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2012 Video Game Industry Litigation Review

*Tanner Robinson**

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As far as significant gaming law developments are concerned, 2011 was a tough act to follow.¹ Last year a new paradigm emerged—courts applied the test set forth in *Hart v. Electronic Arts, Inc.* to lawsuits involving celebrities' publicity rights in video games,² and the Supreme Court validated a new art form in *Brown v. Entertainment Merchants Association*.³ While not new in 2012, an important trend certainly continued in a significant way: the video game industry continued to become more mainstream.⁴ As video games continue to cross demographic lines and become more ubiquitous, production companies begin to resemble those in other industries. As a result of risk-focused business decisions and industry growth, many of last year's contentious lawsuits have settled.

As the scope of a business expands, the variety of its contracts tends to expand as well. Video game companies faced everything from old-fashioned employment disputes to celebrity licensing deals gone awry. While the video game market continued to expand, intellectual property (IP) litigation—initiated by competitors and non-practicing entities (NPEs) alike—plagued gaming companies. The well-known threat of IP infringement claims affected the largest players, and even the smallest mobile app startups proved vulnerable to NPE's troll-like claims. Plaintiffs discovered new IP mediums through which to litigate; some even taking pages from old IP portfolios to find new defendants.

Slow economic growth negatively impacted nearly every gaming company. The shift to less profitable, yet more popular, mobile gaming has perpetuated the problem. This trend could explain why some gaming companies are beginning to litigate against competitors in more ways and on a greater scale than ever before. Likewise, the evolution of the industry to one popu-

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1. See Kent Jordan & Robert Wilkinson, Comment, *A Review of 2011 Video Game Litigation and Selected Cases*, 15 SMU SCI. & TECH. L. REV. 271 (2012).

2. See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 776 (D.N.J. 2011).

3. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2731 (2011).

4. See Ryan Winslett, *Are Video Games Mainstream Yet?*, JOYSTICKDIVISION.COM (Nov. 4, 2011, 12:00 PM), http://www.joystickdivision.com/2011/11/are_video_games_mainstream_yet.php.

lated with an increasing number of businesspeople and investors could explain why more of these suits settled out of court.

I. PATENT INFRINGEMENT

In 2012, the video game industry seemed to avoid the mass attacks from NPEs that characterized 2011. However, NPEs are still pressuring some major players. Several cases between practicing entities have threatened foundations of the industry. Independent developers and startups usually avoid major patent traps; however, giants like Nintendo and Microsoft have been consistently dragged into the courtroom over their console technologies, sometimes at the mercy of smaller technology companies. Video game litigation in 2012 was comprised of a collection of suits that threatened Xbox, iPhone, and every gadget in-between.⁵ Consequently, wise counsel must clear new technologies early to avoid lengthy litigation.

A. *Microsoft Corp. v. Motorola, Inc.*⁶

In 2010, after acquiring Motorola, Google flexed its muscle and sued Microsoft and Apple over their H.264 video compression and wireless patents.⁷ After making initial headway with the International Trade Commission (ITC), the Federal Trade Commission (FTC) began an antitrust investigation into Google's conduct, and federal district judges denied Google's injunction petitions against the Xbox and other products.⁸ The Xbox's fate seems somewhat secure since Google recently dropped the video-encoding patents from the investigation.⁹ This came on the heels of the settlement resulting from the FTC's antitrust investigation, which ruled that Google must cease seeking

5. See Jordan & Wilkinson, *supra* note 1, at 277–80.

6. 696 F.3d 872 (9th Cir. 2012).

7. *Mortorola*, No. 2:10-cv-01823-JLR (W.D. Wash. Nov. 9, 2012), ECF No. 1; Steven Musil, *ITC Judge Recommends Banning Xbox Imports*, CNET NEWS (May 22, 2012, 10:55 PM), http://news.cnet.com/8301-1023_3-57439737-93/itc-judge-recommends-banning-xbox-imports/.

8. Certain Gaming & Entm't Consoles, Related Software, & Components Thereof, Inv. No. 337-TA-752 (Dec. 17, 2010) (Notice of Investigation); Karen Gullo, *Motorola Mobility Loses Appeal in Microsoft Xbox Lawsuit*, BLOOMBERG (Sept. 28, 2012, 7:59 PM), <http://www.bloomberg.com/news/2012-09-28/motorola-mobility-loses-appeal-in-microsoft-xbox-lawsuit.html>; Miguel Helft, *Google Confirms F.T.C. Antitrust Inquiry*, N.Y. TIMES (June 24, 2011, 1:59 PM), <http://bits.blogs.nytimes.com/2011/06/24/google-confirms-f-t-c-antitrust-inquiry/>.

9. Certain Gaming & Entm't Consoles, Related Software, & Components Thereof, Inv. No. 337-TA-752, USITC Pub. 52 (Jan. 11, 2013) (Initial Recommendation); Steven Musil, *Google Withdraws ITC Patent Claims against Microsoft*, CNET NEWS (Jan. 8, 2013, 7:38 PM), http://news.cnet.com/8301-1023_3-57562922-93/google-withdraws-itc-patent-claims-against-microsoft/.

injunctions against competitors using standard-essential patents (such as the H.264 patent) and, instead, continue third-party negotiations.¹⁰ Nevertheless, several patent-related district court cases are still ongoing. Although negotiations have been spurred on, conclusions are not close at hand.¹¹

B. *Worlds, Inc. v. Activision Blizzard, Inc.*¹²

On March 30, 2012, Worlds Inc. (“Worlds”), a NPE, sued *World of Warcraft* and *Call of Duty* mastermind, Activision Blizzard (“Activision”).¹³ Worlds claimed that Activision allegedly infringed United States Patent Numbers 8,082,501; 7,493,558; 7,945,856; and 7,181,690, collectively titled “System and Method for Enabling Users to Interact in a Virtual Space.”¹⁴ These patents arguably give Worlds a monopoly on the technology at the core of most massively multiplayer online games (MMOs).¹⁵ A *Markman* hearing, also called a patent claim construction hearing, is set for June 27, 2013.¹⁶ If this hearing construes the patent as broadly as its title suggests,

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10. *In re Google Inc.*, File No. 111-0163, 2013 WL 268924 (F.T.C. Jan. 3, 2013); *The Federal Trade Commission Closes its Antitrust Review*, GOOGLE BLOG (Jan. 2, 2013), <http://googleblog.blogspot.com/2013/01/the-federal-trade-commission-closes-its.html>.
 11. Susan Decker, *Google Patent Offers Probably Won't End Microsoft Suit*, BLOOMBERG (Jan. 7, 2013, 12:07 PM), <http://www.bloomberg.com/news/2013-01-07/google-patent-offers-probably-won-t-end-microsoft-apple-suits.html>.
 12. Civil Action No. 1:12-cv-10576-DJC (D. Mass. Mar. 30, 2012).
 13. Compl. at ¶¶ 2–5, 18, *Worlds, Inc.*, Civil Action No. 1:12-cv-10576-DJC (D. Mass. Mar. 30, 2012), ECF No. 1; John Gaudiosi, *Worlds Inc. Explains Why It's Suing Activision Blizzard over World of Warcraft and Call of Duty*, FORBES (Apr. 13, 2012, 12:23 PM), <http://www.forbes.com/sites/johngaudiosi/2012/04/13/worlds-inc-explains-why-its-suing-activision-blizzard-over-world-of-warcraft-and-call-of-duty/>.
 14. Compl., *Worlds, Inc.*, *supra* note 13, at ¶¶ 23, 29, 35, 41; Steve Peterson, *Patent Suit Against Activision Proceeds*, GAMEINDUSTRY INT'L (Sept. 17, 2012, 6:40 AM), <http://www.gamesindustry.biz/articles/2012-09-17-patent-suit-against-activision-proceeds>.
 15. *Markman Hearing Date Set in Worlds Inc. vs. Activision Blizzard, Inc., Blizzard Entertainment, Inc. and Activision Publishing, Inc. Patent Infringement Lawsuit*, MARKETWIRE.COM (Sept. 10, 2012, 8:15 AM), <http://www.marketwire.com/press-release/markman-hearing-date-set-worlds-inc-vs-activision-blizzard-inc-blizzard-entertainment-otcbb-wddd-1699189.htm>; *Worlds Inc. v. Activision Blizzard Markman Hearing Date Set in Patent Suit*, YAHOO! FINANCE (Sept. 10, 2012), <http://finance.yahoo.com/news/worlds-inc-vs-activision-blizzard-122824136.html>.
 16. Peterson, *supra* note 14.

hundreds of other game creators could be held liable.¹⁷ This lawsuit could possibly settle with a licensing deal, giving Worlds an opportunity to sue other MMOs using similar technology.

C. Tomita Technologies USA, LLC v. Nintendo Co., Ltd.¹⁸

The first in-depth look at an augmented reality patent infringement case was presented in 2012 when Seiji Tomita, the founder of Tomita Technologies and holder of a glasses-free 3D patent, sued Nintendo.¹⁹ The Nintendo 3DS's 3D imaging and augmented reality capabilities seem similar enough to United States Patent Number 7,417,664, titled "Stereoscopic Image Picking Up and Display System Based Upon Optical Axes Cross-Point Information," for the Federal District Court of the Southern District of New York to deny Nintendo's motion for summary judgment.²⁰ Nintendo is usually forced to defend against patent infringement lawsuits at least twice each year, typically focused on the Wii and its peripherals.²¹ *Tomita*, however, is the first case to target its 3D applications.²²

D. Uniloc v. Everyone

By filing no fewer than fifty lawsuits in the Eastern District of Texas in 2012, Uniloc USA—a prominent NPE—plagued the gaming industry this year.²³ Among the defendants were every kind of technology company, including several game developers: Mojang, the creator of *Minecraft*; Halfbrick, the makers of *Fruit Ninja*; Gameloft, a mobile game mogul; Madfinger, producer of mobile first-person shooting games (FPSs) like

17. See Jake Thomas, *Interview: Worlds Inc. CEO Explains Lawsuit with Activision-Blizzard*, GAMINGUNWRAPPED.COM (Apr. 17, 2012), <http://gamingunwrapped.com/exclusive-worlds-inc-ceo-explains-lawsuit-with-activision-blizzard/>.

18. No. 1:11-cv-04256-JSR (S.D.N.Y. June 22, 2011).

19. Compl. at 1–2, ¶¶ 1–2, 5–6, *Tomita*, No. 1:11-cv-04256-JSR (S.D.N.Y. June 22, 2011), ECF No. 1; Owen Good, *Retired Sony Engineer Says 3DS Copied His Patent*, KOTAKU (July 7, 2011, 7:30 PM), <http://kotaku.com/5819199/retired-sony-engineer-says-3ds-copied-his-patent>.

20. Order, *Tomita*, No. 1:11-cv-04256-JSR (S.D.N.Y. Apr. 23, 2012), ECF No. 77; Brian Wassom, *Tomita v. Nintendo: The First Augmented Reality Patent Infringement Case*, WASSOM.COM (July 12, 2012), <http://www.wassom.com/tomita-v-nintendo-the-first-augmented-reality-patent-infringement-case.html>.

21. *Nintendo Faces Suit over 3DS*, PATENT ARCADE (July 5, 2011, 10:17 AM), <http://www.patentarcade.com/2011/07/nintendo-faces-suit-over-3ds.html>.

22. *Id.*

23. *Lawsuit Summary: Uniloc USA, Inc. et al v. Revostock, Inc. et al*, RFC EXPRESS, <http://www.rfcexpress.com/lawsuits/patent-lawsuits/texas-eastern-district-court/90827/uniloc-usa-inc-et-al-v-revostock-inc-et-al/summary/> (last visited Mar. 26, 2013).

Shadowgun; and even Square Enix and Electronic Arts.²⁴ Uniloc owns U.S. Patent Number 6,857,067, entitled “System and Method for Preventing Unauthorized Access to Electronic Data,” and asserted that mobile games, like *Minecraft—Pocket Edition*, use their patented process for server authorization, including “a portable licensing medium configured to communicate with the electronic device and to store license data.”²⁵ As of December 27, 2012, Uniloc had also filed suit against Take-Two Interactive and 2K Games regarding United States Patent No. 5,490,216, “System for Software Registration,” mentioning *Borderlands* as the culprit.²⁶ The litigation is still ongoing, but *Minecraft* creator Markus “Notch” Persson has vowed he “will throw piles of money at making sure they do not get a cent.”²⁷ If Notch keeps his word a patent infringement ruling might be forthcoming—a key to future patent defense.

E. Wildcat Intellectual Property Holdings, LLC v. Wizards of the Coast LLC²⁸

A different NPE has filed an infringement case against a game over ten years old; this time in the Northern District of Texas.²⁹ Wildcat Intellectual Property Holdings LLC, of Dallas sued Wizards of the Coast, LLC, on November 1, 2012, targeting *Magic: The Gathering Online*, claiming it infringes upon United States Patent Number 6,200,216, “Electronic Trading Cards.”³⁰ Interestingly, in 2011 Wildcat asserted this patent in similar suits against numerous defendants.³¹ All but one ended in dismissal without

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24. Owen Good, *Some Patent Troll is Suing Minecraft and an Ensemble Cast of Big Names*, KOTAKU (July 21, 2012, 2:00 PM), <http://kotaku.com/5927978/some-patent-troll-is-suing-minecraft-and-an-ensemble-cast-of-big-names>.
 25. Emily Gera, ‘Minecraft’ Developer Sued over Android Patent Infringement, POLYGON (July 23, 2012, 7:46 AM), <http://www.polygon.com/gaming/2012/7/23/3177205/minecraft-developer-sued-over-android-patent-infringement>.
 26. Pls.’ Original Compl. for Patent Infringement at ¶ 14, Uniloc USA, Inc. v. Take-Two Interactive Software, Inc., Civil Action No. 6:12-cv-01013-LED (E.D. Tex. Dec. 27, 2012), ECF No. 1.
 27. Adam Rosenberg, *Mojang Facing Patent Infringement Lawsuit for ‘Mindcraft’*, G4TV (July 23, 2012), <http://www.g4tv.com/thefeed/blog/post/726206/mojang-facing-patent-infringement-lawsuit-for-mindcraft/>.
 28. No. 3:12-cv-04412-K (N.D. Tex. Nov. 1, 2012).
 29. Compl. at 1-3, ¶¶ 1, 8, *Wizards of the Coast*, No. 3:12-cv-04412-K (N.D. Tex. Nov. 1, 2012), ECF No. 1.
 30. *Id.* at 2-3, ¶¶ 7-8; David Lee, *Patent Fight over Trading Cards*, COURTHOUSE NEWS SERVICE (Nov. 2, 2012, 8:29 AM), <http://www.courthousenews.com/2012/11/02/51931.htm>.
 31. Compl. at 1, 5 ¶¶ 1, 18, *Wildcat Intellectual Prop. Holdings, LLC v. 4Kids Entm’t, Inc.*, No. 2:11-cv-00305-JRG (E.D. Tex. July 1, 2011), ECF No. 1.

prejudice.³² Wildcat asked the judge for an injunction to immediately take down the website—a cash cow for Wizards of the Coast.³³ The details of the settlement from the previous case have not been released, but Wildcat was not dealt the hand it actually wanted.³⁴

F. Walker Digital and Lodsys v. Everyone

A Review of 2011 Video Game Litigation and Selected Cases reported on pending patent litigation aiming to educate conference attendees on the trends in patent law.³⁵ Somewhat expectedly, most of the suits discussed are still being fought, and few court opinions have issued. However, NPEs, such as Walker Digital, LLC, and Lodsys, LLC, have been vicious and are constant threats to videogame developers, large and small.³⁶ Walker Digital's infamous 2011 deluge of fifteen patent infringement cases against over 100 defendants included nearly every major player in the video game industry,³⁷ while Lodsys attacked iOS developers in nearly forty suits.³⁸ This type of behavior by NPEs has apparently prompted some independent developers to move to Europe.³⁹ This is a shift to watch, as video game copyright law

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32. *Id.* at 5, ¶ 18; see also Paul Lesko, *Law of Cards: A Defining Moment in Wildcat's Electronic Trading Card Lawsuit*, CARDBOARD CONNECTION, (Jan. 15, 2013), <http://www.cardboardconnection.com/news/law-of-cards-a-defining-moment-in-wildcats-electronic-trading-card-lawsuit>.
 33. Compl., *Wizards of the Coast*, *supra* note 29, at 4, ¶ 2; Owen Good, *Texas Patent Firm Asks Judge to Shut Down Magic: The Gathering Online*, KOTAKU (Nov. 3, 2012, 4:01 PM), <http://kotaku.com/5957317/texas-patent-firm-asks-judge-to-shut-down-magic-the-gathering-online>.
 34. Stipulation of Dismissal with Prejudice, *Wizards of the Coast*, No. 3:12-cv-04412-K (N.D. Tex. Dec. 27, 2012), ECF No. 20.
 35. Jordan & Wilkinson, *supra* note 1, at 278-79.
 36. See, e.g., Ben Rooney, *Patent Firm Sues Angry Birds Maker Rovio*, WALL ST. J. (July 22, 2011, 3:26 PM), <http://blogs.wsj.com/tech-europe/2011/07/22/patent-firm-sues-angry-birds-maker-rovio/>; Erik S. Syverson, *Lodsys Sues Angry Birds Game Manufacturer for Patent Infringement*, SYVERSONLAW.COM (Aug. 1, 2011), <http://www.syversonlaw.com/blog/2011/08/lodsys-sues-angry-birds-game-manufacturer-for-patent-infringement.shtml>; Robert Van Arnam & Neil Magnuson, *Walker Digital Enters the Game: Recent Trend of Patent Infringement Suits Against Activision, Blizzard, Microsoft, Electronic Arts and Other Video Game Companies*, MARTINDALE.COM (June 2, 2011), http://www.martindale.com/education/article_Williams-Mullen_1291924.htm.
 37. *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>.
 38. Rooney, *supra* note 36; Syverson, *supra* note 36.
 39. Jacqui Cheng, *Lodsys Claims Momentum in Patent Fight as Some Indie Devs Leave US (Updated)*, ARSTECHNICA.COM (Oct. 9, 2012, 1:15 PM), <http://ar->

abroad is constantly changing.⁴⁰ But, more often, developers simply pay up to avoid the costs of long, drawn-out litigation.⁴¹

G. Impulse Tech. v. Nintendo of America;⁴² Impulse Tech. v. Microsoft;⁴³ ThinkOptics Inc. v. Nintendo of America⁴⁴

Patent litigation not involving NPEs was more focused and was more quickly resolved. In 2012, closure from litigation came when console makers Microsoft and Nintendo—and even their developers and retailers—were sued over motion-tracking peripherals such as the Wii Remote and the Xbox Kinect.⁴⁵ One suit, brought by Impulse Technology in the Northern District of Ohio, was voluntarily dismissed after the court’s *Markman* hearing construed the claim in favor of the defendant.⁴⁶ A plaintiff, however, emerged victorious in 2011 when ThinkOptics, Inc. sued Nintendo over the Wii remote.⁴⁷ The two companies have now settled and have entered into a licensing agreement.⁴⁸ Why these companies waited five years to attack the Wii is uncertain, but, in the end, motion-controlled virtual bowling continues.

technica.com/apple/2012/10/lodsys-claims-momentum-in-patent-fight-as-some-indie-devs-leave-us/.

40. See Eddie Makuch, *German Group Sues Valve*, GAMESPOT.COM (Feb. 1, 2013, 12:01 PM), http://www.gamespot.com/news/german-group-sues-valve-6403307?utm_medium=referral&utm_source=pulsenews; see also Connor Sheridan, *Secondhand Sale of Software Protected, Rules European Court*, GAMESPOT.COM (July 3, 2012, 12:19 PM), <http://www.gamespot.com/news/second-hand-sale-of-software-protected-rules-european-court-6385463>.
41. *Licensing Momentum*, LODSYS (Oct. 8, 2012), <http://www.lodsys.com/1/post/2012/10/licensing-momentum.htm>.
42. No. 1:11-cv-02519-JG, 2012 WL 4794635 (N.D. Ohio Nov. 18, 2011).
43. No. 1:11-cv-00586-RGA-CJB (D. Del. July 1, 2011).
44. No. 6:11-cv-00455-LED (E.D. Tex. Sept. 2, 2011).
45. Compl. at 9–16, ¶¶ 56–95, *ThinkOptics*, No. 6:11-cv-00455-LED (E.D. Tex. Sept. 2, 2011), ECF No. 1; Compl. at 4–6, ¶¶ 15–21, *Nintendo*, No. 1:11-cv-02519-JG, 2012 WL 4794635 (N.D. Ohio Nov. 18, 2011), ECF No. 1; Compl. at 5–7, ¶¶ 21–29, *Microsoft*, No. 1:11-cv-00586-RGA-CJB (D. Del. July 1, 2011), ECF No. 1; see also *New Case: Microsoft Sued over Kinect and 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>.
46. *Nintendo*, No. 1:11-cv-02519, 2012 WL 4794635 (N.D. Ohio Oct. 9, 2012).
47. Compl., *ThinkOptics*, *supra* note 45; *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>.
48. *Recent News*, THINKOPTICS, INC., <http://thinkoptics.com/recent-news/> (last visited Mar. 26, 2013).

II. COPYRIGHT AND TRADEMARK INFRINGEMENT

Copyright and trademark law in the video game industry has always been interesting, and often entertaining; this year was no exception. As virtual tattoos, video game plot lines, and depicted helicopters, among others, are accused of infringement, the subject matter of litigation has grown wider and more diverse.

A. Tetris Holding, LLC v. Xio Interactive, Inc.⁴⁹

Tetris Holding, LLC's victory over Xio—makers of a Tetris clone for the iPhone—was arguably the most important development in video game copyright law in 2012.⁵⁰ In response to Tetris's complaint, Xio admitted that they were copying, but claimed that “the only similarities between the games are elements not protected by copyright law.”⁵¹ While code and graphical elements of a game are copyrightable, the rules and mechanics are not.⁵² As the court stated, the “doctrine is simple to state—copyright will not protect an idea, only its expression—but difficult to apply.”⁵³ The court proffered the “Squint Test,” declaring: “If one has to squint to find distinctions only at a granular level, then the works are likely to be substantially similar.”⁵⁴ In applying the Squint Test, the court found “the overall look and feel of the two games [to be] identical.” Thus Xio had almost copied, per se, the “visual expression” of Tetris, infringing its copyright.⁵⁵ With copying in the industry so commonplace, this opinion will surely cause companies to rethink strategies for avoiding suit.

B. Ubisoft Entertainment, S.A. v. Beiswenger⁵⁶

In April, many industry professionals and gamers were troubled to hear that the popular *Assassin's Creed* series' entire premise might have been lifted from the pages of a self-published novel titled “Link,” written by John

49. 863 F. Supp. 2d 394 (D.N.J. 2012).

50. Consent Order & Permanent Inj. At 1, ¶ 1, *Tetris Holding*, No. 3:09-cv-6115-FLW-DEA, 863 F. Supp. 2d 394 (D.N.J. Jan. 31, 2013), ECF No. 66; Compl. at 9–12, ¶¶ 31–37, *Tetris Holding*, No. 3:09-cv-611-FLW-DEA, 863 F. Supp. 2d 394 (D.N.J. Dec. 2, 2009), ECF No. 1.

51. Def.'s Mem. at 2, *Tetris Holding*, No. 3:09-cv-6115-FLW-DEA, 863 F. Supp. 2d 394 (D.N.J. Sept. 30, 2011), ECF No. 46-1.

52. *Tetris Holding*, 863 F. Supp. 2d at 404.

53. *Id.* at 400.

54. *Id.* at 410.

55. *Id.*

56. No. 3:12-cv-02754-NC (N.D. Cal. May 30, 2012).

L. Beiswenger in 2003.⁵⁷ The novel, which pre-dated the first game by five years, includes familiar touchstones such as a machine that allowed characters to relive their ancestors' memories and analogous spiritual and Biblical overtones.⁵⁸ Beiswenger sued Ubisoft, the makers of *Assassin's Creed*, for copyright infringement, but dropped the suit without prejudice only a month later.⁵⁹ This prompted Ubisoft to immediately pursue declaratory judgment to end the dispute.⁶⁰ While a ruling in this case would have interested developers who might be tempted to "borrow" a few ideas from a favorite sci-fi novel, the case settled fairly quickly in August, though this time without prejudice.⁶¹

C. **Electronic Arts Inc. v. Zynga Inc.**⁶²

Copying between competing developers in the social game sphere has escalated from copying a game's basic concepts to blatant cloning of code, but how much is too much is still a legal gray area. In June, Zynga revealed one of its most ambitious projects yet, *The Ville*, only to be sued a month later by Electronic Arts ("EA") for infringing upon *Sims Social*.⁶³ Zynga geared up for what could be the biggest infringement lawsuit to date between

57. Compl. at 4–11, ¶¶ 8–38, *Beiswenger v. Ubisoft Entm't, Inc.*, No. 1:12-cv-00717-CCC (M.D. Pa. Apr. 17, 2012), ECF No. 1; Matthew Hawkins, *Author Suing Ubisoft Based on Claims that 'Assassin's Creed' was His Idea*, NBCNEWS.COM, <http://www.nbcnews.com/technology/ingame/author-suing-ubisoft-based-claims-assassins-creed-was-his-idea-722586> (last visited Mar. 26, 2013).
58. Compl., *Beiswenger*, *supra* note 57, at 4, 5, ¶¶ 8, 12; Kyle Orland, *Sci-Fi Author Sues Ubisoft over Assassin's Creed Copyright Infringement*, ARS TECHNICA.COM (Apr. 18, 2012, 6:08 PM), <http://arstechnica.com/gaming/2012/04/sci-fi-author-sues-ubisoft-over-assassins-creed-copyright-infringement/>.
59. Notice of Voluntary Dismissal, *Beiswenger*. No. 1:12-cv-00717-CCC (M.D. Pa. May 29, 2012), ECF No. 22; Compl., *Beiswenger*, *supra* note 57, at 1; Ross Dannenberg, *Case Update: Beiswenger v. Ubisoft (Assassin's Creed)*, PATENT ARCADE (June 26, 2012, 7:00 AM), <http://www.patentarcade.com/2012/04/new-case-beiswenger-v-ubisoft-assassins.html>.
60. Compl. for Declaratory Relief at 2, ¶ 1, *Ubisoft Entm't*, No. 3:12-cv-02754-NC (N.D. Cal. May 30, 2012), ECF No. 1; *Ubisoft Sues Beiswenger for Declaration of Rights*, PATENT ARCADE (Aug. 21, 2012, 12:00 PM), <http://www.patentarcade.com/2012/06/ubisoft-sues-beiswenger-for-declaration.html>.
61. Notice of Dismissal without Prejudice, *Ubisoft Entm't*, No. 3:12-cv-02754-NC (N.D. Cal. Aug. 20, 2012), ECF No. 11; *Ubisoft Sues Beiswenger for Declaration of Rights*, *supra* note 60.
62. No. 3:12-cv-04099-JST (N.D. Cal. Aug. 3, 2012).
63. Compl. at 1–2, ¶ 5, *Electronic Arts*, 3:12-cv-04099-JST (N.D. Cal. Aug. 30, 2012), ECF No. 1; Owen Thomas, *The Game that Got Zynga Sued by EA is Headed for the Dumpster*, BUSINESS INSIDER (Oct. 23, 2012, 6:25 PM), <http://www.businessinsider.com/zynga-is-sunsetting-the-ville-2012-10>.

the companies, and counterclaimed in three parts.⁶⁴ The most important claim asserted that EA originally stole *Sims Social* from their own *CityVille*, a game they released eighteen months earlier.⁶⁵ However, Professor Eric Goldman believes that this is a lawsuit that “EA [cannot] afford to win.”⁶⁶ The legal precedent in copyright law allows copying of “the basic game concept,” and even the general appearance of the game.⁶⁷ EA needs to push the boundaries of what is considered infringement in order to win this case; but if it does, it will be much easier for copyright owners to win on these types of claims and could potentially create more work for EA in developing its next social game.⁶⁸ Further complicating the suit, Zynga is sun-setting *The Ville*.⁶⁹ The impact this may have on pending litigation remains to be seen, but a possible settlement could be imminent.

D. Electronic Arts, Inc. v. Textron, Inc.⁷⁰

In apparent déjà vu, Textron, the maker of Bell Helicopters, again claimed trademark infringement against EA games over the helicopters depicted in the *Battlefield* series.⁷¹ In 2006, the same suit was settled with a licensing agreement,⁷² but, surprisingly, the negotiations for licensing the Bell trademark for *Battlefield 3* seem to have broken down.⁷³ EA, in its Mo-

64. Counterclaim, *Electronic Arts*, 3:12-cv-04099-JST (N.D. Cal. Sept. 19, 2012), ECF No. 25; Answer and Demand for Jury Trial, *Electronic Arts*, 3:12-cv-04099-JST (N.D. Cal. Sept. 14, 2012), ECF No. 17; Alex Pham, *Zynga Calls EA Lawsuit ‘Baseless,’ Countersues*, L.A. TIMES (Sept. 14, 2012), <http://articles.latimes.com/2012/sep/14/entertainment/la-et-ct-zynga-calls-ea-lawsuit-absurd-20120914>.

65. Answer and Demand for Jury Trial, *Electronic Arts*, *supra* note 64, at 1; Emily Price, *Zynga Fights Back, Says EA Copied Games*, MASHABLE.COM (Sept. 14, 2012), <http://mashable.com/2012/09/14/ea-zynga-lawsuit/>.

66. Eric Goldman, *EA’s Copyright Infringement Lawsuit Against Zynga is Dangerous—for EA*, FORBES (Aug. 6, 2012, 4:20 PM), <http://www.forbes.com/sites/ericgoldman/2012/08/06/eas-copyright-infringement-lawsuit-against-zynga-is-dangerous-for-ea/>.

67. *Id.*

68. *Id.*

69. Thomas, *supra* note 63.

70. No. 3:12-cv-00118-WHA (N.D. Cal. Jan. 6, 2012).

71. Defs.’ Counterclaim, *Textron*, No. 3:12-cv-00118-WH (N.D. Cal. Feb. 29, 2012), ECF No. 35; Alison Frankel, *The Battle over Brand-Name Helicopters in ‘Battlefield’*, THOMSON REUTERS: NEWS & INSIGHT (July 26, 2012), <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=53123>.

72. Defs.’ Counterclaim, *Textron*, *supra* note 71, at 2.

73. *EA’s Video Game ‘Battlefield 3’ Turning into ‘Battlefield Trademark’ as Video Game Manufacturer Sues to Adjudicate Non-Infringement of Military Helicopters*, LEXISNEXIS COPYRIGHT & TRADEMARK LAW COMMUNITY (Jan. 25, 2012,

tion to Dismiss, claimed First Amendment protections like those acknowledged in the Supreme Court's *Brown* decision, but was disappointed when the motion was denied in July.⁷⁴ The suit is ongoing and could provide a first look at how courts will handle the implementation of the *Brown* decision. However, EA will likely steer clear of that potential minefield and end up settling with new licensing terms.

E. EMI April Music, Inc. v. 4MM Games⁷⁵

Musical video games create an exciting collision of two of the edgiest sectors in the entertainment industry. However, this intersection could raise new issues regarding copyright infringement. EMI filed a suit against 4MM Games, creator of the *Def Jam Rapstar* music video game, alleging copyright infringement.⁷⁶ The complaint claimed that the developer used certain songs in which EMI had an interest without obtaining the proper permissions.⁷⁷ EMI only owned portions of some of the songs it claimed infringement upon; including Kanye West's *Stronger*, which samples the EMI-owned *Better, Faster, Stronger* by Daft Punk.⁷⁸ EMI claimed statutory damages of \$150,000 per violation, net profits from the game, and requested an injunction.⁷⁹

Games like *Rock Band* and *Guitar Hero* have left a well-blazed trail in the world of music licensing for video games. However, some commentators believe that because rap songs often sample multiple tracks from various contributors and they generally have a more complicated ownership portfolio; thus, a much more complex legal system is required to address these

3:23 PM), <http://www.lexisnexis.com/community/copyright-trademarklaw/blogs/copyrightandtrademarklawblog/archive/2012/01/25/ea-s-video-game-quot-battlefield-3-quot-turning-into-quot-battlefield-trademark-sues-to-adjudicate-non-infringement-of-helicopters.aspx>.

74. *Brown*, 131 S. Ct. 2729; Order on Mot. to Dismiss at 9, *Textron*, 3:12-cv-00118-WHA (N.D. Cal. July 25, 2012), ECF No. 79; Pl.'s Mot. to Dismiss Counterclaim at 1, *Textron*, 3:12-cv-00118-WHA (N.D. Cal. June 1, 2012), ECF No. 57; *EA Motion to Dismiss Counter-Claims in Battlefield Helicopter Lawsuit Denied*, GAMEPOLITICS.COM (July 31, 2012), <http://www.gamepolitics.com/2012/07/31/ea-motion-dismiss-counter-claims-battlefield-helicopter-law-suit-denied>.
75. No. 1:12-cv-02080-DLC (S.D.N.Y. Mar. 12, 2012).
76. Compl.at 1–2, *EMI*, No. 1:12-cv-02080-DLC (S.D.N.Y. Mar. 21, 2012), ECF No. 1.
77. *Id.* at 6, ¶ 27; Eriq Gardner, *EMI Sues over Def Jam Rapstar Video Game*, HOLLYWOOD REPORTER (Mar. 29, 2012, 10:02 AM), <http://www.hollywoodreporter.com/thr-esq/emi-def-jam-rapstar-video-game-lawsuit-305434>.
78. Compl., *EMI*, *supra* note 76, at 19; Gardner, *supra* note 77.
79. Compl., *EMI*, *supra* note 76, at 6–7, ¶¶ 31–32, 34; Gardner, *supra* note 77.

issues.⁸⁰ EMI claims that 4MM Games did not do the necessary work, resulting in infringement of EMI's property.⁸¹ The industry should watch this case and consider the added costs associated with this market sector before attempting to expand music-based video games.

F. SocialApps, LLC v. Zynga, Inc.⁸²

Throughout 2011, NPEs and Zynga were ever-present in the courtroom. Zynga is still in the midst of numerous lawsuits—on both sides of cease and desist letters. One such suit involved SocialApps, LLC, creator of the Facebook game *myFarm*, in which players give farm animals and plants to friends to raise and grow on their virtual farms.⁸³ Zynga began negotiations with SocialApps to buy or license *myFarm*, but after a due diligence review of SocialApps' source code, Zynga created *Farmville*.⁸⁴ Shortly thereafter, SocialApps filed suit, claiming breach of implied contract, confidence, and implied covenant; in 2012 SocialApps overcame Zynga's Motion to Dismiss.⁸⁵ SocialApps demanded \$100,000 in punitive damages, a permanent injunction, and Zynga's *Farmville* profits—estimated at over \$500,000.⁸⁶ If most of the allegations in the complaint are true, SocialApps has a strong case. If Zynga proceeds to trial, it may be difficult to avoid a ruling that it engaged in willful copyright infringement, which is typical in copyright litigation.

80. Gardner, *supra* note 77.

81. Compl., *EMI*, *supra* note 75, at 6, ¶ 27; Gardner, *supra* note 77.

82. No. 4:11-cv-04910-YGR (N.D. Cal. June 17, 2011).

83. Compl. at 2–3, ¶¶ 3, 8, *SocialApps*, No. 4:11-cv-04910 (N.D. Cal. June 17, 2011), ECF No. 1.

84. *Id.* at 4–5, ¶¶ 10–13; *Zynga Wins, Loses in Latest Round of SocialApps Lawsuit*, GAMEPOLITICS.COM (Feb. 17, 2012), <http://www.gamepolitics.com/2012/02/17/zynga-wins-loses-latest-round-socialapps-lawsuit>.

85. Order on Mot. to Dismiss at 8, *SocialApps*, No. 4:11-cv-04910-YGR (N.D. Cal. Feb. 6, 2012), ECF No. 36; Joe Osborne, *FarmVille Could Owe a lot (of Cash) to myFarm for its Success in Lawsuit*, GAMES.COM (Feb. 17, 2012, 12:30 PM), <http://blog.games.com/2012/02/17/farmville-myfarm-zynga-socialapps-lawsuit/>.

86. Compl., *SocialApps*, *supra* note 83, at 6, ¶¶ 24–26; Nathan Brown, *How Zynga Cloned its Way to Success*, EDGE ONLINE (Jan. 25, 2012, 4:37 PM), <http://www.edge-online.com/features/how-zynga-cloned-its-way-success/>.

G. The Learning Company v. Zynga Inc.⁸⁷

In May 2011, Zynga was accused of infringing on the trademark of a game that introduced many children to PC gaming—*The Oregon Trail*.⁸⁸ Zynga's *Frontierville* expansion, called *Oregon Trail*, was the last straw for The Learning Company, which sued Zynga for trademark infringement.⁸⁹ This suit was recently settled on December 18, 2012.⁹⁰ However, details of the settlement have yet to be divulged. During the suit Zynga voluntarily removed *Oregon Trail* from all of its products and the court ordered this removal to remain in effect throughout the litigation; it seems unlikely that Zynga will use this bit of history in future game development.⁹¹

H. Augusta National, Inc. v. CustomPlay Games Ltd.⁹²; Atari Interactive, Inc. v. Wan⁹³

A Review of 2011 Video Game Litigation and Selected Cases reported on two other cases from 2011 that were rare among the ubiquitous pack of social game infringement suits: a trade dress case about a virtual rendition of a golf course⁹⁴ and a copyright infringement case that involved knock-off Ataris.⁹⁵ When a cease and desist letter failed to prompt CustomPlay Games to remove Augusta National's golf course map and other notable locations from *CPG Golf*, Augusta National sued.⁹⁶ However, that same year, Custom-Play Games went bankrupt, and a settlement was negotiated with the other defendants.⁹⁷ Sadly, no legal direction has resulted from this trade dress

87. Civil Action No. 1:11-cv-10894-MLW (D. Mass. May 18, 2011).

88. Compl. at 2, 15, ¶¶ 3, 53, *Learning Co.*, Civil Action No. 1:11-cv-10894-MLW (D. Mass. May 18, 2011), ECF No. 1.

89. *Id.* at 1, ¶ 1.

90. Voluntary Dismissal with Prejudice, *Learning Co.*, No. 1:11-cv-10894-MLW (D. Mass. Dec. 18, 2012), ECF No. 58.

91. Order, *Learning Co.*, No. 1:11-cv-10894-MLW (D. Mass. June 15, 2011), ECF No. 46.

92. No. 1:11-cv-00119-JRH-WLB (S.D. Ga. Aug. 5, 2011).

93. No. 2:11-cv-05224-SVW-PLA (C.D. Cal. June 22, 2011).

94. Compl. at 2, *Augusta Nat'l*, No. 1:11-cv-00119-JRH-WLB (S.D. Ga. Aug. 5, 2011), ECF No. 1.

95. Compl. at 6, *Atari*, 2:11-cv-05224-SVW-PLA (C.D. Cal. June 22, 2011), ECF No. 1; see Frank Cifaldi, *Bootleg Consoles Attract Lawsuit From Atari*, GAMASUTRA (July 6, 2011), http://www.gamasutra.com/view/news/35697/Bootleg_Consoles_Attract_Lawsuit_From_Atari.php.

96. Compl., *Augusta Nat'l*, *supra* note 94, at 2.

97. Notice of Settlement & Status, *Augusta Nat'l*, No. 1:11-cv-00119-JRH-WLB (S.D. Ga. Sept. 27, 2011), ECF No. 18.

claim in the Eleventh Circuit, but it is known that other defendants settled with Augusta National in some fashion.

Likewise, in the *Atari* case, defendants John Wan and Tommi, Inc., ended litigation in 2012 by agreeing to license copyrights and trademarks from Atari.⁹⁸ Evidence suggested the defendants were wise to settle as soon as possible.

III. TATTOO CASES

Alleged infringement on tattoo designs is quickly becoming the next trend of copyright litigation, evidenced by two recent suits involving tattoos. Little precedent in this area exists, but legal scholars suggest that tattoos satisfy the requirements for copyright protection—a work of art fixed in a tangible medium—even if the medium of art is someone else’s body.

A. *Escobedo v. THQ, Inc.*⁹⁹

When THQ recreated UFC fighters for *UFC: Undisputed 3*, licensing copyrighted tattoos on each fighter from each of their respective tattoo artists was probably the last thing they thought to do. Perhaps they should have; Chris Escobedo, a tattoo artist whose work was recreated on fighter Carlos Condit in the game, sued THQ.¹⁰⁰ This may sound similar to the suit involving Mike Tyson’s infamous face tattoo created by artist Victor Whitmill.¹⁰¹ Whitmill sued Warner Brothers over its recreation of his design in *The Hangover II*.¹⁰² That suit settled, leaving no precedent to guide Escobedo, but legal experts believe that tattoos are copyrightable.¹⁰³

98. Stipulation of Dismissal with Prejudice at 8, *Atari*, No. 2:11-cv-05224-SVW-PLA (C.D. Cal. Jan. 6, 2012), ECF No. 20.

99. No. 2:12-cv-02470-JAT (D. Ariz. Nov. 16, 2012).

100. Compl. at 2-3, ¶¶ 12, 14, 26, *Escobedo*, No. 2:12-cv-02470-JAT (D. Ariz. Nov. 16, 2012), ECF No. 1; Eriq Gardner, *Tattoo Artist Sues over Copycat in ‘UFC Undisputed’ Video Game*, HOLLYWOOD REPORTER (Nov. 22, 2012, 7:00 AM), <http://www.hollywoodreporter.com/thr-esq/ufc-undisputed-video-game-at-393653>.

101. Compl. at 1, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-00752-CDP (E.D. Mo. Apr. 28, 2011), ECF No. 1.

102. *Id.*; see also *THE HANGOVER II* (Warner Bros. 2011)

103. Order of Dismissal, *Whitmill*, No. 4:11-cv-00752-CDP (E.D. Mo. June 22, 2011), ECF No. 59; see also Dan Seitz, *UFC Fighter’s Tattoo Artist Sues THQ for Copyright Infringement*, GAMETRAILERS.COM (Nov. 27, 2012, 10:28 AM), <http://www.gametrailers.com/side-mission/40377/carlos-condits-tattoo-artist-sues-thq-for-copyright-infringement>.

B. Allen v. Electronic Arts¹⁰⁴

Recently, Stephen Allen sued EA after former NFL running back Ricky Williams and his tattoos appeared on the cover of *NFL Street*, a game released in 2004.¹⁰⁵ Allen, a tattoo artist from Louisiana, argued that the tattoos are not Williams', but instead were his intellectual property.¹⁰⁶ Whether this lawsuit will spark more claims from tattoo artists across the country whose works are prominently displayed in sports-themed video games remains to be seen. Nonetheless, general counsel for developers should consider recommending licensing deals with tattoo artists or significantly change in-game tattoo recreation.

IV. RIGHT OF PUBLICITY

In 2011, the landmark *Hart* case and its "transformative test" made massive changes to the right of publicity landscape.¹⁰⁷ By comparison, 2012 was fairly quiet; though one case is of interest.

A. No Doubt v. Activision¹⁰⁸

No Doubt's long-running dispute with Activision came to an end this year when the parties settled on undisclosed terms.¹⁰⁹ The suit concerned No Doubt's licensing of its images and selected songs to Activision for the game *Band Hero*.¹¹⁰ No Doubt claimed that Activision improperly used its members' likenesses and exceeded the terms 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 claims they would never perform); by creating content that permitted the lead singer, Gwen Stefani, to sing in a male voice; and splitting up the band members to perform individually.¹¹¹

A California appellate court had already ruled that there could be no First Amendment protection for Activision under the *Hart* "transformative test" because the band members' avatars could not be edited or transformed

104. No. 5:12-cv-03172-SMH-MLH (W.D. La. Dec. 31, 2012).

105. Compl. at 3–4, ¶¶ 10–11, *Allen*, No. 5:12-cv-03172-SMH-MLH (W.D. La. Dec. 31, 2012), ECF No. 1; Luke Plunkett, *EA is Being Sued over A . . . Tattoo. From 2004.*, KOTAKU (Jan. 9, 2013, 10:00 PM), <http://kotaku.com/5974683/ea-is-being-sued-over-atattoo-from-2004>.

106. Compl., *Allen*, *supra* note 105, at 3–4, ¶¶ 7–9, 14.

107. *Hart*, 808 F. Supp. 2d at 776.

108. 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).

109. Billy Kidd, *No Doubt Settle 'Band Hero' Video Game Lawsuit*, ROLLING STONE MUSIC (Oct. 4, 2012, 9:40 AM), <http://www.rollingstone.com/music/news/no-doubt-settle-band-hero-video-game-lawsuit-20121004>.

110. *No Doubt*, 122 Cal. Rptr. 3d at 402–03.

111. *Id.*

in the game.¹¹² Because the parties settled, the potential legal impact of the case remains unknown.¹¹³

V. CONTRACT DISPUTES

A. Silicon Knights, Inc. v. Epic Games Inc.¹¹⁴

The apparent conclusion of the five-year-long lawsuit between Silicon Knights, Inc., and Unreal Engine, the creator of Epic Games, came in 2012.¹¹⁵ Although initiated by Silicon Knights, Epic Games prevailed on several different claims with a large judgment in its favor.¹¹⁶

Silicon Knights, a licensee of the Unreal Engine 3 (UE3), sued creator Epic Games in 2007 for fraudulent misrepresentation, and claimed that the UE3 engine contained so many flaws that it was unusable for its game *Too Human*.¹¹⁷ Silicon Knights claimed that these flaws forced it to create its own proprietary engine for the game to meet its planned timelines.¹¹⁸ Although it originally claimed upwards of \$63 million in damages, Silicon Knights is liable to Epic Games for nearly \$10 million.¹¹⁹

In response to Silicon Knights' claims, Epic Games counterclaimed under theories of copyright infringement, trade secret misappropriation, and breach of contract.¹²⁰ Epic Games claimed that Silicon Knights' new engine, SKE, violated the UE3 Licensing Agreement and used portions of UE3's code in violation of Epic Games' copyrights and trade secrets.¹²¹

112. *Id.* at 410–11.

113. Kidd, *supra* note 70.

114. No. 5:07-cv-00275-D (E.D.N.C. July 18, 2007).

115. Order (Post-Trial), *Silicon Knights*, No. 5:07-cv-00275-D (E.D.N.C. Nov. 7, 2012), ECF No. 862; Adam Rosenberg, *Silicon Knights Ordered to Destroy Games Code in Epic Lawsuit*, G4TV (Nov. 9, 2012), <http://www.g4tv.com/thefeed/blog/post/729401/silicon-knights-ordered-to-destroy-games-code-in-epic-lawsuit/>.

116. Order (Post-Trial), *Silicon Knights*, *supra* note 115, at 2; Wesley Yin-Poole, *Silicon Knights Ordered to Recall and Destroy All Unsold Copies of Too Human, X-Men Destiny, More*, EUROGAMER.NET (Nov. 9, 2012), <http://www.eurogamer.net/articles/2012-11-09-silicon-knights-has-a-month-to-recall-and-destroy-all-unsold-copies-of-too-human-x-men-destiny-more>.

117. Compl. at 1, *Silicon Knights*, No. 5:07-cv-00275-D (E.D.N.C. July 8, 2007), ECF No. 1; *See* Order at 1, *Silicon Knights*, No. 5:07-cv-00275-D (E.D.N.C. Dec. 22, 2011), ECF No. 697.

118. Compl., *Silicon Knights*, *supra* note 117, at 7, ¶ 21.

119. Order (Post-Trial), *Silicon Knights*, *supra* note 115, at 47; Order, *Silicon Knights*, *supra* note 117, at 2.

120. Counterclaim at 11–14, ¶¶ 26–41, *Silicon Knights*, No. 5:07-cv-00275-D (E.D.N.C. Aug. 8, 2007), ECF No. 8.

121. *Id.* at 1.

Upon comparison of the companies' codes, clear evidence of copying was observed.¹²² The court was aided in its decision by evidence that Silicon Knights not only copied Epic Games' functional code, but also some of its non-functioning programmer comments—some copied code even contained typographical errors left intact by Silicon Knights.¹²³

On May 30, 2012, the jury returned a verdict in favor of Epic Games, awarding \$2.65 million for its breach of contract damages and \$1.8 million for copyright infringement and trade secret misappropriation damages.¹²⁴ The court entered a judgment reflecting this verdict the same day.¹²⁵ In accordance with court rules and applicable laws, the court also awarded Epic Games' costs (\$277,852.13), attorney's fees for the copyright and trade secret counterclaims (but not for the breach of contract counterclaim) (\$2,091,722.83), prejudgment interest (\$2,302,147.96), and expert witness fees (\$680).¹²⁶ The expert witness fee award was a pittance, since over \$1,000,000 was claimed.¹²⁷ Silicon Knights was also required to wipe all UE3 code from its engine and to "recall and destroy" any existing copies of games in which UE3 code could be found, including *Too Human*, *The Box/Ritualist*, *The Sandman*, *X-Men: Destiny*, and *Siren in the Maelstrom*.¹²⁸ This case shows that even "borrowing" portions of code or ideas from copyrighted software can be a very expensive undertaking.

B. Gate Five, LLC v. Knowles-Carter¹²⁹

In 2011, Gate Five, LLC, filed suit against singer Beyoncé Knowles-Carter (Beyoncé) for allegedly breaching a contract related to the in-development game *Superstar: Beyoncé*.¹³⁰ The conflict arose when Beyoncé terminated the contract that she had negotiated licensing her image and songs for the game—a move that cost Gate Five \$6.7 million in prior investment, as well as 70 jobs.¹³¹ Beyoncé claims that she merely exercised a financing contingency in the contract, which required Gate Five to raise a certain

122. Order (Post-Trial), *Silicon Knights*, *supra* note 115, at 17–18.

123. *Id.* at 18.

124. *Id.* at 1.

125. *Id.*

126. *Id.* at 47.

127. *Id.* at 26, 47.

128. Order (Post-Trial), *Silicon Knights, Inc.*, *supra* note 115, at 40–41.

129. 953 N.Y.S.2d 193 (N.Y. App. Div. 2012).

130. Compl. at 1, *Gate Five*, No. 651094/2011 (Sup. Ct. N.Y. May 9, 2011), NYS-CEF No. 12; Dan Rogers, *Part 2: The Five Most Influential Video Game Lawsuits of 2012*, GAMASUTRA (Dec. 12, 2012, 7:50 PM), http://www.gamasutra.com/blogs/DanRogers/20121231/184221/Part_2_The_Five_Most_Influential_Video_Game_Lawsuits_of_2012.php.

131. Compl., *Gate Five*, *supra* note 130, at 5–6, ¶¶ 12–13; Rogers, *supra* note 130.

amount of capital for the game by a deadline; if Gate Five did not raise the capital in time, Beyoncé could terminate the deal.¹³² Gate Five failed to meet the deadline, but countered with an estoppel argument; the argument asserted that Beyoncé waived her right to financing contingency based on representations she and her agents made, namely that the financing arrangements, though late, were acceptable to them.¹³³

It now seems that this case may proceed to trial, as the New York Superior Court denied Beyoncé's motion for summary judgment, which has been confirmed by the appellate division.¹³⁴ Gate Five seeks to recover its lost investment and lost profits (which it estimates at \$172 million) and to enjoin Beyoncé from working on any competing video games.¹³⁵ As one commentator noted, this case could be significant because it demonstrates the potential for disconnection between the talent and video game industries. Additionally, this case could indicate that an especially high level of communication is needed for joint ventures; such as the game at the center of this dispute.¹³⁶

C. Zynga v. KIXEYE¹³⁷

A war of words that began with a KIXEYE recruiting video lobbying thinly veiled criticisms at Zynga has culminated in an equally vitriolic lawsuit.¹³⁸ The legal dispute centers around Dan Patmore, a former programmer on Zynga's popular free-to-play game, *CityVille*, who was hired by KIXEYE.¹³⁹ In Zynga's complaint—alleging breach of contract and misappropriation of trade secrets—the social games giant accuses Patmore of violating

132. Counterclaim at 9, ¶¶ 65–66, *Gate Five*, No. 651094/2011 (Sup. Ct. N.Y. Dec. 22, 2011), NYSCEF No. 32; Eriq Gardner, *Judge: Beyoncé Video Game Lawsuit Can Move Forward*, HOLLYWOOD REPORTER (Dec. 8, 2011, 1:44 PM), <http://www.hollywoodreporter.com/thr-esq/beyonce-video-game-lawsuit-gate-five-271442>.

133. *Gate Five*, 953 N.Y.S.2d at 193–94.

134. *Id.*; Ron Dicker, *Beyoncé Lawsuit: \$100 Million Claim Against Singer over Dance Video Game Gets Go-Ahead*, HUFFPOST SMALL BUSINESS (Nov. 19, 2012, 1:06 PM), http://www.huffingtonpost.com/2012/11/19/beyonce-lawsuit-100-milli_n_2158954.html; see *Gate Five*, 953 N.Y.S.2d at 193–94.

135. Compl., *Gate Five*, *supra* note 130, at 28–32.

136. Dan Lee Rogers, *Countdown: The 5 Most Influential Video Game Lawsuits of 2012: Gate Five LLC v. Beyoncé Knowles-Carter*, LAW OFFICE OF DAN LEE ROGERS (Dec. 31, 2012), <http://dlr-law.com/3/post/2012/12/countdown-the-5-most-influential-video-game-lawsuits-of-2012-2-of-5.html>.

137. No. CGC-12-525099 (Cal. App. Dep't Super. Ct. Nov. 13, 2012).

138. *Id.*

139. Cross-Compl. at 3, ¶¶ 8, 10, *KIXEYE*, No. CGC-12-525099 (Cal. App. Dep't Super. Ct. Nov. 13, 2012); Kim-Mai Cutler, *The Legal Tussle Between Zynga and the Cityville GM that Left for Kixeye Heats Up*, TECHCRUNCH (Oct. 16, 2012), <http://techcrunch.com/2012/10/16/kixeye-harbin-suit-zynga>.

his employment agreement and engaging in “wholesale theft” of Zynga documents and secrets.¹⁴⁰ Zynga originally sued only Patmore, but has since amended its complaint, naming KIXEYE as a co-defendant.¹⁴¹

This lawsuit is still in its early stages, but could be the bellwether of things to come. The demand for talent in the industry, especially social-games programming talent, is well publicized.¹⁴² If the litigious Zynga continues to lose talent to competitors, similar lawsuits could become the story of the next year.

D. Bethesda Softworks LLC v. Interplay Entertainment Corp.¹⁴³

Bethesda Softworks LLC and Interplay Entertainment Corp. settled their long-running dispute at the beginning of 2013.¹⁴⁴ Bethesda sued Interplay for breach of contract and trademark infringement stemming from Interplay’s use of Bethesda’s *Fallout* brand.¹⁴⁵ Interplay—which created the *Fallout* series and sold it to Bethesda in 2007—retained the rights to sell preexisting *Fallout* games and licensed back the series so it could develop a *Fallout* massively multiplayer online role-playing game (MMORPG).¹⁴⁶ Bethesda claimed Interplay failed to seek approval on marketing materials for the pre-existing titles and Interplay entered into licensing agreements for those titles with distribution channels, such as Steam.¹⁴⁷ Both actions would be violations of the licensing agreement between Bethesda and Interplay.¹⁴⁸ In a

140. Compl. at 1, ¶¶ 304, *KIXEYE*, No. CGC-12-525099 (Cal. App. Dep’t Super. Ct. Oct. 12, 2012); Cutler, *supra* note 139; Tricia Duryee, *Zynga Files Suit Against Former Staffer, Claiming Theft of Trade Secrets*, ALL THINGS D (Oct. 14, 2012, 3:29 PM), <http://allthingsd.com/20121014/zynga-files-suit-against-former-staffer-claiming-theft-of-trade-secrets/>.

141. Amended Compl., *KIXEYE*, No. CGC-12-525099 (Cal. App. Dep’t Super. Ct. Nov. 8, 2012); Cutler, *supra* note 139.

142. Dean Takahashi, *Kixeye Steals a General Manager from Zynga, Rescuing Him from the ‘Dark Side’*, GAMESBEAT (Aug. 23, 2012, 6:00 AM), <http://venturebeat.com/2012/08/23/kixeye-steals-a-general-manager-from-zynga/>.

143. No. 8:09-cv-02357-DKC (D. Md. Sept. 8, 2009).

144. Order of Dismissal, *Bethesda*, No. 8:09-cv-02357-DKC (D. Md. Jan. 9, 2009), ECF No. 169; Mike Rose, *Report: Bethesda, Interplay Reach Settlement in Fallout Dispute*, GAMASUTRA (Jan. 3, 2012), http://www.gamasutra.com/view/news/39441/Report_Bethesda_Interplay_reach_settlement_in_Fallout_dispute.php#.UO2W5m_hrhe.

145. Compl. at 19–21, 23, 25–26, ¶¶ 90–102, 112–117, 125–135, *Bethesda*, No. 8:09-cv-02357-DKC (D. Md. Sept. 8, 2009), ECF No. 1; Kris Graft, *Bethesda Sues Interplay over Use of Fallout License*, GAMASUTRA (Sept. 11, 2009), http://www.gamasutra.com/php-bin/news_index.php?story=25226#.UO2XIG_hrhd.

146. Compl., *Bethesda*, *supra* note 145, at 5–6, ¶¶ 15–19; Graft, *supra* note 145.

147. Compl., *Bethesda*, *supra* note 145, at 12, ¶ 44.

148. *Id.* at 15–16, ¶¶ 67–68; Graft, *supra* note 145.

somewhat unusual development, announcement of settlement details is expected, at least in part, later this year.¹⁴⁹

E. Antonick v. Electronic Arts, Inc.¹⁵⁰

EA is locked in a legal battle with Robin Antonick, a longtime employee and creator of the software that allowed the football teams in EA's *Madden NFL* series to use eleven-man teams rather than five.¹⁵¹ This feature plays a huge part in *Madden's* realism and, arguably, its popularity.¹⁵² Antonick ultimately signed a few employment contracts, including one in 1986 that guaranteed him royalties "on not only the versions of the *Madden* game developed by him but also any derivative works and any works 'derived' from derivative works."¹⁵³ Antonick claims modifications to the contract were made in subsequent years, though the contract itself was never voided nor did it expire.¹⁵⁴ The case centers on whether the more recent *Madden* games are derivative works of the ones Antonick worked on and whether EA deceived Antonick in any way regarding this aspect of development.¹⁵⁵

The case also mentions several other EA sports titles that may contain vestiges of Antonick's engine.¹⁵⁶ Antonick alleges that EA told him the new games were based on new code, which did not include any of his work.¹⁵⁷ He further claims that he remained unaware of the new games' existence until 2009—a fact that is critically important to the case because of statute of limitations considerations.¹⁵⁸ In fact, EA originally filed a motion to dismiss on statute of limitations grounds, but the court found that the statute of limitations did not begin to run until Antonick's discovery in 2009.¹⁵⁹ In theory, this should be a relatively simple case, comparing Antonick's code to that of the EA games alleged to be using it. However, the financial consequences for EA could prove to be dire, as the *Madden* games have earned about \$4 billion for EA, and Antonick potentially has a claim for royalties from his con-

149. *Id.*

150. No. 3:11-cv-01543-CRB (N.D. Cal. Mar. 30, 2011).

151. Compl. at 1, 4–5, *Antonick*, No. 3:11-cv-01543-CRB (N.D. Cal. Mar. 30, 2011), ECF No. 1.

152. *Id.*

153. *Id.* at 1.

154. *Id.* at 8, 19.

155. *Id.* at 1, 19–20.

156. *Id.* at 23.

157. Compl., *Antonick*, *supra* note 151 at 1–2, 21–22.

158. *Id.* at 1, 4–5.

159. Order Denying Mot. to Dismiss at 1, 9–10, *Antonick*, No. 3:11-cv-01543-CRB (N.D. Cal. Sept. 27, 2011), ECF No. 47.

tract based on that figure.¹⁶⁰ The case was tangled in continuance motions and delayed hearings throughout 2012.¹⁶¹ Most recently, EA's motion for summary judgment was denied in late January.¹⁶²

F. **West v. Activision Publishing, Inc.**¹⁶³

This highly contentious case settled—somewhat surprisingly—on the eve of trial this year.¹⁶⁴ The terms are undisclosed, but EA (opposite Activision in the suit) described the settlement as “a vindication of Vince [Zampella] and Jason [West], and the right of creative artists to collect the rewards due for their hard work.”¹⁶⁵ This description seems to imply the settlement, at least in EA's opinion, was more favorable to West and Zampella.¹⁶⁶

In 2002, Activision acquired Infinity Ward Studios—founded by West and Zampella—and was responsible for the popular *Modern Warfare* and *Call of Duty* titles.¹⁶⁷ The two signed employment agreements that allowed them to retain creative control over Infinity Ward and set the terms of their compensation, including royalty payments for *Modern Warfare 2*.¹⁶⁸ However, Activision terminated West and Zampella for insubordination on March 1, 2010, just weeks before the royalty payments for *Modern Warfare 2* were due.¹⁶⁹ West and Zampella sued, alleging the termination was pretextual so Activision could avoid making royalty payments.¹⁷⁰ Activision countersued West and Zampella, and later added EA based on interference grounds.¹⁷¹

160. *Id.*

161. Stipulation and Order at 2, *Antonick*, No. 3:11-cv-01543-CRB (N.D. Cal. Dec. 27, 2012), ECF No. 249.

162. Order Denying Mot. for Summ. J., *Antonick*, No. 3:11-cv-01543-CRB (N.D. Cal. Jan. 28, 2013), ECF No. 288.

163. No. SC 107041 (Cal. App. Dep't Super. Ct. Mar. 3, 2010).

164. Michael McWhertor, *Settlement Reached in Call of Duty's Billion Dollar West v. Activision Lawsuit*, POLYGON (May 31, 2012, 4:26 PM), <http://www.polygon.com/gaming/2012/5/31/3049988/activision-call-of-duty-trial-placeholder>.

165. *Id.*

166. *Id.*

167. Compl. at 5x6, *West*, No. SC 107041 (Cal. App. Dep't Super. Ct. Mar. 3, 2010).

168. *Id.* at 5, 7–8.

169. *Id.* at 8, 10.

170. *Id.* at 9–10.

171. First Amended Cross-Compl. at 1, ¶ 1, *West*, SC 107041 (Cal. App. Dep't Super. Ct. Dec. 21, 2010); Ben Gilbert, *Activision Blasts West and Zampella in Countersuit [Update: Activision Responds!]*, JOYSTIQ (Apr. 9, 2010, 3:48 PM), <http://www.joystiq.com/2010/04/09/activision-blasts-west-and-zampella-in->

This was precisely the high-stakes, contentious case that many assumed would go to trial; ultimately a settlement was reached.

VI. FINANCIAL REVIEW OF 2012

Continuing a trend started in 2008, retail sales of games continued to fall in 2012 as more gamers moved to mobile and social gaming.¹⁷² Although console gamers are now considerably outnumbered, they spend about 35% more than the typical mobile gamer.¹⁷³ The decline leveled off in the fourth quarter as *Halo 4*, *Assassin's Creed III*, and *Call of Duty: Black Ops 2* were released for the holiday season.¹⁷⁴ These titles actually sold better than the top five games last year.¹⁷⁵ Problematically, titles outside of the Top Five did not sell quite as well.¹⁷⁶ Overall, 2012 continued the trend of reaching a more broad and diverse, albeit less profitable, consumer market.¹⁷⁷

Unfortunately, a bleak 2012 saw a few game companies declare bankruptcy, most notably THQ and 38 Studios.¹⁷⁸ The 38 Studios collapse was quite a mainstream story, partly due to the fact that the company was owned by sports legend Curt Schilling.¹⁷⁹ Part of this bankruptcy concerned state

countersuit; Edvard Petterson, *Electronic Arts Asks Must Defend \$400 Million Activision Suit, Judge Says*, BLOOMBERG (Dec. 21, 2011, 11:01 PM), <http://www.bloomberg.com/news/2011-12-21/electronic-arts-asks-judge-to-dismiss-400-million-activision-claims.html>.

172. Lance Whitney, *Xbox 360 Shines Bright in Otherwise Dismal Game Market*, CNET NEWS (Nov. 9, 2012, 8:57 AM), http://news.cnet.com/8301-10805_3-57547692-75/xbox-360-shines-bright-in-otherwise-dismal-game-market/.
173. Mike Snider, *NPD: Video Game Sales Slide Continues*, USA TODAY (Sept. 6, 2012, 8:25 PM), <http://content.usatoday.com/communities/gamehunters/post/2012/09/npd-video-game-sales-slide-continues/1>.
174. Juan G. Rodriguez, *Black Ops 2, Halo 4 and Assassin's Creed 3 Top Game Charts for November*, GAMENGUIDE (Dec. 7, 2012, 2:15 PM), <http://www.gamenguide.com/articles/4431/20121207/black-ops-2-halo-4-assassins-creed-3-sales-charts-november.htm>.
175. *Id.*
176. *Id.*
177. *Mobile Gaming Market Surges in 2012 as Traditional Gaming Continues to Decline*, YAHOO! FINANCE (Nov. 30, 2012, 8:20 AM), <http://finance.yahoo.com/news/mobile-gaming-market-surges-2012-132000563.html>.
178. *In re THQ, Inc.*, No. 12-13398-MFW (Bankr. D. Del. Dec. 19, 2012); Core Licht, *Videogame Maker THQ Files for Bankruptcy*, ATLANTA BANKRUPTCY LAW NEWS (Dec. 20, 2012, 3:12 PM), <http://atlantabankruptcynews.com/2012/12/videogame-maker-thq-files-for-bankruptcy-sells-its-studios.html>.
179. *In re 38 Studios, LLC*, No. 12-11743-MFW (Bankr. D. Del. June 7, 2012); Todd Wallack, *38 Studios Files for Bankruptcy*, BOSTON.COM (June 8, 2012), <http://www.boston.com/business/technology/2012/06/08/studios-files-for-bankruptcy/F6bbxOM4oxN2isKyDJqL5J/story.html>.

support for video game development.¹⁸⁰ Schilling, who played perhaps his most storied seasons for the Boston Red Sox, was lured to Rhode Island by millions of dollars in preferential loans issued by the Rhode Island state government.¹⁸¹ 38 Studios defaulted on its first payment and, subsequently, was forced to lay off its entire workforce—some 400 employees.¹⁸² To stay solvent, experts estimated that 38 Studios needed to sell two million copies of its game, *Kingdoms of Amalur: Reckoning*, but ultimately it only shipped between 1.3 million and 1.4 million copies.¹⁸³ When paired with the chilling of the MMO market—which negatively affected investment prospects of 38 Studios’ primary in-development title, *Copernicus*—this lackluster performance doomed 38 Studios, which ultimately filed for Chapter 7 bankruptcy.¹⁸⁴ Any potential impact of this debacle may have on government involvement in video game funding remains to be seen, but it certainly is an example of how things can go very wrong.¹⁸⁵

THQ—in financial trouble for most of the year—filed for bankruptcy protection on December 19, 2012.¹⁸⁶ Originally set to be quickly sold in its entirety to investor Clearlake Capital for around \$60 million, Bankruptcy Judge Mary Walrath declared earlier this year that she did not believe the quick sale was required to satisfy THQ’s creditors.¹⁸⁷ Instead, investors bid on THQ’s various studios and titles on January 22, 2013.¹⁸⁸ The individual sale was conditional: THQ’s assets would be sold separately only if the net bids of the individual assets totaled more than Clearlake’s \$60 million bid for

180. Jason Hidalgo, *Fallen Kingdom: 38 Studios’ Collapse and the Pitfalls of Using Public Money to Support Tech Companies*, ENGADGET (Sept. 7, 2012, 11:00 AM), <http://www.engadget.com/2012/09/07/38-studios-collapse-and-risk-of-public-private-partnerships/> (discussing, in depth, state-sponsored programs for technological and video game development).

181. Connor Sheridan, *38 Studios Spent \$133 Million before Bankruptcy*, GAMESPOT.COM (July 26, 2012, 12:45 PM), <http://www.gamespot.com/news/38-studios-spent-133-million-before-bankruptcy-6388664>.

182. *Id.*

183. Andrew Goldfarb, *38 Studios Executives Testify in Bankruptcy Hearing*, IGN (July 13, 2012), <http://www.ign.com/articles/2012/07/13/38-studios-executives-testify-in-bankruptcy-hearing>.

184. *Id.*

185. Hidalgo, *supra* note 180.

186. Licht, *supra* note 178.

187. Michael Bathon, *THQ Denied Approval of Bankruptcy Sale Process and Loan*, BLOOMBERG (Jan. 4, 2013, 11:01 PM), <http://www.bloomberg.com/news/2013-01-05/thq-denied-approval-of-bankruptcy-sale-process-and-loan-1-.html>.

188. Alexander Sliwinski, *THQ Will Sell Whole Unless Exceeded by Individual Asset Bids*, JOYSTIQ (Jan. 8, 2013, 8:30 AM), <http://www.joystiq.com/2013/01/08/thq-auction-details/>.

the whole package.¹⁸⁹ The auction was successful, generating approximately \$72 million for THQ and allowing many beloved game franchises to continue into the future.¹⁹⁰ Koch Media's Deep Silver reportedly purchased *Saints Row* at the January sale,¹⁹¹ but other major titles such as *Red Faction* and *Darksiders* were unsold and included in a second auction that is set to close on April 1, 2013.¹⁹² Some of THQ's in-development projects will be carried forward, including *South Park: The Stick of Truth*, purchased by Ubisoft;¹⁹³ *Company of Heroes 2*, acquired by Sega;¹⁹⁴ and *Metro: Last Light*, also picked up by Deep Silver.¹⁹⁵

189. *Id.*

190. Andrew Goldfarb, *THQ Dissolved, Saints Row, Company of Heroes Devs Acquired*, IGN (Jan. 23, 2013), <http://ign.com/articles/2013/01/23/thq-dissolved-saints-row-company-of-heroes-darksiders-devs-acquired>.

191. *Id.*

192. Michael McWhertor, *THQ to Auction Off Darksiders, Red Faction, Homeworld and More by May*, POLYGON (Feb. 26, 2013, 7:48 PM), <http://www.polygon.com/2013/2/26/4033902/thq-auction-off-darksiders-red-faction-homeworld>.

193. Earnest Cavalli, *Ubisoft Acquires THQ Montreal, South Park: The Stick of Truth Will Survive*, DIGITALTRENDS.COM (Jan. 23, 2013), <http://www.digitaltrends.com/gaming/ubisoft-acquires-thq-montreal-south-park-the-stick-of-truth-will-survive/>.

194. Alexander Sliwinski, *Company of Heroes 2 Deploys June 25*, JOYSTIQ (Mar. 6, 2013, 10:05 AM), <http://www.joystiq.com/2013/03/06/company-of-heroes-2-release-date/>.

195. Alexander Sliwinski, *Deep Silver Confirms Acquisition of Saints Row, Metro and Volition*, JOYSTIQ (Jan 23, 2013, 5:30 PM), <http://www.joystiq.com/2013/01/23/deep-silver-confirms-acquisition-of-saints-row-metro-and-voliti/>.