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Kent Jordan

Robert Wilkinson

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A Review of 2011 Video-Game Litigation and Selected Cases

*Kent Jordan**

*Robert Wilkinson***

Two thousand eleven was a notable year for video-game litigation. For the first time, the Supreme Court affirmatively extended First Amendment protection to video games.¹ The Court held—much to the delight of the gaming industry—that video games use the same literary devices found in other media, that games are used to convey ideas and social messages, and that video games are therefore on equal footing with other artistic works under the First Amendment.² And in related cases on opposite sides of the country, college athletes have squared off against Electronic Arts (EA) and the National Collegiate Athletic Association (NCAA) for using their likenesses in the popular *NCAA Football* series.³ The importance of social media and casual gaming to the game industry is also readily apparent this year, based on the amount of litigation involving the leaders in social media and gaming. There was significant movement in several long-running cases, as well as the expected number of trademark, patent, and copyright claims, and the cases that follow represent noteworthy or interesting developments in gaming litigation for 2011. The cases are organized in reverse chronological order, within their respective categories, by date of filing or disposition as appropriate; disposed cases precede those that are still pending.

I. CONSTITUTIONAL CASES

It is little wonder that the gaming industry praised the Supreme Court's holding in *Brown v. Entertainment Merchants Association*.⁴ Violence in video games has been a contentious issue for almost twenty years, dating back to the days of the original *Mortal Kombat* in 1993.⁵ Many of the most

* Kent Jordan is a May 2013 candidate for Juris Doctor at Southern Methodist University Dedman School of Law.

** Robert Wilkinson is a May 2013 candidate for Juris Doctor at Southern Methodist University Dedman School of Law.

1. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2731 (2011).

2. *Id.*

3. *Hart v. Elec. Arts, Inc.*, 808 F.Supp.2d 757 (D.N.J. 2011); *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

4. Frank Cifaldi, Video Game Industry Celebrates Supreme Court Victory, GAMASUTRA (June 27, 2011), available at http://www.gamasutra.com/view/news/35461/Video_Game_Industry_Celebrates_Supreme_Court_Victory.php (last visited Apr. 18, 2012).

5. Tom Redburn, Toys 'R' Us Stops Selling a Violent Video Game, N.Y. TIMES (Dec. 17, 1993), available at <http://www.nytimes.com/1993/12/17/nyregion/toys-r-us-stops-selling-a-violent-video-game.html?scp=17&sq=mortal%20kombat&st=cse> (last visited Apr. 18, 2012).

popular and profitable gaming franchises have also been some of the most contentious, from older titles such as *Mortal Kombat* and *Doom*, to newer titles such as the *Grand Theft Auto* series. If violence in games had been put into the same category as obscenity, more family-oriented retailers such as Wal-Mart might have refused to carry certain titles, potentially costing the gaming industry millions of dollars in lost sales.⁶ Though this is the first time the Supreme Court has addressed the issue, a handful of states have tried bans of violent video games before, and lower courts struck down each ban.⁷ Now that the Supreme Court has unequivocally settled the matter, the gaming industry can breathe easier without the possible chilling effects of such a ban hanging over their heads—though the California senator who authored the original bill is not giving up on the fight just yet, saying his legal team is “poring through the opinions to see where we can create a pathway for a successful bill that could withstand a challenge.”⁸

II. *BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION*, 131 S. CT. 2729 (2011).

When California enacted legislation banning the sale of violent video games to minors, the video-game and software industry quickly responded with a pre-enforcement challenge to the Act.⁹ The Supreme Court agreed with both the district court and the Ninth Circuit that such a ban was an unconstitutional violation of the First Amendment, and that California was attempting to create an entirely new category of content-based regulation for speech directed at children that contains depictions of violence.¹⁰ Most im-

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6. See Paul Tassi, Do Video Games Need First Amendment Protection, *FORBES* (Nov. 02, 2010, 10:55 AM), available at <http://www.forbes.com/sites/insertcoin/2010/11/02/do-video-games-need-first-amendment-protection/> (last visited Apr. 18, 2012); see also Andrew Dat, Will The Supreme Court Allow California to Ban Violent Video Games, *LEGAL MATCH* (Jan. 5, 2011), available at <http://lawblog.legalmatch.com/2011/01/05/will-the-supreme-court-allow-california-to-ban-violent-video-games/> (last visited Apr. 18, 2012).
 7. Nina Totenburg, Calif. Pushes To Uphold Ban On Violent Video Games, *NPR* (Nov. 2, 2010), available at <http://www.npr.org/2010/11/02/130979773/calif-pushes-to-uphold-ban-on-violent-video-games> (last visited Apr. 18, 2012); Anne Broache, Court Upholds Ban On Minnesota Video Game Law, *CNET NEWS* (Mar. 17, 2008, 1:34 PM), available at http://news.cnet.com/8301-10784_3-9895920-7.html (last visited Apr. 18, 2012).
 8. Losing California Senator To Propose New Anti-Gaming Law, *SPONG.COM* (June 28, 2011), available at <http://spong.com/article/24740/Losing-Californian-Senator-to-Propose-a-New-Anti-Gaming-Law> (last visited Apr. 18, 2012); David Louie, Yee Still Committed To Violent Video Game Ban, *ABC NEWS* (June 27, 2011), available at <http://abclocal.go.com/kgo/story?section=news/state&id=8217074> (last visited Apr. 18, 2012).
 9. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2731 (2011).
 10. *Id.* at 2735.

portantly, the Court for the first time explicitly extended First Amendment protection to video games, ruling that they are expressive speech on par with plays, films, and literature.¹¹ Thus, any future attempts to enact a ban on video games because of the game's content will have to face the very high "strict scrutiny" standard to be successful.¹²

III. RIGHT-OF-PUBLICITY CASES

Two thousand eleven saw significant decisions in right-of-publicity cases, both favorable¹³ and unfavorable¹⁴ to the gaming industry. The gaming industry must keep a close eye on these cases, as they will provide guidance for the virtual use of real persons within a game. In recent years, legal commentators have suggested that, given the merging of the virtual world with depictions of real people and products, many cases could be disposed of on summary judgment, utilizing the First Amendment as a total bar to a claim.¹⁵ While courts are currently split on using the fair-use doctrine transformative test¹⁶ or the *Rogers*¹⁷ test as the basis for right-of-publicity decisions, the courts have certainly not been shy about utilizing the First Amendment to dispose of cases under either test.¹⁸

11. *Id.* at 2731.

12. *Id.* at 2738.

13. *Hart v. Elec. Arts, Inc.*, 808 F.Supp.2d 757 (D.N.J. 2011).

14. *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

15. 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> (last visited Apr. 18, 2012).

16. *Hart*, 808 F.Supp.2d at 779 (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (2001) (the transformative test asks "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question")).

17. *Id.* at 788 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 999–1000 (2d Cir. 1989) (mandating that "liability should not be imposed unless the title to the challenged work has no relevance to the underlying work, or, if the title bears some relevance, whether the title misleads the public as to the content or source of the work")).

18. *Hart*, 808 F.Supp.2d at 757; *Dillinger, LLC v. Elec. Arts, Inc.*, No. 1:09-CV-1236-JMS-DKL, 2011 WL 2457678 (S.D. Ind. June 16, 2011); see also Richard Raysman & Peter Brown, Video Games And The Right of Publicity, *LAW.COM* (Oct. 17, 2011), available at <http://www.law.com/jsp/article.jsp?id=1202518866367&slreturn=1> (last visited Apr. 18, 2012).

As EA continues to face claims from former collegiate and professional athletes over its use of their likenesses,¹⁹ the Supreme Court ruling in *Brown* has strengthened its First Amendment defense. EA received decisions in two of its NCAA Football cases; however, the decisions are a classic circuit split. While the court in *Hart* ruled in EA's favor, the trial court in *Keller* took the opposite stance, ruling that the First Amendment did not protect EA.²⁰ Keller's case was argued on appeal in 2011 before the Ninth Circuit, and that court's ruling is pending.²¹ A favorable ruling for Keller could subject EA to thousands of similar cases from former collegiate athletes across the nation.²² The gaming industry will closely watch these cases, as a vital component of the appeal of collegiate athletic games is the realism they offer. Such lawsuits have already possibly begun to affect titles, as EA has left their now-familiar "historic" rosters—comprised of thinly veiled likenesses of notable past collegiate stars—out of the most recent NCAA releases.²³

Related cases include the long-running suit against Activision by the band No Doubt²⁴—which received approval from the California Court of Appeals to go ahead with No Doubt's claim—and a similar suit against Activision filed recently by Adam Levine of the rock band Maroon 5.²⁵ The latter claim involves the same title at issue in the No Doubt litigation, *Band Hero*, and for the same reasons as No Doubt filed suit.²⁶ Given the tremendous impact that having the right artist's or band's involvement in a particular title can have on sales, the gaming industry will closely watch these cases to determine how the balance of power plays out, and whether the ultimate control over the final product will rest with the studio or the artist whose likeness is used.

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19. Matt Norlander, Bill Russell the Latest to be Suing the NCAA, CBSSPORTS.COM (Oct. 6, 2011), *available at* <http://www.cbssports.com/mcc/blogs/entry/26283066/32536617> (last visited Apr. 18, 2012) (discussing Russell v. National Collegiate Athletic Association, No. 4:2011-cv-04938 (N.D. Cal. filed Oct. 5, 2011)).
 20. Keller v. Elec. Arts, Inc., 2010 WL 530108 at *5 (N.D. Cal. Feb. 8, 2010).
 21. Paul Elias, Former College Athlete's Suit Threatens Hollywood, THE ASSOCIATED PRESS (Feb. 14, 2011), *available at* <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202481850767&slreturn=1> (last visited Apr. 18, 2012).
 22. *Id.*
 23. Owen Good, Game-Inspired Lawsuit No Longer About Video Games, KOTAKU (Feb. 9, 2010, 7:20 PM), *available at* <http://kotaku.com/5468174/game-inspired-lawsuit-no-longer-about-video-games> (last visited Apr. 18, 2012).
 24. No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011), rev. denied (June 8, 2011).
 25. Tim Kenneally, 'Voice' Coach Adam Levine Sues Over 'Band Hero', REUTERS.COM (Aug. 4, 2011), *available at* <http://www.reuters.com/article/2011/08/04/idUS390792524320110804> (last visited Apr. 18, 2012).
 26. *Id.*

IV. *HART v. ELEC. ARTS, INC.*, 808 F.Supp.2d 757.

Former collegiate athlete Ryan Hart alleged that EA violated his right of publicity under New Jersey law by misappropriating his likeness during his time at Rutgers University for the titles *NCAA Football 2004-06* and *NCAA Football 2009*.²⁷ Hart alleged that the attributes of the virtual player mimicked Hart in every respect except name—from physical statistics, to jersey number, to the type of helmet visor he wore.²⁸ EA's motion for summary judgment did not dispute that Hart had established a *prima facie* claim, but instead claimed that the First Amendment barred Hart's right of recovery in that the games constitute protected expressive works.²⁹ Hart argued that the games are speech for commercial purposes, and therefore, not afforded total First Amendment protection.³⁰ The court found that the games are protected speech, and applied both the *Rogers*³¹ test and the transformative test.³² The court noted that the image of Hart in the game can be manipulated in a variety of ways, such as the player's height, weight, and athletic ability, as well as his physical abilities and the accessories for his uniform.³³ The court concluded that there is sufficient evidence of EA's own expression found in the game (since EA created the means by which a player can alter attributes), and that EA's use of Hart's image is sufficiently transformative.³⁴ While the court questioned whether the *Rogers* test should be applied in this case, the court applied the test anyway and concluded that the game easily passed the *Rogers* test.³⁵ Thus, under either test, EA's First Amendment rights outweigh Hart's right of publicity.³⁶

V. *DILLINGER, LLC v. ELECTRONIC ARTS, INC.*, 2011 WL 2457678.

The estate of John Dillinger—claiming to own the trademark and publicity rights for the name “John Dillinger”—brought suit against EA for using the Dillinger name in reference to one of the weapons (a Tommy Gun) in their *Godfather* game series.³⁷ The Dillinger estate claimed that John Dillinger is closely intertwined with the Tommy Gun via his public image, and that

27. *Hart v. Elec. Arts, Inc.* 808 F.Supp.2d 757, 761 (D.N.J. 2011).

28. *Id.* at 762.

29. *Id.* at 766–67.

30. *Id.* at 768–69.

31. *Id.* at 787–93.

32. *Hart*, 808 F.Supp.2d at 777–87.

33. *Id.* at 785.

34. *Id.* at 786.

35. *Id.* at 792–93.

36. *Id.* at 794.

37. *Dillinger, LLC v. Elec. Arts, Inc.*, 2011 WL 2457678 at *1 (S.D. Ind. June 16, 2011).

common law and the Lanham Act prohibited EA's use.³⁸ The court applied the *Rogers* test, concluding that Dillinger's connection with the Tommy Gun, used in a game about gangsters, established some relevance, even if remote and attenuated.³⁹ But in the second prong of the test, the court could find no evidence that any consumer was misled or purchased the game because of the Dillinger name.⁴⁰ Since the Dillinger estate could not point to any explicit misrepresentation, the court found in favor of EA.⁴¹

**VI. NO DOUBT v. ACTIVISION PUBLISHING, INC.,
122 CAL. RPTR. 3D 397.**

No Doubt's long-running dispute with Activision received a big boost this year from the California Court of Appeals. No Doubt licensed their images and selected songs for use in the game *Band Hero*, but the band now claims that Activision improperly used their likeness outside the scope of the licensing agreement by allowing players to "unlock" the band's virtual avatars to play any song in the game (including songs the band says they would never perform), allowing players to make the female lead singer sing in a male voice, and by allowing players to split the band up and have them perform individually.⁴² The Court of Appeals upheld the Superior Court's denial of Activision's motion to strike under the California anti-SLAPP statute,⁴³ finding that Activision did not sufficiently transform the virtual likenesses of the band enough to qualify for First Amendment protection.⁴⁴ Unlike the virtual football players in *Hart*, here the player could not modify the band's likeness at all.⁴⁵ The virtual avatars of the band members in the game look exactly like the band (the band even spent a day posing for motion-capture photography to make the virtual likenesses more realistic) and perform rock songs, which is exactly what the band does in real life.⁴⁶ Merely changing the location in which they perform, even to some fanciful

38. *Id.*

39. *Id.* at *4.

40. *Id.* at *8.

41. *Id.*

42. *No Doubt v. Activision Publ'g, Inc.*, 122 Cal. Rptr. 3d 397, 402 (Cal. Ct. App. 2011), rev. denied (June 8, 2011).

43. CAL. CIV. PROC. CODE § 425.16 (West) (providing that "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").

44. *No Doubt*, 122 Cal. Rptr. 3d at 411–12.

45. *Id.* at 410.

46. *Id.* at 410–11.

place such as the moon, does not sufficiently transform the avatars to qualify for protected speech.⁴⁷ Perhaps because of the favorable ruling for No Doubt, Adam Levine—the lead singer for Maroon 5—has filed a virtually identical suit in Los Angeles Superior Court.⁴⁸ Levine is alleging breach of contract, fraudulent inducement, unfair business practices, and violation of the common-law right of publicity.⁴⁹ A jury trial for No Doubt’s case has been scheduled for June, and No Doubt and Levine’s suits have been consolidated.⁵⁰

VII. *RUSSELL V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*

Ex-NBA star William Russell filed suit against the NCAA for using his likeness without his consent or compensation, and Russell also named EA as a defendant.⁵¹ Russell claims that EA used his image in the “Tournament of Legends” feature in an *NCAA Basketball* title.⁵² Russell’s suit will probably be consolidated with other pending lawsuits by former athletes against the NCAA and EA.⁵³

VIII. PATENT INFRINGEMENT

The technological evolution of video games has progressed exponentially since the introduction of Atari’s *Pong* in 1972. Games with only two moving, rectangular paddles and a single ball have given way to three-dimensional games which read body movements through a system of complex imbedded cameras and have no need for external controllers. While the technology may have evolved, one thing that has not changed in the 40 years since *Pong* was introduced is the accompanying presence of patent litigation. Just as Atari was the subject of a patent-infringement suit in 1974,⁵⁴ today’s video-game developers must also traverse a minefield of patent litigation in

47. *Id.* at 411.

48. Kenneally, *supra* note 25.

49. *Id.*

50. Eriq Gardner, Video Game Lawsuit Suggests Guns ‘N Roses Reunion Won’t Happen, *THE HOLLYWOOD REPORTER* (Dec. 23, 2011, 10:19 AM), *available at* <http://www.hollywoodreporter.com/thr-esq/video-game-lawsuit-guns-roses-axl-276170> (last visited Apr. 18, 2012).

51. Karen Gullo, Ex-Celtics Star Bill Russell Sues NCAA, Electronic Arts Over Image Use, *BLOOMBERG* (Oct. 6, 2011, 7:05PM), *available at* <http://www.bloomberg.com/news/2011-10-06/ex-celtics-star-bill-russell-sues-ncaa-for-antitrust-in-licensing-dispute.html> (last visited Apr. 18, 2012).

52. *Id.*

53. *Id.*

54. *Magnavox Co. v. Activision, Inc.*, No. C-82-5270-CAL, 1985 WL 9496 (N.D. Cal. Dec. 27, 1985), *aff’d*, 848 F.2d 1244, Nos. 86-1263, 86-1334, 1988 WL 44721 (Fed. Cir. May 9, 1988) (unpublished table decision).

bringing their games to the marketplace. The introduction of patent-holding companies and the harsh realities of a hugely competitive market have only amplified the danger. If the groundswell of patent litigation in 2011 is any indication, this minefield is set to become even more treacherous.

Among the most active participants in the video-game patent-litigation arena has been Walker Digital LLC. From January to June of 2011, this patent-holding company created by Jay Walker—the founder of Price-line.com⁵⁵—filed at least 15 suits involving more than 100 companies.⁵⁶ Walker Digital’s aggressiveness has prompted one online technology blog to lead with the headline, “Walker Digital Sues the Internet (almost).”⁵⁷ Among those in the holding company’s crosshairs include a veritable “Who’s Who” within the gaming industry: Activision, Blizzard, Zynga, Microsoft, Sony, and EA have all been listed as defendants.⁵⁸ The most prominent of these suits involve Walker Digital’s online-tournament patents using a “method[] of distributed electronic tournaments,” entitled “Database Driven Online Distributed Tournament System.”⁵⁹ Games implicated in this litigation series include *Madden NFL 11*, *Halo 3*, *Gears of War 2*, and *Aliens vs. Predator*.⁶⁰ These patents are broad enough to ensnare any online game that stores player information.⁶¹ With Walker claiming to have at least 400 issued and pending U.S. patents in its portfolio,⁶² its influence on the gaming landscape seems indomitable.

55. Complaint for Patent Infringement at 3, *Walker Digital, LLC v. Activision, Inc.*, No. 1:11-cv-00004 (D. Del. dismissed Mar. 26, 2012).

56. Walker Digital LLC Sues 2K Games (Again) PATENT ARCADE (Aug. 10, 2011, 9:08 AM), <http://www.patentarcade.com/2011/08/walker-digital-sues-2k-games-again.html> (last visited Apr. 18, 2012).

57. Walker Digital Sues the Internet (Almost), PATENT ARCADE (June. 23, 2011, 2:53 PM), <http://www.patentarcade.com/2011/06/walker-digital-sues-internet-almost.html> (last visited Apr. 18, 2012).

58. *Id.*

59. Complaint for Patent Infringement, Activision, *supra* note 55, at 3–4; Complaint for Patent Infringement at 5, *Walker Digital, LLC v. 2K Games, Inc.*, No. 1:11-cv-00368 (D. Del. filed April 25, 2011).

60. Complaint for Patent Infringement, 2K Games, *supra* note 59, at 7–9; *see also* Robert Van Arnam & Neil Magnuson, Walker Digital Enters the Game: Recent Trend of Patent Infringement Suits Against Activision, Blizzard, Microsoft, Electronic Arts & Other Video Game Companies, MARTINDALE.COM (June 2, 2011), http://www.martindale.com/education/article_Williams-Mullen_1291924.htm (last visited Apr. 18, 2012).

61. Van Arnam & Magnuson, *supra* note 60.

62. PATENT ARCADE, Walker Digital Sues the Internet, *supra* note 57.

Not to be outdone, however, another patent-holding company has also filed an impressive number of lawsuits.⁶³ Lodsys, a Texas-based patent company, has filed more than three dozen patent-infringement cases since 2011.⁶⁴ The Finnish game-maker Rovio, creator of the video game and mobile-phone app *Angry Birds*, is among the defendants.⁶⁵ The patent at issue in the Rovio case claims a method that would anticipate any game “allow[ing] players to pay for upgrades to new levels.”⁶⁶ This includes the ability to upgrade from the trial version to the fully paid version.⁶⁷ This case, and other similar cases involving European companies, are being closely watched by other European game developers and could have a chilling effect on the evolution of the international gaming landscape.⁶⁸ Indeed, some European developers are already pulling their apps from U.S. platforms.⁶⁹ In addition to this suit, Lodsys has also sent notices to individual game developers informing them of the infringement and encouraging them to license the technology from Lodsys.⁷⁰ But relief for video-game developers may be on the horizon. Apple, perhaps foreseeing the damage Lodsys’s tactics could inflict on its individual-developer-created mobile-app market, has sent its own cease-and-desist type of letter to Lodsys.⁷¹ Apple—who has a license with Lodsys—argues that since the developers are using its iOS platform to develop games, the developers have coverage under the Apple-Lodsys license agreement.⁷²

But patent-holding companies were not the only plaintiffs in this year’s patent-litigation field. The popularity of motion-sensing game systems such

63. See Complaint for Patent Infringement, *Lodsys, LLC v. Adidas Am., Inc.*, No. 2:11-cv-00283 (E.D. Tex. filed June 10, 2011); Complaint for Patent Infringement, *Lodsys, LLC v. Combay, Inc.*, No. 2:11-cv-00272 (E.D. Tex. filed May 31, 2011).

64. Ben Rooney, Patent Firm Sues Angry Birds Maker Rovio, WALL ST. J. TECHEUROPE (July 22, 2011, 3:26 PM), <http://blogs.wsj.com/tech-europe/2011/07/22/patent-firm-sues-angry-birds-maker-rovio/> (last visited Apr. 18, 2012).

65. Erik S. Syverson, Lodsys Sues Angry Birds Game Manufacturer for Patent Infringement, MILLER BARONDESS LLP (Aug. 1, 2011), available at <http://www.syversonlaw.com/blog/2011/08/lodsys-sues-angry-birds-game-manufacturer-for-patent-infringement.shtml> (last visited Apr. 18, 2012).

66. *Id.*

67. *Id.*

68. *Id.*; see also Rooney, *supra* note 64.

69. Rooney, *supra* note 64.

70. *Id.*

71. Erik Sherman, Apple Does Right By Its Developers. Will Google?, CBS MONEY WATCH (May 24, 2011, 4:12 PM), available at http://www.cbsnews.com/8301-505124_162-43450820/apple-does-right-by-its-developers-will-google/?tab=bnetdomain (last visited Apr. 18, 2012).

72. *Id.*

as Nintendo's Wii and Xbox's Kinect game console have proven popular targets for technology firms keen on protecting their intellectual property.⁷³ Impulse Technology, an Ohio-based company, has sued Microsoft claiming the Xbox infringes at least seven of its patents.⁷⁴ The company owns patents covering "technology that tracks users' movements," thus allowing video games to dispense with a controller.⁷⁵ While Microsoft is the maker of the infringing system, Impulse also included various video-game developers such as EA and Sega in its suit.⁷⁶ Games implicated in this suit include *Kinect Sports*, *Sports Active 2.0*, *Virtua Tennis 4*, *Biggest Loser: Ultimate Workout*, and *Zumba Fitness*.⁷⁷ Another technology firm, ThinkOptic, has sued Nintendo, claiming that Nintendo's Wii Remote infringes on its "Electronic equipment for handheld vision based absolute pointing system" patent.⁷⁸ ThinkOptic alleges that almost the entire Wii gaming system infringes the patent.⁷⁹ In addition to Nintendo, ThinkOptic has also listed retailers such as GameStop, RadioShack, and JCPenney as defendants.⁸⁰

In the four decades since Atari introduced *Pong* to the world, much has changed in the gaming industry. The technology itself has exponentially evolved, and the advent of social networking, coupled with the seemingly endless array of new wireless markets, has changed the landscape beyond recognition. In addition, breakthroughs in telecommunication have made the world a much smaller place. But if the trends of 2011 are any indication, one thing remains constant for video-game developers—the ever-present threat of patent litigation.

73. See Complaint for Patent Infringement, *Impulse Tech. Ltd. v. Microsoft Corp.*, No. 1:11-cv-00586 (D. Del. filed July 1, 2011).

74. Complaint for Patent Infringement, *Impulse Tech.*, *supra* note 73, at 4–5; see also New Case: Microsoft Sued Over Kinect & Motion Tracking Patent, PATENT ARCADE (July 22, 2011, 9:38 AM), <http://www.patentarcade.com/2011/07/new-case-microsoft-sued-over-kinect-and.html> (last visited Apr. 18, 2012).

75. PATENT ARCADE, New Case, *supra* note 74.

76. Complaint for Patent Infringement, *Impulse Tech.*, *supra* note 73, at 2–3.

77. *Id.* at 6–7.

78. Wavit Remote Maker Sues Nintendo Over Wii Remote, GAMEPOLITICS.COM (Sept. 8, 2011), <http://gamepolitics.com/2011/09/08/wavit-remote-maker-sues-nintendo-over-wii-remote> (last visited Apr. 18, 2012); Jordan Crook, Nintendo Gets Sued Over the Wii, TECHCRUNCH.COM (Sept. 7, 2011), <http://techcrunch.com/2011/09/07/nintendo-gets-sued-over-the-wii/> (last visited Apr. 18, 2012).

79. Crook, *supra* note 78.

80. *Id.*

IX. COPYRIGHT & TRADEMARK INFRINGEMENT

As with most areas of video game litigation of 2011, social-app companies led the pack in copyright- and trademark-infringement cases this year. Zynga particularly distinguished itself, as both a plaintiff and a defendant, and was responsible for summing up the nature of such litigation when it stated in its complaint against Vostu, “[w]hile imitation may be the sincerest form of flattery, the copying of valuable intellectual property rights is theft.”⁸¹ Yet, while prolifically litigious this year, Zynga and its opponents were by no means the only players on the copyright and trademark field.⁸² Industry stalwart Atari made its presence known, as did one particularly famous golf course.

X. THE ZYNGA CASES

A. *SocialApps, LLC v. Zynga, Inc.*, No. 4:11-cv-04910 (C.D. Cal. filed June 6, 2011).

In what seems to be a textbook example of “be careful what you disclose,” SocialApps has sued Zynga claiming Zynga’s hugely successful *FarmVille* was actually stolen from SocialApps during a due-diligence exchange between the two companies.⁸³ According to the complaint, as early as 2008, SocialApps developed *myFarm*, a social-networking game in which players create and manage their own virtual farms through a system of “*myFarm* Credits.”⁸⁴ The game was introduced onto Facebook around November 2008.⁸⁵ In May 2009, Zynga approached SocialApps about acquiring the rights and source code to *myFarm*.⁸⁶ After signing a confidentiality agreement, SocialApps gave Zynga the source code.⁸⁷ Shortly thereafter, Zynga broke off communications, and one month later released the hugely successful *Farmville*.⁸⁸ SocialApps claims Zynga stole the source code

81. Complaint for Federal Copyright Infringement at 1, *Zynga, Inc. v. Vostu USA, Inc.*, No. 5:11-cv-02959 (N.D. Cal. dismissed Dec. 8, 2011).

82. See Complaint for Copyright Infringement, Trademark Infringement, Unfair Competition, & California Unfair Competition, Demand for a Jury Trial, *Atari Interactive, Inc. v. Wan*, No. 2:11-cv-05224 (C.D. Cal. Dismissed Feb. 2, 2012) [hereinafter Complaint for Copyright Infringement, Atari]; Complaint, *Augusta Nat’l, Inc. v. CustomPlay Games Ltd.*, No. 1:11-cv-00119 (S.D. Ga. filed Aug. 5, 2011).

83. Complaint for Damages at 4–5, *SocialApps, LLC v. Zynga, Inc.*, No. 4:11-cv-04910 (C.D. Cal. filed June 17, 2011).

84. *Id.* at 3–4.

85. *Id.* at 3.

86. *Id.* at 4.

87. *Id.*

88. Complaint for Damages, *SocialApps*, *supra* note 83, at 4–5.

under the “ruse of ‘due diligence.’”⁸⁹ SocialApps is suing for copyright infringement and breach of a written contract.⁹⁰

B. *Zynga, Inc. v. Vostu USA, Inc.*, No. 5:11-cv-02959 (N.D. Cal. dismissed Dec. 8, 2011).

Showing it can use both sides of a courtroom effectively, Zynga became a plaintiff in June by suing the Brazilian company Vostu for copyright infringement.⁹¹ In its complaint, Zynga claims that, not only did Vostu brazenly copy Zynga’s games, but Vostu copied Zynga’s entire business model as well, including Zynga’s mission statement, philanthropic ventures, marketing material, and company website design.⁹² In its complaint, Zynga lays out side-by-side screen shots and launch dates of its games and compares them to Vostu.⁹³ Included among the comparisons are Zynga’s *Farmville* (Vostu’s *MiniFazenda* or “Mini Farm”), *Zynga Poker* (Vostu’s *Vostu Poker*), *Café World* (Vostu’s *Café Mania*), *PetVille* (Vostu’s *Pet Mania*), and *CityVille* (Vostu’s *Mega City*).⁹⁴ Zynga also claims Vostu even copied inadvertent mistakes made by Zynga developers.⁹⁵ Perhaps aware of similar lawsuits pending against Zynga, Vostu issued the following statement in response to the suit, “Zynga has been accused of copying so many games that they’ve sadly lost the ability to recognize games like ours that are chock full of original content and have been independently created.”⁹⁶ After issuing that statement, however, Vostu perhaps bowed to the inevitable and settled with Zynga in December 2011, in exchange for cash and a promise to modify four of Vostu’s games.⁹⁷

89. *Id.* at 4.

90. *Id.* at 5-6, 8-9.

91. Complaint for Federal Copyright Infringement, Zynga, *supra* note 81.

92. *Id.* at 7-9.

93. *Id.* at 11.

94. *Id.*

95. *Id.* at 19-20.

96. Michael Arrington, Zynga v. Vostu: Vostu Uses the “I Know You Are But What Am I” Defense, *TECHCRUNCH.COM* (June 16, 2011), <http://techcrunch.com/2011/06/16/zynga-v-vostu-vostu-uses-the-i-know-you-are-but-what-am-i-defense/> (last visited Apr. 18, 2012).

97. Matt Lynley, Vostu Pays Zynga Cold Hard Cash to Settle Theft Allegations, *BUS. INSIDER* (Dec. 6, 2011), http://articles.businessinsider.com/2011-12-06/tech/30480441_1_vostu-frivolous-lawsuit-zynga-and (last visited Apr. 18, 2012).

C. *The Learning Co. v. Zynga, Inc.*, No. 1:11-cv-10894 (D. Mass. filed May 18, 2011).

This year, SocialApps was not the only company to accuse Zynga of copying one of their games after meeting to discuss partnership possibilities. In a similar case, The Learning Company has sued Zynga for trademark infringement of its game *The Oregon Trail*.⁹⁸ The Learning Company developed *The Oregon Trail* in 1971.⁹⁹ Since that time, this successful game has, according to the company's complaint, been a staple in homes and classrooms for over three decades.¹⁰⁰ The company wanted to produce a Facebook version of the game, so it approached Zynga with the possibility of a partnership.¹⁰¹ Unlike SocialApps, The Learning Company did not divulge any source code at this meeting.¹⁰² But they did produce detailed information on the brand, history, sales, and development plans of the game.¹⁰³ As with SocialApps, the deal between The Learning Company and Zynga fell through.¹⁰⁴ This prompted The Learning Company to partner with another game developer, Blue Fang, to produce the Facebook version of the game.¹⁰⁵ The Facebook version was released in February 2011 and was an immediate success.¹⁰⁶ Not long afterward, Zynga informed the public via its website that it intended to launch its own "Oregon Trail" game on May 30, 2011.¹⁰⁷ In bolstering their claim for willful trademark infringement and unfair competition, The Learning Company uses Zynga's CEO Mark Pincus's own words against him.¹⁰⁸ The complaint details Zynga's reputation as a willful infringer of intellectual-property rights and even quotes the CEO as admitting "Zynga has engaged in 'every horrible thing in the book' to generate revenue."¹⁰⁹ The Learning Company is asking for injunctive relief as well as treble damages.¹¹⁰

98. Original Complaint at 15, *The Learning Co. v. Zynga, Inc.*, No. 1:11-cv-10894 (D. Mass. filed May 18, 2011).

99. *Id.* at 5.

100. *Id.* at 2.

101. *Id.*

102. See Complaint for Damages, SocialApps, *supra* note 83, at 4; Original Complaint, *The Learning Co.*, *supra* note 98, at 2.

103. Original Complaint, *The Learning Co.*, *supra* note 98, at 2.

104. *Id.*

105. *Id.*

106. *Id.* at 2–3.

107. *Id.* at 3.

108. Original Complaint, *The Learning Co.*, *supra* note 98, at 3.

109. *Id.*

110. *Id.* at 20.

**XI. *AUGUSTA NAT'L IMC., v. CUSTOMPLAY GAMES, LTD.,*
No. 1:11-CV-00119 (S.D. GA. FILED AUG. 5, 2011).**

Augusta National—the owner of the Augusta National Golf Club, home of the Masters Tournament—is suing European game developer CustomPlay Games for trademark and trade-dress infringement.¹¹¹ In the complaint, Augusta National claims the game company's *CPG Golf* incorporates several of the famous golf club's most prominent features, including Amen Corner, Hogan Bridge, and the Club House.¹¹² In addition, the game also uses the Masters "Map and Flag Design" trademark without permission.¹¹³ Upon first learning that CustomPlay was using these features in its game, Augusta National sent a cease-and-desist letter to Custom Play, who initially denied the presence of the game on their website.¹¹⁴ After a second letter was sent, however, CustomPlay promised to remove the features.¹¹⁵ When Augusta National discovered the features were not removed, they contacted CustomPlay again, at which time the company responding by denying any infringing activity.¹¹⁶ As a result, Augusta National brought suit against CustomPlay.¹¹⁷ A similar Fifth Circuit case involving Pebble Beach Golf Links held that the design of a golf course is not functional, and is therefore subject to trade dress protection.¹¹⁸ However, since Augusta National's case was filed in the Eleventh Circuit, not the Fifth Circuit, the *Pebble Beach* ruling is merely persuasive.¹¹⁹

**XII. *ATARI INTERACTIVE, INC. v. WAN*, No. 2:11-CV-05224
(C.D. CAL. DISMISSED FEB. 2, 2012).**

Pirating continued to be a problem for game developers in 2011. Among the most prominent was Atari's \$30 million suit against video-game merchandise distributor Tommo Inc. claiming it sold knockoff copies of Atari's Flashback 2 console.¹²⁰ In the suit, originally filed in a California

111. Complaint, *Augusta Nat'l*, *supra* note 82, at 1–2.

112. *Id.* at 8.

113. *Id.*

114. *Id.* at 8–9.

115. *Id.* at 9.

116. Complaint, *Augusta Nat'l*, *supra* note 82, at 9.

117. *Id.* at 9–10.

118. *Pebble Beach Co. v. Tour 18 I Ltd.*, 155 F.3d 526, 539–40 (5th Cir. 1998).

119. Daniel Diskin, *Augusta National Brings Lawsuit Over Video Game That Simulates Golf Course*, COPYMARKBLOG.COM (Aug. 8, 2011), <http://copymarkblog.com/2011/08/08/augusta-national-brings-lawsuit-over-video-game-that-simulates-golf-course/> (last visited Apr. 18, 2012).

120. Complaint for Copyright Infringement, *Atari*, *supra* note 82, at 6; *see also* Frank Cifaldi, *Bootleg Consoles Attract Lawsuit From Atari*, GAMASUTRA

district court, Atari alleges the knockoffs differed from Atari's originals only through slight cosmetic differences, such as font variations on the internal circuit board and a minor color difference on the unit's face.¹²¹ Atari also alleges the knockoffs were sold through both online retailers, such as Amazon.com, and brick-and-mortar stores, such as Kroger and Ralphs grocery stores.¹²² The company is asking for up to \$150,000 for each infringing copy.¹²³

XIII. CONTRACTUAL DISPUTES

With the current cost of developing a successful game title, and the potential financial gain from a commercially-successful title, there is little wonder why contractual disputes are among the most high-stakes litigation in the video game industry, with hundreds of millions of dollars on the line. Litigation in 2011 included significant movement in the faceoff between two of the industry's most successful game designers and the company for which they once worked, a claim for royalties from one of the most successful game franchises of all time, and potential showdowns between music superstars and game companies that need those stars to sell titles. In particular, EA finds itself enmeshed in two cases that, given the stakes of the litigation, could have serious financial ramifications for the company if they are unsuccessful.

XIV. *ANTONICK V. ELECTRONIC ARTS, INC.*, No. 3:11-CV-01543 (N.D. CAL. FILED MARCH 30, 2011).

Robin Antonick filed suit against EA over the wildly successful *Madden* series, for which he created groundbreaking code that allowed the game, among other things, to utilize eleven-man teams instead of the five-man teams to which software at the time restricted the game, thus vastly improving the realism of the game.¹²⁴ His work led to a series of employment contracts, which culminated in a 1986 contract that requires EA to pay Antonick royalties "on not only the versions of the Madden game developed by him but also any derivative works and any works 'derived' from derivative

(July 6, 2011), http://www.gamasutra.com/view/news/35697/Bootleg_Consoles_Attract_Lawsuit_From_Atari.php (last visited Apr. 18, 2012).

121. Complaint for Copyright Infringement, Atari, *supra* note 82, at 6; Cifaldi, *supra* note 120.
122. Complaint for Copyright Infringement, Atari, *supra* note 82, at 7, 9; Cifaldi, *supra* note 120.
123. Complaint for Copyright Infringement, Atari, *supra* note 82, at 7; Cifaldi, *supra* note 120.
124. Complaint for Breach of Contract and Fraud at 1, 4–5, *Antonick v. Elec. Arts, Inc.*, No. 3:11-cv-01543 (N.D. Cal. Filed March 30, 2011).

works.”¹²⁵ According to the lawsuit, this contract was modified in subsequent years, but never set aside.¹²⁶ Antonick claims EA deceived him regarding the derivation of the current generation of Madden games via affirmative and fraudulent misrepresentation.¹²⁷ According to the suit, EA allegedly shuttled development of the Sega version of the series to a new development company once they realized that their use of actual NFL rosters would allow them to make minimal modifications to the game, yet release a new version each year to substantially increase profits.¹²⁸ Antonick alleges that once he became aware of the new development, he was told that it was to be a different style of game, not using or referencing any of his intellectual property.¹²⁹ Antonick claims that he was unaware that the current generation was derived from the same software he developed until the statements made by EA founder Trip Hawkins during the publicity surrounding 20th anniversary of the *Madden* series in 2009.¹³⁰ Antonick also claims that the game engine that he developed and that drives the *Madden* games also likely underpins other EA titles, such as hockey games and the *NCAA Football* franchises.¹³¹ After Antonick filed suit, EA filed a motion to dismiss based on the statute of limitations.¹³² The court denied the motion to dismiss, finding that Antonick’s claim of fraudulent concealment plausible, and that the statute did not begin to run until Antonick’s discovery in 2009.¹³³ According to John Blackburn, an attorney and professor of business law at Ohio State University, the case should be relatively straightforward, as “[t]he defendant will probably be asked to surrender internal programming code to the court, and if the plaintiff can link anything from that code to his original product, there should be no question as to the defendant’s liability.”¹³⁴ But even though the resolution of the case may be simple, the ramifications of a loss for EA could be severe, as the potential percentage of royalties range from

125. *Id.* at 1.

126. *Id.* at 8, 19.

127. *Id.* at 1, 19–20.

128. *Id.* at 16–17.

129. Complaint for Breach of Contract and Fraud at 17, *Antonick v. Elec. Arts, Inc.*, No. 3:11-cv-01543.

130. *Id.* at 1–2, 21–22.

131. *Id.* at 23.

132. Order Denying Motion to Dismiss at 1, *Antonick v. Elec. Arts, Inc.*, No. 3:11-cv-01543, 2011 WL 4501324 at *1 (N.D. Cal. filed Sept. 27, 2011).

133. *Id.* at 6–7, 9.

134. Darleen Hartley, Maddengate: EA Sued For Duping A Game Franchise Creator, *BRIGHT SIDE OF NEWS* (Apr. 5, 2011), <http://www.brightsideofnews.com/news/2011/4/5/maddengate-ea-sued-for-duping-a-game-franchise-creator.aspx> (last visited Apr. 18, 2012).

0.5% up to 15%, based on the time frame.¹³⁵ It is estimated that the *Madden* series has garnered as much as \$4 billion in profits for EA.¹³⁶

XV. *GATE FIVE, LLC v. BEYONCÉ KNOWLES-CARTER*, No. 0651094-2011 (N.Y. SUP. FILED APRIL 29, 2011).

Software developer Gate Five filed suit against the popular singer Beyoncé for breach of contract.¹³⁷ While they have yet to file an official complaint due to confidentiality issues, Gate Five alleges that they entered into a licensing agreement with Beyoncé for a proposed game entitled *Starpower: Beyoncé*.¹³⁸ After negotiating “lavish compensation terms,” Gate Five alleges that Beyoncé made “an extortionate demand for entirely new compensation terms she suddenly decided she wanted.”¹³⁹ Gate Five alleged that the financier balked, finding Beyoncé “too erratic to do business with,” and that Beyoncé then pulled out of the agreement. Gate Five alleges this forced them to lay off seventy employees and cost them \$6.7 million in money already invested in development of the game, as well as over \$100 million in potential profits.¹⁴⁰ Gate Five seeks to recover the entire monetary amount, as well as to enjoin Beyoncé from commercially associating with any other video game.¹⁴¹

XVI. *WEST v. ACTIVISION PUBLISHING, INC.*, No. SC107041 (CAL. SUPER. CT. L.A. CNTY. FILED MAR. 3, 2010).

In 2002, Activision acquired Infinity Ward Studios, founded by West and Zampella, which created two of the most valuable gaming titles in history, the *Modern Warfare* and *Call of Duty* titles for Microsoft’s Xbox 360.¹⁴² West and Zampella were given employment agreements that saw them remain co-heads of the studio, and they were also given a Memorandum of Understanding granting the pair creative direction over Infinity Ward and further compensation for developing *Modern Warfare 2*.¹⁴³ The game

135. *Id.*

136. *Id.*

137. Summons With Notice at 1, *Gate Five, LLC v. Beyoncé Knowles-Carter*, No. 0651094-2011, 2011 WL 1572174 (N.Y. Sup. Ct. Apr. 26, 2011).

138. *Id.* at 2.

139. *Id.*

140. *Id.*

141. *Id.*

142. 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 5–6, *West v. Activision Publ’g, Inc.*, No. SC107041 (Ca. Super. Ct. L.A. Cnty. Mar. 3, 2010).

143. *Id.* at 5, 7–8.

was released in 2009 and royalty payments were scheduled to begin March 31, 2010.¹⁴⁴ However, on March 1, 2010, Activision terminated West and Zampella's employment, citing insubordination.¹⁴⁵ West and Zampella sued, claiming that Activision had begun a pretextual investigation in February in order to create a basis for terminating the pair so as to avoid having to make the royalty payments.¹⁴⁶ Activision countersued, claiming the terminations were the result of collusive conduct between West and Zampella and rival studio EA.¹⁴⁷ Activision eventually added EA to the suit, claiming \$400 million in contract interference.¹⁴⁸ Additionally, several current and former Infinity Ward employees sued Activision, claiming they were not paid their bonuses or royalties for work on *Modern Warfare 2*.¹⁴⁹ Those claims have been consolidated into West and Zampella's case.¹⁵⁰ The case saw significant movement in 2011, with the trial judge denying EA's motion for summary judgment against Activision in March and denying Activision's motion for summary judgment against West and Zampella in June.¹⁵¹ This high-stakes case seems destined to go to trial unless the parties can work out a settlement, but given the contentiousness of the case, that seems unlikely.

XVII. *SILICON KNIGHTS, INC. v. EPIC GAMES INC.*, No: 5:07-CV-275 (E.D.N.C. FILED JULY 17, 2007).

In 2007, Silicon Knights first filed suit against Epic Games for fraudulent misrepresentation.¹⁵² The dispute arose regarding licensing of Epic's game engine Unreal Engine 3 (UE3); Silicon Knights entered into an agreement with Epic in 2005 to use the engine as a base for its own game, *Too*

144. *Id.* at 8, 10.

145. *Id.* at 10.

146. *Id.* at 9–10.

147. Ben Gilbert, Activision Blasts West and Zampella in Countersuit, JOYSTIQ (Apr. 9, 2010, 3:48 PM), <http://www.joystiq.com/2010/04/09/activision-blasts-west-and-zampella-in-countersuit> (last visited Apr. 18, 2012).

148. Edvard Pettersson, Electronic Arts Must Defend \$400 Million Activision Suit, Judge Says, BLOOMBERG (Dec. 21, 2011, 11:01 PM), available at <http://www.bloomberg.com/news/2011-12-21/electronic-arts-asks-judge-to-dismiss-400-million-activision-claims.html> (last visited Apr. 18, 2012).

149. *Id.*

150. *Id.*

151. John Gaudiosi, Activision's Call of Duty and Electronic Arts' Madden Franchises Face Major Lawsuits, FORBES (June 18, 2011, 10:33 PM), available at <http://www.forbes.com/sites/johngaudiosi/2011/06/18/activisions-call-of-duty-and-electronic-arts-madden-franchises-face-major-lawsuits/> (last visited Apr. 18, 2012).

152. Complaint at 1, *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-275, 2007 WL 7652276 (E.D.N.C. filed July 18, 2007).

Human.¹⁵³ However, Silicon Knights claims numerous flaws in Epic's UE3 which eventually forced it to abandon the engine and design its own game engine called SKE.¹⁵⁴ As a consequence, this forced redesign delayed the release of *Too Human* by nearly two years.¹⁵⁵ Silicon Knights sued for fraudulent inducement, negligent representation, violations under the Unfair and Deceptive Trade Practices Act, and common-law unfair competition.¹⁵⁶ In what initially seemed like a victory for Silicon Knights, a North Carolina federal court ruled in March 2011 that a jury could hear the case.¹⁵⁷ But the court has since ruled against the company in one crucial area—damages.¹⁵⁸ Using the expert testimony of Terry Lloyd, a Certified Public Accountant and Chartered Financial Analyst, Silicon Knights demanded more than \$63 million in lost profits and damages.¹⁵⁹ In arriving at this number, Mr. Lloyd used various financial theories including lost income and royalties brought on by the delay in development of *Too Human*, as well lost profits of ancillary sales and sales of possible game sequels.¹⁶⁰ Epic filed a motion to exclude Mr. Lloyd's testimony as too speculative, which the court granted on December 22, 2011.¹⁶¹ While the trial continues, Silicon Knights must now come up with a less speculative, and probably less profitable, theory for damages.

XVIII. OTHER CASES OF NOTE

A. *In re Sony PS3 Other OS Litigation*, C 10-1811 RS, 2011 WL 6117892 (N.D. Cal. Dec. 8, 2011).

This case, previously *Ventura v. Sony Computer Entertainment America, Inc.*, was a class-action suit against Sony on behalf of all purchasers of Sony's PlayStation 3 system (PS3) between November 2006 and March 2010.¹⁶² The complaint alleges that one of the marketing devices employed

153. See Order on Motion for Miscellaneous Relief at 2, Silicon Knights, Inc., No. 5:07-CV-275-D (E.D.N.C. Dec. 22, 2011).

154. *Id.*

155. *Id.*

156. *Id.* at 3.

157. Epic Games vs. Silicon Knights: The saga continues., IGN.COM (March 31, 2011), http://xbox360.ign.com/articles/115/1158763p1.html?RSSwhen2011-03-31_145500&RSSid=1158763 (last visited Apr. 18, 2012).

158. Order on Motion for Miscellaneous Relief at 44-45, Silicon Knights, Inc., No. 5:07-CV-275-D (E.D.N.C. Dec. 22, 2011).

159. *Id.* at 4, 17.

160. *Id.* at 4.

161. *Id.* at 43-45.

162. Complaint at 2, *Ventura v. Sony Computer Entm't Am., Inc.*, No. CV 10-1811 EMC, 2011 WL 6117892, (N.D. Cal. filed Apr. 27, 2010).

by Sony was the ability to install another operating system (OS)—such as Linux—on the PS3, enabling it to function more like a personal computer.¹⁶³ In 2009, Sony introduced a newer model of the PS3 that eliminated the Other OS feature, but assured owners of older models that they would continue to have access to the feature.¹⁶⁴ But in 2010, Sony introduced “firmware update 3.21,” which disabled the Other OS feature.¹⁶⁵ While users were not required to download the update, users who chose not to download it would not be able to access the PlayStation Network (PSN), and would not be able to play any future game or movie that required the update.¹⁶⁶ This suit was filed, alleging that Sony breached the express and implied warranty, alleging that access to the PSN is a fundamental feature of the PS3.¹⁶⁷ Sony filed a motion to dismiss for failure to state a claim, which was granted in December 2011.¹⁶⁸ The court differentiated between a right to the features of the product (the PS3) and the right to a service (the PSN) offered by Sony.¹⁶⁹ The court notes that owners who did not download the update would still have a fully functional device capable of playing games and watching movies.¹⁷⁰ The court points out that a Hobson’s choice, while difficult to make, is still a choice, and thus Sony did not disable access to the PSN, but rather the owner of the PS3 did so by affirmatively choosing not to download update 3.21.¹⁷¹ Sony did not unilaterally remove a fundamental feature of the hardware; it simply imposed a unilateral requirement for continued access to the PSN.¹⁷² In order to prevail, plaintiffs must show a legal entitlement of continued access to the PSN that Sony violated, which the court found that the plaintiffs failed to do.¹⁷³

B. *Fineman v. Sony Network Entertainment International, LLC*, No. 3:2011-cv-05680 (N.D. Cal. filed Nov. 28, 2011).

In September 2011, likely in response to the suits filed over the massive data breach on the PlayStation Network (PSN), Sony changed the PSN terms of service (TOS) requirements, acceptance of which is mandatory for access

163. *In re Sony PS3 Other OS Litig.*, 2011 WL 6117892 at *1 (N.D. Cal. Dec. 8, 2011).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *3–5.

168. *In re Sony PS3 Other OS Litig.*, 2011 WL 6117892, at *6.

169. *Id.* at *3.

170. *Id.*

171. *Id.* at *2–3.

172. *d.* at *3.

173. *In re Sony PS3 Other OS Litig.*, 2011 WL 6117892, at *4.

to the PSN.¹⁷⁴ The new TOS requires users to submit to binding arbitration in place of such suits.¹⁷⁵ In November, a class-action suit was filed in California challenging the change, alleging unfair business practices in forcing consumers to choose between the online service they paid for as part of their hardware purchase or giving up their right to sue.¹⁷⁶ The suit says that Sony effectively hid the clause near the end of a twenty-one page document viewable only through the PS3, and they did not provide an easily viewable version of the form online, as they had in the past.¹⁷⁷ Moreover, while the complaint notes that it is possible to opt out of the provision regarding class-action suits, it can only be done in writing within thirty days, and emails, phone calls, or online forms will not be accepted.¹⁷⁸ This suit will be closely watched by Microsoft and EA, who enacted similar clauses in their respective TOS's shortly after Sony did.¹⁷⁹ It will be interesting to see the outcome of the suit, which was filed shortly before the decision in *In re Sony PS3 Other OS Litigation*, given the support the Supreme Court lent to mandatory arbitration clauses in 2011.¹⁸⁰

C. *Mitchell v. Sony Computer Entertainment America, LLC*, No. 11-cv-03601 (C.D. Cal. filed April 27, 2011); *Cupp v. Sony Computer Entertainment America, LLC*, No. 11-cv-03627 (C.D. Cal. filed April 27, 2011).

These two complaints, each filed individually but as class actions on behalf of other consumers, bring claims of negligence, breach of contract to a third-party beneficiary, and breach of implied contract against Sony for the failure to adequately safeguard personal information.¹⁸¹ The complaint stems

174. Mike Fahey, *New PlayStation Network Terms of Service Include A No Suing Sony Clause*, KOTAKU (Sep. 15, 2011, 1:30 AM), <http://kotaku.com/5840517/new-playstation-network-terms-of-service-include-a-no-suing-sony-clause> (last visited Apr. 18, 2012).

175. *Id.*

176. Brendan Sinclair, *New PSN Terms Intended To Limit Class-Action Lawsuits Result In A Class-Action Lawsuit Alleging Unfair Business Practices*, GAMESPOT UK (Dec. 19, 2011, 11:23 PM), <http://uk.gamespot.com/news/sony-sued-over-terms-of-service-update-6347852> (last visited Apr. 18, 2012).

177. *Id.*

178. *Id.*

179. *See* Luke Plunkett, *Now Microsoft Wants To Stop You Taking Them To Court*, KOTAKU (Dec. 7, 2011, 1:00 AM), <http://kotaku.com/5865797/now-microsoft-wants-to-stop-you-taking-them-to-court> (last visited Apr. 18, 2012).

180. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743 (2011) (holding that a California state law that disallowed mandatory binding arbitration clauses was preempted by the Federal Arbitration Act).

181. Complaint for Negligence, Breach of Contract to a Third-Party Beneficiary, and Breach of Implied Contract at 2, *Mitchell v. Sony Computer Entm't Am.*,

from the illegal data breach of Sony's online PlayStation Network (PSN) between April 17, 2011 and April 19, 2011, in which personal information and possibly credit card numbers of seventy-seven million users was stolen.¹⁸²

XIX. CONCLUSION

Gaming litigation in 2011 demonstrated the importance of video games as a cultural medium and an economic force. The creative freedom now enjoyed by game designers is rivaled only by the ever-increasing costs of developing a successful game franchise. Litigation involving social media underscored the growing influence of social media to the game industry, and the integration between video games and sites like Facebook will only continue to grow. Looking ahead, 2012 is shaping up to be an even more important year, as several of the cases that experienced significant movement in 2011 will likely be decided, and the outcome of those decisions will have an enormous effect on several popular titles.

LLC, No. 11-cv-03601 (C.D. Cal. April 27, 2011); Complaint for Negligence, Breach of Contract to a Third-Party Beneficiary, and Breach of Implied Contract at 2, *Cupp v. Sony Computer Entm't Am., LLC*, No. 11-cv-03627 (C.D. Cal. April 27, 2011).

182. Liana B. Baker, *Sony PlayStation Suffers Massive Data Breach*, REUTERS (Apr. 26, 2011, 7:36 PM), available at <http://www.reuters.com/article/2011/04/26/us-sony-stoldendata-idUSTRE73P6WB20110426> (last visited Apr. 18, 2012).