. Activision Publ’g, Inc.*, No. SC107041 (Ca. . Super. Ct. L.A. Cnty. Mar. 3, 2010).

166. *Id.* at 5–6.

167. *Id.* at 5.

168. *Id.*

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developing *Modern Warfare 2*.<sup>169</sup> Infinity Ward and Activision released the game *Modern Warfare 2* in late 2009 and royalty payments to West and Zampella were scheduled to begin March 31, 2010.<sup>170</sup> But according to the complaint, in early February Activision initiated a “pre-textual investigation against West and Zampella to create a basis to fire the two co-heads of Infinity Ward before the first *Modern Warfare 2* royalty payment would be paid.”<sup>171</sup> The alleged investigation entailed “interviews over the Presidents’ Day holiday weekend,” an interrogation “for over six hours in a windowless conference room,” and bringing “Infinity Ward employees to tears in their questioning and accusations.”<sup>172</sup> Activision subsequently terminated West and Zampella on March 1, 2010, citing insubordination.<sup>173</sup> Activision countersued, claiming that West’s and Zampella’s terminations resulted from their collusive conduct with rival EA.<sup>174</sup> Activision has now filed to add EA as a defendant in its counterclaim.<sup>175</sup>

## V. ANTITRUST

The market dominance of companies like Microsoft and Electronic Arts easily makes them subject to antitrust scrutiny. Antitrust suits often result in some of the most protracted legal wrangling, even if the plaintiff does not survive summary judgment. The cases that follow still may not have a resolution by the end of 2011.

### A. *Datel Holdings Ltd. v. Microsoft Corporation*, No. 3:09-cv-05535 (N.D. Cal. filed Nov. 20, 2009).

Datel Holdings (“Datel”), a manufacturer of the *Max Memory* card for Microsoft’s Xbox 360, sued the technology behemoth for allegedly foreclosing the market in aftermarket memory cards by distributing an update on

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169. *Id.* at 7–8.

170. Complaint for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, Wrongful Termination in Violation of Public Policy, and Declaratory Relief at 8, 10, *West v. Activision Publ’g, Inc.*, No. SC107041 (Ca. Super. Ct. L.A. Cnty. Mar. 3, 2010).

171. *Id.* at 9–10.

172. *Id.* at 10.

173. *Id.*

174. Ben Gilbert, *Activision Blasts West and Zampella in Countersuit*, JOYSTIQ (Apr. 9, 2010), <http://www.joystiq.com/2010/04/09/activision-blasts-west-and-zampella-in-countersuit>.

175. Nick Wingfield, *Activision Seeks to Add EA to Suit*, WALL ST. J., (Dec. 22, 2010, 3:28 AM), <http://online.wsj.com/article/SB10001424052748704851204576034572448159118.html>.

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Xbox 360 units that disabled Datel's product.<sup>176</sup> Datel alleges that it distributes the only Xbox 360 compatible memory cards in the market aside from Microsoft.<sup>177</sup> The company further claims that its memory cards offer larger storage capabilities at a lower price than those distributed by Microsoft.<sup>178</sup> In October 2009, Microsoft issued an Xbox 360 update that had the effect of disabling "unauthorized" memory cards.<sup>179</sup> Datel's complaint states that Microsoft claimed the update was designed to reduce "cheating."<sup>180</sup> But Datel avers that Microsoft's true purpose was to eliminate competition and reduce consumer choice.<sup>181</sup> Microsoft also allegedly tried to tie the sale of its game consoles to the purchase of Microsoft brand add-ons and accessories.<sup>182</sup> Microsoft responded by arguing that Datel has no standing to sue in the first place because the *Max Memory* card violates the DMCA.<sup>183</sup>

**B. *Pecover v. Electronic Arts, Inc.*, 633 F. Supp. 2d 976 (N.D. Cal. 2009).**

In 2008, two purchasers of EA's *Madden NFL* game sued EA for monopolizing the interactive football software market by entering into exclusive agreements with organizations such as the NFL and NCAA.<sup>184</sup> The plaintiffs claimed that the exclusive agreements have stifled competition, most notably Take Two Interactive Software, Inc., resulting in higher prices for consumers.<sup>185</sup> In December 2010, a federal judge certified the plaintiff class for the case as: "All persons in the United States who Purchased Electronic Arts' Madden NFL, NCAA or Arena Football League brand interactive football

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176. Complaint for Violations of §§1-2 of the Sherman Act and §3 of the Clayton Act; for Unfair Competition; and for Tortious Interference with Prospective Economic Advantage at 1, *Datel Holdings Ltd. v. Microsoft Corp.*, No. 3:09-cv-05535 (N.D. Cal. Nov. 20, 2009).

177. *Id.*

178. *Id.* at 4-5.

179. *Id.* at 5.

180. *Id.* at 6.

181. Complaint for Violations of §§1-2 of the Sherman Act and §3 of the Clayton Act; for Unfair Competition; and for Tortious Interference with Prospective Economic Advantage at 6, *Datel Holdings Ltd.*, No. 3:09-cv-05535 (N.D. Cal. Nov. 20, 2009).

182. *Id.* at 15.

183. Defendant Microsoft Corp.'s Reply in Support of Motion to Bifurcate at 1, *Datel Holdings Ltd.*, No. 3:09-cv-05535 (N.D. Cal. Aug. 27, 2010).

184. Class Action Complaint at 1, *Pecover v. Elec. Arts, Inc.*, 633 F. Supp. 2d 976 (N.D. Cal. 2008) (No. 4:08-cv-02820).

185. *Id.*

software, . . . with a release date of January 1, 2005 to the present.”<sup>186</sup> Incidentally, the Supreme Court recently declined to give the NFL antitrust exemption for exclusive agreements, holding that the organization’s licenses with Reebok constituted concerted action under Sherman Act § 1.<sup>187</sup> It is unclear whether the Court’s decision will affect future negotiations between the NFL and video game makers.

## VI. OTHER NOTABLE CASES

### A. *No Doubt v. Activision Publishing, Inc.*, 702 F. Supp. 2d 1139 (C.D. Cal. 2010).

The musical group No Doubt granted Activision limited use of its name and likeness for the video game, *Band Hero*.<sup>188</sup> No Doubt alleged that Activision violated the parties’ agreement by enabling the *Band Hero* representation of the group “to perform . . . sixty plus unapproved songs” and “to engage in unapproved acts with other characters included in the game.”<sup>189</sup> Activision filed for removal to federal court after the suit was originally filed in state court, claiming that Copyright Act § 301 preempted the state issues.<sup>190</sup> But No Doubt sought to remand the case back to state court since the claims arose “only from the misappropriation of Plaintiff’s name and likeness in violation of the agreement.”<sup>191</sup> The Ninth Circuit articulated a two-part test for deciding whether preemption of state law by the federal Copyright Act is appropriate.<sup>192</sup> The first step is to “determine whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.”<sup>193</sup> If the first prong is met, the next step is to “determine whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.”<sup>194</sup> Applying the Ninth Circuit’s test to the facts of the case, the District Court found that the Copyright Act did not preempt No Doubt’s state claims.<sup>195</sup> The court ruled that “[n]ame, likeliness,

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186. Order to Certify Class at 52, *Pecover*, 633 F. Supp. 2d 976 (N.D. Cal. 2010) (No. 4:08-cv-02820).

187. *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2215 (U.S. 2010).

188. *No Doubt v. Activision Publ’g*, 702 F. Supp. 2d 1139, 1140 (C.D. Cal. 2010).

189. *Id.*

190. *Id.* at 1141.

191. *Id.*

192. *Id.* at 1142.

193. *No Doubt v. Activision Publ’g*, 702 F. Supp. 2d 1139, 1142, (C.D. Cal. 2010) (citing *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006)).

194. *Id.* at 1142.

195. *Id.* at 1145.

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and persona are not copyrightable subject matter . . . because a name, likeness, or persona is not a work of ‘authorship’ entitled to copyright protection.”<sup>196</sup>

**B. *Schwartz v. Def Jam Enterprises.*, No. 1:10-cv-09275-LTS (S.D.N.Y. Dec. 13, 2010).**

Justin Schwartz sued Def Jam Enterprises—a rap music label owned by Universal Music Group—alleging that the company stole his idea for the *Def Jam Rapstar* video game.<sup>197</sup> Using a game console like Sony PlayStation or Nintendo Wii, *Def Jam Rapstar* users record themselves and upload their songs to a linked website to be rated by other users.<sup>198</sup> Schwartz allegedly pitched the idea to Universal Music executives in late 2008.<sup>199</sup> Schwartz claimed that the executives initially seemed enthusiastic about his idea but then suspiciously backed away from the project, citing a need for “more development.”<sup>200</sup>

**C. *Smallwood v. NCSoft, Corporation*, 730 F. Supp. 2d 1213, (D. Haw. Oct. 19, 2009) (No. 1:09-cv-00497).**

A federal judge in the District of Hawaii has denied a motion to dismiss in a case in which a video game user is suing a video game developer for making a game that is too addictive and failing to warn consumers of the game’s addictive quality.<sup>201</sup> Craig Smallwood, acting pro se, sued NCsoft for negligence and gross negligence, alleging the company failed to warn *Lineage II* users that the game might be addictive.<sup>202</sup> Smallwood alleged that as a marketing ploy for its game *Aion*, NCsoft purposely locked out players from *Lineage II* without warning.<sup>203</sup> He claimed that he discovered the psychological dependency of *Lineage II* in September 2009 after NCsoft locked him out of the game.<sup>204</sup> Smallwood alleges that he now suffers from anxiety, paranoia, and disassociation due to his experiences with *Lineage II* and inter-

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196. *Id.*

197. Complaint at 2, *Schwartz v. Def Jam Enters.*, No. 1:10-cv-09275 (S.D.N.Y. Dec. 13, 2010).

198. *Id.* at 16.

199. *Id.* at 4–5.

200. *Id.* at 4–6, 23–25.

201. Order Granting in Part and Denying in Part Defendant’s Motion to Dismiss the Second Amended Complaint at 1-6, 48, *Smallwood v. NCsoft, Inc.*, 730 F. Supp. 2d 1213 (D. Haw. Oct. 19, 2009) (No. 1:09-cv-00497).

202. Second Amended Complaint at 4, 18-21, 26, *Smallwood*, 730 F. Supp. 2d 1213 (No. 1:09-cv-00497).

203. *Id.* at 4–5.

204. *Id.* at 5.



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actions with NCsoft.<sup>205</sup> He seeks compensatory and general damages in the amount of \$500,000 as well as \$9 million in punitive damages.<sup>206</sup>

**D. *Roberts ex. rel. Cheyenne Mountain Games v. Dark Comet Games, LLC*, No. CV2010-025559 (Ariz. Super. Ct. Maricopa Cnty. filed Aug. 20, 2010).**

Derivative shareholders of Cheyenne Mountain Games, developer of the online game *Stargate Resistance*, sued the principals of Dark Comet Games and Fresh Start Studios for allegedly pilfering Cheyenne Mountain's assets following bankruptcy proceedings.<sup>207</sup> The plaintiffs claim that the defendants fraudulently transferred Cheyenne Mountain's assets to Dark Comet and Fresh Start under the auspices of a joint-venture agreement.<sup>208</sup> The complaint avers that the defendants misrepresented their positions within Cheyenne Mountain in the joint-venture agreement and failed to gain shareholder approval for the application or subsequent transfer of assets.<sup>209</sup> Further, the defendants allegedly paid less than one percent for all of Cheyenne Mountain's assets even though the bankrupt company had "spent tens of millions of dollars" developing *Stargate Resistance*.<sup>210</sup>

**E. *Collins v. GameStop Corporation*, No. 3:10-cv-01210 (N.D. Cal. filed Mar. 23, 2010).**

James Collins, a GameStop customer, filed a class-action suit against the retailer for failing to provide free downloadable content with its used games.<sup>211</sup> Recently, it has become common for video game makers to bundle free downloadable content like weapons and characters with new video games.<sup>212</sup> If the original purchaser of a video game has already redeemed the "use code" for the free content, subsequent purchasers must pay for access to

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205. *Id.* at 12.

206. *Id.* at 26.

207. Verified Complaint at 2, 4-6, 22, *Roberts ex. rel. Cheyenne Mountain Games v. Dark Comet Games, LLC*, No. CV2010-025559 (Ariz. Super. Ct. Maricopa Cnty. Aug. 20, 2010). See Jayson Peters, 'Stargate' Video Game Fraud Case Heads to Court, E. VALLEY TRIB. BLOGS (Oct. 2, 2010), <http://blogs.evtrib.com/nerdvana/2010/10/02/stargate-video-game-fraud-case-heads-to-court>.

208. Verified Complaint, *supra* note 207, at 6.

209. Verified Complaint, *supra* note 207, at 5-9.

210. Verified Complaint, *supra* note 207, at 9.

211. Class Action Complaint at 1, *Collins v. GameStop Corp.*, No. 3:10-cv01210 (N.D. Cal. Mar. 23, 2010).

212. *Id.* See Lydia Sung, *GameStop Customer Sues Over Lack of Free DLC*, NEOSEEKER (Mar. 26, 2010, 10:06 PM), <http://www.neoseeker.com/news/13447-gamestop-customer-sues-over-lack-of-free-dlc>.

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the same features.<sup>213</sup> Collins claims that since the manufacturer advertises the add-ons on the video game boxes, GameStop is perpetrating fraud by failing to inform purchasers of used games that the “use code” may no longer be valid.<sup>214</sup> In addition, Collins avers that GameStop’s seven-day return policy exacerbates the deception because “[i]n many cases, a consumer does not use the downloadable content until after finishing most or all of the other features,” which “can take weeks or even months.”<sup>215</sup>

## VII. CONCLUSION

Video game litigation in 2010 showed the increasing pervasiveness of video games in today’s society. The breakneck progress of recent video game technology indicates that the future of video games is anything but certain. Yet it is very reasonable to believe that the video game industry is poised for great success as developers continue to create games that defy imagination and reshape reality. The court cases that arose or were decided last year likely will influence video game litigation for some time.

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213. Class Action Complaint, *supra* note 211, at 1.

214. Class Action Complaint, *supra* note 211, at 5.

215. Class Action Complaint, *supra* note 211, at 8–9.

