

January 2013

Legal Threats to Game Developers

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Recommended Citation

Carolyn Luedtke et al., *Legal Threats to Game Developers*, 16 SMU SCI. & TECH. L. REV. 99 (2013)

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Legal Threats to Game Developers

SYMPOSIUM PANEL III

Panelists

Ms. Carolyn Luedtke, Munger, Tolles and Olson, LLP

Ms. Kerry Hopkins, Electronic Arts

Mr. Marco Mereu, uCool

Mr. Jonathan Blavin, Munger, Tolles and Olson, LLP

Ms. Carolyn Luedtke:

I am Carolyn Luedtke, and I am a litigator at Munger, Tolles & Olson.¹ I represent many companies, including gaming companies. We are excited to be having this panel on the legal threats that exist for game developers.

We have several individuals on our esteemed panel. First is Kerry Hopkins, who is the senior director of intellectual property at Electronic Arts (EA).² Ms. Hopkins manages all of the intellectual property attorneys and efforts within Electronic Arts,³ and she will be talking about some of the challenges and issues they face at EA. Next, in a repeat performance for today, is Marco Mereu⁴ who is General Counsel at uCool.⁵ He has been working on a variety of gaming properties, including Evony;⁶ and then last week he launched DigiSocial.⁷ Finally, we have my partner Jonathan Blavin.⁸ He is also a litigator and is working on a variety of intellectual property issues, including intellectual property issues in the gaming space.

Today, we are going to tackle some of the legal problems that arise with gaming companies. First, I am going to start with some caveats and realities. One question that was posed earlier today was: what can be done to stop people from copying your game? The answer was that sometimes there is simply nothing you can do about it. If you have a successful game out there,

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1. Carolyn Luedtke - Profile, MUNGER, TOLLES & OLSON, <http://www.mto.com/lawyers/attorneys/Carolyn-Hoecker-Luedtke> (last visited Apr. 6, 2013).
 2. SMU Program Participants: Kerry Hopkins, GAME BUSINESS LAW 2013 INTERNATIONAL SUMMIT, <http://smu.edu/gbl/speakers.html> (last visited Mar. 26, 2013)
 3. ELECTRONIC ARTS, <http://www.ea.com/> (last visited Feb. 29, 2013).
 4. Marco Mereu - Profile, LINKEDIN, <http://www.linkedin.com/in/marcomereu> (last visited Feb. 29, 2013).
 5. uCool, LINKEDIN, <http://www.linkedin.com/company/ucool> (last visited Feb. 29, 2013).
 6. EVONY, <http://www.evony.com/> (last visited Feb. 29, 2013).
 7. DigiSocial, LINKEDIN, <http://www.linkedin.com/company/digisocial> (last visited Feb. 29, 2013).
 8. Jonathan H. Blavin, MUNGER, TOLLES & OLSON, <http://www.mto.com/lawyers/Jonathan-H-Blavin> (last visited Feb. 29, 2013).

people will frequently hack into it, they will attempt to copy it, and there will be limits on what can be done. Therefore, we are going to discuss how we can play the game of “Whack-a-Mole,” and how we can fight this daunting problem.⁹

Mr. Blavin and I speak from the perspective of litigation, and we realize that a lot of gaming companies are small companies that do not have in-house counsel. They do not have big legal budgets, and sometimes, litigation is not a viable option. Consequently, we are going to discuss alternatives to litigation. We should also recognize that this is a somewhat intractable problem, which we have to do our best to minimize, but probably will not be able to eliminate.

Ms. Hopkins and Mr. Mereu, what are some examples of the biggest problems your clients face in terms of intellectual property, cheating, and hacking issues?

Ms. Kerry Hopkins:

First, straight piracy is still a huge problem for the industry. I began doing anti-piracy work in the industry back in the mid-90s for Sony, so I was there when the first PlayStation¹⁰ was hacked. Back then, it was old-school piracy of packaged goods. We were going after pirates in Malaysia and China, conducting seizures and raids.

In comparison to all of the other content industries, my industry was not hit as early by the online piracy phenomenon. This is largely because the files were so big. As a result, it was extremely difficult to download files, and it was very complicated to put them back together and play them. Nevertheless, approximately five or six years ago our industry started getting hit really hard with piracy.¹¹ Personal computers (“PCs”) were the main targets, but consoles were also hit and mobile piracy is beginning to grow.¹²

To put it in perspective, for a Triple A game that comes out on PCs, Xbox,¹³ and PlayStation³,¹⁴ we see around three to five million downloads. Those are just the downloads we can monitor; that number does not include all of the downloads from linking sites or private servers. In other words, it is an extremely large volume.

9. *It's in the Game: How EA Tackles Piracy*, WIPR (Jan. 3, 2013), <http://www.worldipreview.com/article/it-s-in-the-game-how-ea-tackles-piracy> (hereinafter *EA Tackles Piracy*).

10. PLAYSTATION, <http://us.playstation.com/> (last visited Mar. 12, 2013).

11. *EA Tackles Piracy*, *supra* note 9.

12. Roger Cheng, *How Piracy Ruins it for Paid Apps*, CNET (Sept. 19, 2011), http://news.cnet.com/8301-1035_3-20107572-94/how-piracy-ruins-it-for-paid-apps-inside-apps/.

13. XBOX, <http://www.xbox.com/en-US/> (last visited Mar. 12, 2013).

14. PLAYSTATION 3, <http://us.playstation.com/ps3/> (last visited Mar. 12, 2013).

To deal with this problem, there are some legal mechanisms in place. For instance, each year we use automated monitoring and takedowns to remove hundreds of thousands of links to pirated games. Also, we work on site-blocking cases. Moreover, we work with trade associations around the world on policy activities, where we work with payment processors to prevent payments from getting to pirated sites. For example, we work to add networks that try to stop revenue from coming in through advertising posted on pirated sites.

The truth is that we are not going to stop online piracy through legal mechanisms. Our real focus is on incentivizing users to play real games through two primary mechanisms. First, we use technology to make it more difficult to access online content. Second, we create an extremely robust online functionality, even for classic games, such as console and PC games. We make sure people want to play online. That way, we know they will buy the real product from us to access it. Consequently, our real focus right now is to use business tools to incentivize people.

Mr. Marco Mereu:

My perspective on the panel is going to be from the small developer. We do not have a large, robust budget that allows us to plan for litigation every year. We do set some money aside; but like most smaller developers, we do not have the means to set aside a large amount of money dedicated to litigation every year. Instead, smaller companies are going to want to dedicate their resources toward marketing, product development, or getting their product to the market.

As an alternative to litigation, I would advocate a guerrilla approach. Under this approach, I get into the trenches and think outside the normal attorney perspective. I ask myself, "What is the best way I can combat the people who are trying to hack into our game, pirate aspects of our game, or sell items that are for sale in our browser base or mobile games?" Basically, I try to determine how to make these guys' lives so difficult that they decide to move on to another product. Therefore, for me, it becomes a war of attrition. Games are global now, and people are playing your games all over the world. As a result, it is very expensive and unrealistic to try to sue somebody who is hacking or accessing your game from, for example, China. Consequently, I have to find other ways to shut them down or shut them out. For example, we obviously utilize methods like Digital Millennium Copyright Act ("DMCA") takedowns.¹⁵ I also monitor all the hacking forums where people talk about the products that they are using to make new bots to access and imbalance my game. I go into those forums to interact with the people who are discussing such topics and to learn exactly what they are doing. Then, in the precise moment when they are about to go live, I go in and shut them down. Therefore, I try to make the biggest problem possible for them.

15. See Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(c)(1)(C) (2012).

Ms. Carolyn Luedtke:

When you are in these hacking forums, do you say who you are? Do you say who you are associated with? Do you actually interact with them? Do you just observe their dialogue?

Mr. Marco Mereu:

I watch, read, and listen to what the forum members are attempting to do. Many browser-based games are created in Flash. Flash is easily decompilable, so a person who knows what he or she is doing can download Flash, then copy and recreate that game. As a result, we have a lot of players who think, "Oh, we can run your game better than you can, so we are going to create our own private servers of your game, and run those on our own sites." Obviously some of these people try to make money off this, and those are the people we really keep an eye on and go after.

Ms. Carolyn Luedtke:

You discuss the important effort of policing, monitoring, and finding the violations that exist out there. One point for attorneys to consider is whether ethical rules require you to identify yourself when you are doing investigations of the type Mr. Mereu is discussing. However, there are disagreements amongst the different bar associations regarding this issue.

For example, the New York Bar Association's Ethics Opinion states that if an attorney is out on the Internet doing an investigation, on a social media site, that attorney does not have to identify himself.¹⁶ Instead, an attorney can go out and say, "I am Carolyn Luedtke, and I want to be your friend," and then find out what others are doing with your games.¹⁷

In other words, under the New York Ethics Opinion, you could go on these chat rooms and say, "I am Carolyn Luedtke and I want to know how you are hacking into EA's games," without having to identify yourself. Under the New York Ethics Opinion, that would be ethical and would not be considered deception. However, an attorney cannot affirmatively lie.¹⁸ Thus, these investigations are ethical so long as you say, "I am Carolyn Luedtke," and do not say, "I am Jane Doe and I am a hacker, too."

Conversely, the Philadelphia Bar Association has recently come down with an ethics opinion requiring attorneys to identify themselves.¹⁹ Under this opinion, if an attorney does not identify himself, he would be acting

16. Obtaining Evidence from Social Networking Websites, New York City Bar Formal Opinion 2010-2 (2010), *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/2010-opinions/786-obtaining-evidence-from-social-networking-websites>.

17. *See id.*

18. *Id.*

19. Professional Guidance Opinion 2009-02, New Philadelphia Bar Association (March 2009) *available at* http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

unethically and would be committing deception.²⁰ For example, if you sat in a hacking chat room, actually participated in the discussion, and did not say, “I work for Electronic Arts, and I am looking into hacking problems,” then you would be committing deception.

Therefore, there is a big divergence of views amongst the bar associations about how lawyers and investigators can use tools, such as blogs and social media sites, to gather information about a case. This presents an interesting question when attorneys are policing. However, in a bigger shop, it is usually not an attorney who is conducting the policing; but it might be an attorney conducting the policing in a smaller shop.

Mr. Marco Mereu:

Actually, I generally have people other than myself who are in the chat rooms pointing issues out to me. Also, in regards to be being proactive or reactive, I would say approximately 80% of what I do is proactive. I try to be proactive because once I get into being reactive, I am spending money on outside counsel for litigation, and I really want to avoid that. Therefore, when I am proactively policing a part, I have to be a little creative. Consequently, part of what I do is try to constantly communicate to our community base and players that we care about cheating, we care about cheaters, and we care about hackers; so rat those guys out. We get reports all the time from players on our own game saying, “So-and-so is doing this on a forum, and it is about to go live,” or “You should see what these guys are doing.” From there, we can go investigate those issues. In other words, we have a kind of community watch in place to some degree that tries to keep us in the loop on those issues.

Ms. Carolyn Luedtke:

When the community watch finds a specific problem, do you use DMCA notices? Do you contact the provider? What do you do to try to get it taken down?

Ms. Kerry Hopkins:

It depends on the type of infringement. When there is a straight copyright claim, DMCA notices or takedown notices are available.²¹ We probably manually send several thousand DMCA and takedown notices a year, and we probably send another million through automated monitoring.

However, DMCA notices and takedown notices are not always a viable remedy. Often, there is not a straight copyright claim. For example, in regards to hacking and cheating, there is rarely a straight copyright claim, so you might not have a remedy. You might learn about the problem and then have no real way to combat it. Or the remedy might be working with your development and security teams to figure out how they have achieved the exploit; then finding a way to tighten up your controls so the game can no

20. *Id.*

21. *See* DMCA, 17 U.S.C. § 512(a) (2012).

longer be exploited in that way. Thus, DMCA's are extremely effective for some situation, but not for all situations.

Mr. Marco Mereu:

From a small developer's perspective, we also utilize the DMCA. Everyone is familiar from last year with the Stop Online Piracy Act ("SOPA")²² and the problems that exist under the DMCA. First, it is still very easy to respond to a DMCA notification. Moreover, the DMCA makes it so that if you have someone hacking or violating the provision, they can very easily swing the pendulum back onto you. Consequently, you have to be prepared as a developer to spend money.

I always tell my board, for which I frequently work, they should not throw DMCA's around like they are going out of business because a receiver of the notification can just file a counter notification. Many of these websites will give the receiver a template to fill out. It is literally half drawn up already, and all the receivers of the notifications have to do is fill out the template and sign it. At that point, that internet service provider ("ISP") is off the hook, and they no longer have to worry about the problem. On the other hand, now I have ten days to file suit or the receiver is off scot-free. Therefore, once you send the DMCA out, you had better be ready to follow that up with litigation.

Mr. Jonathan Blavin:

Additionally, under 512(f) after the enactment of DMCA,²³ you have to be concerned about notifications that are inaccurate or incorrect. Inaccurate or incorrect notifications can happen frequently when you are using automated systems. Such systems present the risk that the person sent the notification will file suit under 512(f),²⁴ claiming that you improperly sent a DMCA notice and failed to use proper due care in vetting it before it went out.

Ms. Kerry Hopkins:

Automation is useful in some cases; specifically in the way we use it for pirated copies of games. It is a very expensive process: we have to access the files that are available for download, actually run them through a scan, make sure they match up with our code, and then send a notice. While we use a vendor to do that, it is still very expensive and time consuming. It is time consuming on the internal side because the lawyers have to learn a lot about the monitoring technology. Then they have to be sure they have all of the checks in place so that notices are not being sent out without proper evidence.

22. Luke Johnson, *What Is SOPA? Anti-Piracy Bill Explained*, HUFFINGTON POST (Jan. 19, 2012), http://www.huffingtonpost.com/2012/01/19/what-is-sopa_n_1216725.html.

23. See DMCA, 17 U.S.C. § 512 (2012).

24. *Id.*

Ms. Carolyn Luedtke:

Now let us turn to the problem of virtual asset phishing and fraud. What is happening in the world of virtual assets and virtual money? How does that apply to these types of protective measures?

Ms. Kerry Hopkins:

We have been using a lot more online functionality and community-type features in our games to incentivize against piracy. However, that brings a whole new set of problems. One big problem deals with virtual assets and virtual coins, another big problem exists with the resale, grey, and black markets we are creating. Virtual coins are the currency used in games to purchase levels or assets in a game. Virtual assets are additional content that is acquired in a game.²⁵ These assets can sometimes be purchased, earned, or won. Moreover, these assets are typically subject to some type of terms of service, which have certain restrictions or prohibitions on resale or transferability. Therefore, you do have contract in place.

What we are seeing now is a huge increase in phishing, farming, and fraud for people to acquire these virtual assets and resell them. Specifically, we are seeing phishing problems with our *FIFA Ultimate Team* game.²⁶ *FIFA Ultimate Team* is one of the games in our FIFA franchise;²⁷ it is basically a team management game. In the game, you build teams through trading card-like objects. Because trading is a part of the game, we have to have a fairly open environment that allows for the trading to take place. However, this open environment creates a playground for abuse. After all, when we make it easy for players to trade, people find ways to turn the trades into something that involves real money. Usually, people do this by going off to an auction site, offering to sell players certain assets or coins, getting money externally outside of the game, and then going into the game to trade.

One of the key ways people get assets in *FIFA Ultimate Team* is through phishing. They set up sites that look like EA sites, ask people to give their accounts and passwords, and then they go in and take all the entitlements. We see some sites that are now exactly like a FIFA site; then we also see other sites like this one where a kid says, "My dad works for EA and I have a way to get coins, give me your account information." We have an obligation to try and deal with this problem.

This is where DMCA comes in very handy. Most of these sites are using copyrighted assets, so we can get the sites taken down fairly quickly. Frankly, ISPs are actually extremely open to getting letters that explain there is a good faith belief that they are engaging phishing. While there are a few

25. See, e.g., Virtual Asset Definition, TECHTARGET, <http://searchfinancial-security.techtarget.com/definition/virtual-asset> (last visited Apr. 6, 2013).

26. FIFA 13 Ultimate Team, EA SPORTS, www.ea.com/soccer/fifa/fifa-ultimate-team (last visited Mar. 2, 2013).

27. Join the FIFA Club, EA SPORTS, <http://www.ea.com/soccer/> (last visited Mar. 2, 2013).

ISPs who don't, most ISPs always take the sites down quickly since they have an interest in preventing their customers' accounts from being stolen.

Again, the big problem here is finding the phishing sites. They go up very quickly. You can hire an automated monitoring service to find them for you, but it is incredibly expensive. For one title, it would be \$30,000-\$50,000 a year. Consequently, in cases where there is a particular problem, we do some proactive monitoring. We are a big company, so we have people all around the world. Also, these sites go up very quickly, so we have a special dedicated inbox where these alerts are sent. We handle it that way rather than going out and looking for them. In the last two years, we have taken down several thousand *FIFA Ultimate* phishing sites.

Once these people get the assets, typically the sellers go onto eBay and auction the assets. This is a normal eBay auction. The question is, therefore, what can we do to pull down these auctions? What are our legal claims? Well, as we said, we have terms of service; and the resale of these items violates the terms of service. However, a breach of contract claim does not resolve these problems very expediently. Our goal here is to get the site taken down and remove the auction. Taking someone to court, filing a breach of contract claim, and going through three years of litigation does not help accomplish that goal.

On top of that, it is not completely clear if we have any direct copyright claims on this type of problem. In regards to virtual assets, the asset in the game is copyrighted content. However, what the user has is not a copy of the content. Instead, they have an entitlement to access the content. Therefore, no actual copying is going on, so you may not have a copyright infringement claim. Furthermore, after the Blizzard MDY Glider case,²⁸ it is not clear whether a breach of an end user license agreement ("EULA") would constitute a copyright infringement claim.

Luckily, we have a great program through eBay, which is the main channel on which these assets are sold. This program is eBay's VeRO program²⁹ and their digital goods policy.³⁰ We can report issues through this program and have those auctions taken down. However, a substantial amount of work goes into trying to find those auctions, compile them, and send them to eBay. Also, eBay's policies are different all around the world, so we often get into a big back and forth with eBay. Nevertheless, we do take down tens of thousands of auctions a year.

28. See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011).

29. VeRO: Helping to Protect Intellectual Property, EBAY, <http://pages.ebay.com/vero/intro/index.html> (last visited Mar. 2, 2013).

30. Help, EBAY, <http://pages.ebay.com/help/policies/downloadable.html> (last visited Mar. 2, 2013).

Now, I am going to give two examples that will depict what the people who are selling these assets are all about. First is a case where the seller gets around eBay's digital goods policy by saying, "I'm selling a blank CD, but I will also give you a gift of some of these digital goods." As a result, what the seller was selling did not fall within the policy. This plan actually worked for a little while, and we had a tough time getting eBay to take these down.

In another eBay auction, a seller was selling *FIFA Ultimate* coins. At the bottom of the page he said, "If you would like to get one hundred more, come here to my site." But when you went to his site, you would just get your account information again, and he would go back and steal everything you just bought.

It is just incredible what you see out there. As we move into a more online environment and as virtual assets and virtual coins become a bigger part of our game, we are dealing with new problems every day.

Ms. Carolyn Luedtke:

Have you seen that in your video games?

Mr. Marco Mereu:

Yes, definitely. It's a burden on Electronic Arts, so you can imagine what it is like for a smaller developer to deal with these same issues. Unfortunately, sometimes when you are a smaller developer, eBay is not as efficient. I am not sure if others run into this, but I am mind-boggled by the difficulty I can have sometimes in getting platforms like Facebook,³¹ Google,³² or PayPal³³ to cooperate with me on removing some of these virtual goods or account enhancements that are listed for sale on their sites.

For example, someone was using my company's trademark in an inappropriate manner through Facebook advertising. I was on the phone with Facebook's intellectual property counsel, and they told me, "You know this stuff might be in our terms of service, or this stuff might be in our advertising policy, but we can't enforce it. We don't have the scale." When Facebook tells you, "We just can't enforce our own policies on our scales unless it's egregious or really, really over the top," then you basically have to threaten to go to court over the matter until it is taken down. That is the length you have to go through sometimes to get some of these major companies to cooperate with you.

On one occasion, we had an issue with a Chinese pirate who was doing something to one of our games and making a lot of money from it. We worked very closely with our own PayPal representative here in the United States to get his PayPal accounts shut down. However, it was taking a long time, and it turned out that the pirate's PayPal representative in China was resisting what we were trying to do. There was a fight going on in PayPal between the account representatives. I am sure both of them were making

31. FACEBOOK, <https://www.facebook.com/>, (last visited Mar. 12, 2013).

32. GOOGLE, <http://www.google.com/>, (last visited Mar. 12, 2013).

33. PAYPAL, <https://www.paypal.com/home>, (last visited Mar. 12, 2013).

money off the accounts. This process is very, very difficult, it is very time consuming, and it takes a lot of effort. I try to put a tremendous amount of time into communicating with users so that they understand the importance of not sharing their account details, not letting other people sit in their accounts, and not letting people make purchases on their accounts for them. A third party can do a charge back on a credit card, and when that third party makes a charge back, I have to suspend that user's account. Then, the user does not understand why he got suspended or why he can no longer play the game.

Ms. Carolyn Luedtke:

Is it worth it? What would happen if you just did nothing? Or is that not an option?

Mr. Marco Mereu:

We would have a lot of unhappy users, for one thing.

Ms. Carolyn Luedtke:

Do you make sure to communicate to your users the efforts that you are taking, even if those efforts are not perfect?

Mr. Marco Mereu:

Always. We have sued pirates, and we have spent hundreds of thousands of dollars on people hacking the game and trying to create bots. It really compromises your game play experience. We were the first company, I think, to introduce CAPTCHA³⁴ in-game. If we thought someone was botting, we would put a CAPTCHA up on their screen. If they could not answer it (a bot cannot answer a CAPTCHA), then they would get logged out. When we did that, people were enraged. Sure enough, all the people that were enraged were people that were botting. Do not be confused—we lost a lot of money from doing that. That cost us huge revenue. But if you do not have game play bounds and you are not dedicated to getting rid of those kind of players, then you do not really have anything, as far as a game goes.

Ms. Carolyn Luedtke:

I am going to transition from that to this idea of cheating. What kind of problems do you face if you have people within your game who are cheating and are affecting the game play experience of other people?

Mr. Jonathan Blavin:

The critical principle for these competitive online games is that there is a fair, level playing field. When you have rampant cheating and hacking, you see that players ultimately do leave these games. It can hurt the developers and services which provide online gaming, such as Microsoft's provision of Xbox Live.³⁵ Also, these kinds of tools that cheaters use are quite diverse. You can have tools that allow people to see through walls in games, fly in

34. CAPTCHA, <http://captcha.net/> (last visited Apr. 6, 2013) (“A CAPTCHA is a program that protects websites against bots by generating and grading tests that humans can pass but current computer programs cannot.”).

35. XBOX LIVE, <http://www.xbox.com/en-US/live> (last visited Mar. 12, 2013).

shooter games, and provide more powerful weapons or rapid fire. You also have bots that play through advanced levels of games, so someone can go out to dinner and the game will progress without them actually playing. Bots were a big issue in the *World of Warcraft*³⁶ game, which ultimately resulted in litigation.³⁷ As Kerry mentioned, you have unearned content in points which cheaters use, so you could have inflated gamer scores, standings in games, unearned content, or virtual assets. Over the last couple of decades since online gaming has taken off, games have really been debilitated by online cheating. Users have ultimately left those games and said, “I can’t play this game. It’s just not working.” *Age of Empires* is a big example that people use.³⁸ It was a very popular game, but the rampant cheating which occurred ultimately took users away from that game. There are a number of other games as well.

People are not going to pay a subscription fee for a service if the cheating is disrupting their game play. It hurts goodwill for the company as well, not to mention the loss of the sales of virtual assets purchased in games. This is an example I found online about a user posting on the PlayStation boards relating to the cheating that they were witnessing in *Call of Duty: Modern Warfare 2*.³⁹ This occurred shortly after the massive hack of the PlayStation network in which cheating and hacking was rampant throughout the entire system.⁴⁰ At that point, *Call of Duty* had been so overrun with cheating and hacking on PlayStation that the game essentially became unplayable, and users did not want to play it anymore.⁴¹ That is the real risk that game developers face when cheating and hacking goes over the point of just being at the fringe and becomes more of a mainstream activity.

So, if you were actually considering bringing a claim, who would you sue? As discussed, it does not really make any sense at all to go after individual cheaters or hackers. It is not economically efficient. You can be tied up in

36. WORLD OF WARCRAFT, <http://us.battle.net/wow/en/?> (last visited Apr. 6, 2013).

37. See *MDY*, 629 F.3d at 934–35.

38. See, e.g., CHEATING IN ONLINE GAMES, ABOUT.COM, <http://internetgames.about.com/od/gamingnews/a/cheating.htm?p=1> (last visited Apr. 6, 2013).

39. MODERN WARFARE 2, <http://www.modernwarfare2.com/> (last visited Mar. 12, 2013).

40. See Tomoko A. Hosaka, *Sony Hack October 2011*, HUFFINGTON POST (Oct. 10, 2011), http://www.huffingtonpost.com/2011/10/12/sony-hack-october-2011-playstation-network_n_1006661.html; see also COD MW2 Hacking Cheating, PLAYSTATION FORUM, <http://community.us.playstation.com/t5/Shooter-Genera/COD-MW2-Hacking-Cheating/td-p/30870984?start=0&tstart=0>.

41. See, e.g., *Activision Could Close Call of Duty: Black Ops Servers on PSN Due to Security Breaches*, GAMES RADAR, <http://www.gamesradar.com/activision-could-close-call-of-duty-black-ops-servers-on-psn-due-to-security-breaches/> (last viewed Apr. 6, 2013).

litigation for years and it is expensive. Plus, with the millions of users on these systems, it becomes a problem trying to catch them all. You can use technological means to go after individuals, which the panelists have already discussed today. You can also enforce your terms of service against them—so you can ban users or you can reset their standing in the games, which may have some positive effect overall.

Ms. Carolyn Luedtke:

Is banning something either of you have used and, if so, to what success? Do those banned individuals come back as others?

Ms. Kerry Hopkins:

Banning is one of the key tools that you have to use against cheaters because the legal options are slim. So, yes, we definitely ban cheaters.

Ms. Carolyn Luedtke:

Do you want to talk some about the economic trade off of who are your cheaters?

Mr. Marco Mereu:

When you have a free-to-play game, it is a lot different. Believe or not, sometimes the people who are the biggest offenders are the “whales.” Those people are spending the largest amounts of money because they take your game very seriously. The game is a big part of their lives. They may play the game eight hours a day and spend \$20,000 a year on it. Often, those people are doing everything they can to get ahead, which includes using bots; but we have to treat all the users the same. I may give one of those people a warning that says, “Hey, look, we caught you doing this. Don’t do it again. Here is a three-day suspension.” And sure enough, when the three-day suspension is up, they come back and are at it again. At that point, you ban those users, and then they go up in a ball of flames. If they have the resources, which some of those people do, they generally hire a high-profile or high-price attorney to call me up and tell me either that they want to try to pick holes in my Terms of Service, that they are going to find something else against me, or they are going to create bad public relations for me. My general position to all of them is, “Pound sand. I don’t care.” We have enough money to fight those people and basically say, “Go find another game to play in.” But the reality of the free-to-play games is that these types of players can just use a new email and start over again. A lot of them will do that, but these guys are judgment proof. The majority of them do not have anything, so I go into those situations knowing I am going to spend money to litigate, but also knowing I am not going to collect anything.

Mr. Jonathan Blavin:

It may make sense to go after third parties who may be enabling, or aiding and abetting the cheating that is occurring. Obviously, the game developer has to make a judgment call as to whether the third party is providing a tool or service that is widespread enough to have a material effect on the gameplay, if you were to get an injunction against them.

In considering whether or not to sue a third party provider of circumvention tools or devices, the important calculus is: Is this device just used by

a fringe set of users or is it becoming mainstream? Is it marketed as a mainstream tool that people can use to advance in the game, and if so, is it actually disrupting game play? Moreover, are there other third parties who are selling it? Do you have to go after many different providers, or can you just go after one who appears to be the most mainstream distributor of such tools?

There are actually some examples from the case law involving various tools which have enabled cheating. A case dating back from the early nineties involved the Game Genie⁴² tool, which was popular on the Nintendo⁴³ system.⁴⁴ This predated online gaming, so there may be a philosophical question about who is being harmed when you are cheating a game in isolation. Nonetheless, there was litigation relating to the Game Genie tool. People would put the Game Genie on top of their Nintendo game cartridge to get special tools and weapons, etc., that they could use in the game.⁴⁵

A newsworthy case from a couple years ago related to the Glider tool, sold and distributed by MDY Industries, which allowed people to cheat.⁴⁶ It was essentially an autobot tool for advancing in *World of Warcraft*⁴⁷ and it became a subject of litigation.

Our firm, Munger, Tolles & Olson LLP,⁴⁸ was involved in a case related to tools distributed by Datel,⁴⁹ which allowed people to engage in various levels of cheating and hacking on Xbox Live.⁵⁰ It is interesting that in these cases, none of the people who are asserting the cheating claims are actually plaintiffs in them. Instead, the cases were typically initiated though declaratory relief actions, like in the *Galoob*⁵¹ and *MDY* cases.⁵² With respect to the *Datel* case, Microsoft⁵³ initially used a self-help technological measure to prevent Datel's tool from working with the Xbox 360, but then Datel ended

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42. GAME GENIE, <http://www.gamegenie.com/> (last visited Mar. 12, 2013).
 43. NINTENDO, <http://www.nintendo.com/?country=US&lang=en> (last visited Mar. 12, 2013).
 44. See *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).
 45. *Id.* at 967.
 46. *MDY*, 629 F.3d at 934–35.
 47. WORLD OF WARCRAFT, *supra* note 36.
 48. MUNGER, TOLLES & OLSON LLP, <http://www.mto.com/> (last visited Mar. 12, 2013).
 49. DATEL, <http://www.datel.co.uk/> (last visited Mar. 12, 2013).
 50. See *Datel Holdings Ltd. v. Microsoft Corp.*, 712 F. Supp. 2d 974, 980 (N.D. Cal. 2010).
 51. *Lewis Galoob Toys*, 964 F.2d at 967.
 52. *MDY*, 629 F.3d at 935.
 53. MICROSOFT, <http://www.microsoft.com/en-us/default.aspx> (last visited Mar. 12, 2013).

up filing an antitrust lawsuit against Microsoft, and claimed this was essentially Microsoft's means of monopolizing an aftermarket accessory market.⁵⁴ These claims relating to cheating and hacking have actually been more reactive than proactive. I have yet to see a case in which the defendant affirmatively went out and sued someone relating to these cheating and hacking tools. Those claims have been of more use in strategic measures in litigation.

Regardless of whether you have been sued or are proactively bringing suit, what are the potential claims you can bring against some of these third parties? The most popular one to date seems to be a claim under the DMCA,⁵⁵ and this is a bit different from what we were talking before with respect to DMCA takedown notices. This relates to the anti-circumvention provisions of the DMCA and, in particular part, the DMCA prohibits trafficking and technologies, and devices that are primarily designed or produced for the purpose of circumventing technological protection measures that protect against unauthorized access to copyrighted content.⁵⁶ An initial threshold question is: Is the material that is being protected actually copyrighted content? This ties into the point Ms. Hopkins was making before with respect to, for example, the coins or other assets. They might not, in fact, be copyrighted content.

In the *MDY* case, someone was progressing through a game using a bot, so the court analyzed the issue of copyrighted content using the audio and visual dynamic game play. Basically, the court said, "Well, there is this tool that circumvents various measures that Blizzard has put in place to prevent autobots, and it allows people to gain unauthorized access to further levels of the game that they normally would not be entitled to access unless they played the game through the regular means without engaging this bot."⁵⁷ That was the copyrighted content in *MDY*. Courts have held that, essentially, detailed descriptions of what copyrighted content may be in the game, comparable to sheet music, could in fact be the copyrighted content itself.⁵⁸

For example, even if you do not have the image, if your code describes the image then that may, in and of itself, be copyrighted content. With respect to assets such as game saves, for example, does that count as copyrighted content if someone was able to hack or cheat a game save? Maybe not, if it just contains information as to what level you were on, what your lives were at that point, what assets you had built, and other similar information. The classification is leaning towards non-copyrightable because it is just data rather than any actual audio or visual expression. But if the game save contains any kind of images, music, or the like, that could fall into the copyrighted content category.

54. *Datel*, 712 F. Supp. 2d at 978–979.

55. *See, e.g., MDY*, 629 F.3d at 950.

56. DMCA, 17 U.S.C. § 1201(a)(2) (2012).

57. *See MDY*, 629 F.3d at 953-954.

58. *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1111–12 (9th Cir. 1998).

What are the protection measures that are being circumvented? Well, courts here are actually taking a very broad view of what technological protection measures may be. The courts have held that even the unauthorized use of a password constitutes “circumvention of a technological prevention measure.”⁵⁹ Courts have also held, with respect to consoles, developing some kind of tool allowing you to connect to, or on, the physical consoles in a way that was not intended could be considered circumventing a technological protection measure.⁶⁰ For example, if courts today looked at the Game Genie from the early 1990s, it may rule that it is circumventing various measures that Nintendo put into its console.

Another potential claim is a secondary infringement claim. To bring a secondary infringement claim, you need to 1) show that the end users are engaging in direct infringement and 2) assert some theory of secondary liability such that the person either had some kind of material contribution or knowledge of the infringement, or had the right and ability to control the infringement and gained a financial benefit from the infringement.⁶¹

A theory that had been espoused was that if people were playing games in violation of the Terms of Use, and in doing so they were necessarily making, for example, cached copies of the games, then that might potentially be infringement. However, the Ninth Circuit in the *MDY* case essentially said “No, that does not quite make sense because the Terms of Use that they are violating are not sufficiently connected to the copying that has occurred.”⁶² Just because you are violating the Terms of Use and making that cached copy in your computer—that is not necessarily infringement. The court effectively held that the cached copies players made of *World of Warcraft* were in violation of the Terms of Use because the players were using an autobot.

Another potential claim would be that these third parties are inducing end users to breach their Terms of Use by providing them with tools or mechanisms to engage in conduct which may violate various provisions of the end user license agreements or the Terms of Use on the web site. In *MDY*, the district court found that the autobot tool did enable or induce viola-

59. *Actuate Corp. v. Int’l Bus. Machines Corp.*, C-09-05892 JCS, 2010 WL 1340519, *9 (N.D. Cal. Apr. 5, 2010).

60. *Nintendo of Am., Inc. v. Chan*, CV 09-4203JFW (PLAX), 2009 WL 2190186, *3 (C.D. Cal. July 21, 2009).

61. *See MDY*, 629 F.3d at 937–38.

62. *See id.* at 941.

tions of the Terms of Use⁶³ and on that basis—in addition to the DMCA—⁶⁴ enjoyed the use of the autobot.⁶⁵

Ms. Carolyn Luedtke:

One of my favorite pieces of the *MDY* case is where the judge in the Ninth Circuit is discussing the tortious interference claim that they send back to the district court.⁶⁶ One of the bases on which they send it back is the public policy factor, and the judge basically said there is a question as to whether the public benefits from these cheating devices because, for instance, men do not need to play the game as long and get to spend more time with their families and wives.⁶⁷ I just thought that was the coolest public policy argument I have ever heard.

Mr. Jonathan Blavin:

Another claim that has been considered, but probably would not work, would be under the Computer Fraud and Abuse Act which makes it unlawful, essentially, to engage unauthorized access to a computer system.⁶⁸ Unfortunately, although there is not a judicial consensus on the issue yet, a number of courts have held that you cannot bring a secondary liability claim under the Computer Fraud and Abuse Act.⁶⁹ So, for example, you cannot bring a complaint alleging a company has distributed a tool which aids, abets, or enables someone to gain unauthorized access to your computer systems. That would primarily be a claim against an end user which, as we have discussed, is not very practical since they are often judgment proof.

Ms. Carolyn Luedtke:

So, in our parade of horrors, you can get hacked, phished, copied, and cheated. We are going to look at copying now. First, I want to talk about when you are representing a game developer, when you are working at a gaming company, or when you are a game developer—how do you avoid being accused of copying? I wanted to turn it to Ms. Hopkins and Mr. Mereu to talk about in their practice advising gaming teams, what are the best practices out there for trying to avoid becoming accused of being a copier?

Ms. Kerry Hopkins:

We are lucky enough to have a pretty big staff, so we get to do a lot of trainings with our development teams, and in particular our artists and writ-

63. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 616 F. Supp. 2d 958, 970 (D. Ariz. 2009), *vacated*, 629 F.3d 928 (9th Cir. 2010), *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011), and *vacated*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011).

64. *Id.* at 974.

65. *Id.* at 975.

66. *MDY*, 629 F.3d at 955.

67. *See id.* at 956.

68. Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2) (2012).

69. *Jagex Ltd. v. Impulse Software*, 750 F. Supp. 2d 228, 238 (D. Mass. 2010).

ers. As a result, they really understand the basics of trademark and copyright law. We are very lucky that EA⁷⁰ does not typically produce games that are like other companies' games; so we have not had a big issue with the overall copying of our games.

Our focus has been mainly on issues relating to specific assets, like when we are working on a character in a game that might resemble an already-known character. Even more important for us are the depictions of real world assets in our games and whether we will have issues with copyright, trademark, or copying claims. We have a legal approvals process where we work with the development team from the first green light, right through the game release. We actually have what we call "franchise legal teams" assigned to each franchise; we have a lawyer, a licensing associate, and an intellectual property associate on my team who are assigned to each franchise. They are there to advise the franchise on everything and really know the game. It has kept us out of trouble, basically.

Mr. Marco Mereu:

Our company has not published anywhere near as many games as EA has, so I can only speak from experience. We do everything in-house; we do not use third-party contractors, and I often have my own art team. Artists use other art for inspiration, so they will look at something and run it by me if they think there is an issue. They will essentially ask questions like, "Is this too close to what this dragon looks like in this big, popular game?" I will tell them, just to be on the safe side, to mix up the product a little bit so it is definitely not a copy.

We have not really been accused of copying anything. On the flip side, *Evony*⁷¹ is probably one of the most knocked off games out there, in terms of what you can play. Two or three of the top-grossing iOS⁷² games are *Evony* knockoffs, and the guys who made those games will tell you the same thing. Almost every big publisher out there has knocked off that style of game, but obviously you cannot cover the look of the game or the way it plays, so as long as the knockoff does not copy my code, then generally we just try to make a better product.

Ms. Carolyn Luedtke:

Small game design companies often do not have an in-house counsel, much less a staff. What do you think about the green-lighting process? How do you set up ways to protect yourselves?

We will talk a little bit about what you can copy and what you cannot copy, but I often tell people, particularly if they are lucky enough to have at least one in-house counsel, to make sure that such a person is involved in the green-lighting process. As I am hearing you all say, there should be a lawyer involved in the process before the game is released who will check whether

70. ELECTRONIC ARTS, *supra* note 3.

71. EVONY, *supra* note 6.

72. iOS, <http://www.apple.com/ios/> (last visited Mar. 13, 2013).

the design is starting to resemble something that might create a problem. It is much easier to fix those resemblances when the artist is sketching the dragon than when the dragon is already launched in a publicly-available game. Once it is launched, you have a problem of rolling it back.

Similarly, if the overall look and feel of the game is too close, it is much easier to address when you are still on a sketch pad and white board, rather than when all of the art and programming has been invested. So, I would encourage you to involve an attorney somewhere in the green-lighting process; if you have the benefit of an in-house resource or can afford an outside resource. Also, it is good if you have the ability to set up gates. For example, take the initial green-lighting of being able to get resources to develop a team. Wherever there are points where you are going to escalate your investment, you should have attorneys there for sign-off and absolutely have an attorney there before you make it go live.

Mr. Marco Mereu:

To the game developers here, or the Guildhall students, it is very important that you take time to file your copyright, file your trademarks, and protect your game early in the process, because if your game is successful, people are going to want to copy it. If you are not doing those things, you are going to have a difficult time trying to protect your intellectual property without having taken those steps. A lot of people do not think about those things early on, but you should. You have to make sure you are protected in the event that someone comes after your intellectual property and tries to do what you are doing.

Ms. Carolyn Luedtke:

We have talked about having methods for discovering potential copiers. Are there things with respect to clones and copiers that are different from what we have talked about with respect to hackers and cheaters? The process of monitoring seems similar.

Ms. Kerry Hopkins:

We are seeing most of the cloning on the Apple App Store,⁷³ Google Play,⁷⁴ and Facebook,⁷⁵ so there our monitoring is more proactive. The monitoring is easy enough when you can just search for titles like your game. If you search your game's name often, you will find knockoff games that are being sold under a different name, but use your title in the metadata. So, we do a bit more proactive monitoring, especially for new releases of franchises or popular games that are susceptible to copying.

73. iPhone App Store, APPLE, <http://www.apple.com/iphone/from-the-app-store/> (last visited Apr. 6, 2013).

74. GOOGLE PLAY, <https://play.google.com/store> (last visited Mar. 13, 2013).

75. FACEBOOK, *supra* note 31.

Ms. Carolyn Luedtke:

I had not thought about the metadata—that is interesting. The game copiers put the original game name in the metadata of their game, so when you search for your game in the App Store, the copied game appears.

Mr. Marco Mereu:

It is not easy for game developers trying to combat knockoffs. Sometimes Apple⁷⁶ does not react very quickly. For example, a few months ago, Mattia Traverso, a young gentleman out of Italy, developed a game that won the Independent Game Festival (“IGF”).⁷⁷ It was a very basic platform. The Flash-based game was about a boy and girl who fall in love.⁷⁸ People really liked it, obviously, since it won the IGF. He was a young kid, and it was a great opportunity for him. While he was in the midst of bringing the game over to iOS, he discovered a copy of his game, pixel-for-pixel; a company out of Vietnam had uploaded it to iOS already.⁷⁹ Traverso looked to Twitter, asking people for help with his situation. A couple of us ended up giving him some guidance on how to get in touch with Apple to get that knockoff game removed.⁸⁰ It took Traverso about ten days to finally get Apple to remove it.

Thanks to the knockoff, he never gets that opportunity again. He will never have that opportunity to launch that IGF award-winning game on iOS and perhaps get his big break because the launch has already been soiled. Somebody copied it pixel-for-pixel and put it up there. That is another lesson for independent developers to make sure to protect their intellectual property.

Ms. Carolyn Luedtke:

Generally, what is protectable and not protectable in the copyright world? Here, we have boiled the copyright statute down to a little chart.⁸¹

76. APPLE, <http://www.apple.com/> (last visited mar. 13, 2013).

77. Tom Magrino & Eddie Makuch, *IGF Finalist Accuses iOS Developer of IP Theft*, GAMESPOT (Mar. 16, 2012), <http://www.gamespot.com/news/igf-finalist-accuses-ios-dev-of-ip-theft-6366654>.

78. Evan Narcisse, *Eighteen-Year-Old Developer: “F**k F**k F**k They Cloned My Game,”* KOTAKU (Mar. 16, 2012), <http://kotaku.com/5894018/eighteen-year-old-developer-fk-fk-fk-they-cloned-my-game>.

79. *Id.*

80. Magrino & Makuch, *supra* note 77.

81. 17 U.S.C. § 102 (2012).

Protectable	Not Protectable
Expression	Function
Particular characters	Mechanic
Shapes, sizes, colors, sequences, arrangements, and sounds	Game Rules
Sequence of images	Idea
Sequence and arrangement of the graphics	Unoriginal Expression
Characters' motion and actions	Scenes A Faire
Expression of a Function, Rule or Mechanic	
Distinct original sounds and music ⁸²	

For example, a function and a mechanic are not protectable.⁸³ An idea is not protectable.⁸⁴ An unoriginal expression, something you did not come up with yourself, is not protectable.⁸⁵ The expression of an idea and particular characters are protectable; the inquiry into these issues becomes very fact specific to your game.⁸⁶ If you have developed a particular character or story, the shapes, sizes, color, the sequence of images and arrangement of things within your game can be protectable.⁸⁷ There was a case recently, the *Spry Fox* case, which says the object hierarchy in your game can be protectable.⁸⁸ So, in other words, the way that your story progresses and the way that you play the game can be protectable.

The characters' motions and actions can be protectable; distinct sounds and music can be protectable within a game.⁸⁹ Just this year we saw a really interesting case. We will talk in more detail about it, but the *Tetris* case that was decided in New Jersey in the last year was a case where the court actually ruled on cross-motions for summary judgment on a game that looked

82. Carolyn Hoecker Luedtke, Moderator, Games :: Business :: Law Conference, Legal Threats to Game Developers Presentation, Slide 39 (Jan. 24, 2013); 17 U.S.C. § 102 (2006).

83. 17 U.S.C. § 102(b) (2012).

84. *Id.*

85. *See id.* § 102(a).

86. *See id.*

87. *See id.*

88. *Spry Fox LLC v. LOLApps Inc.*, 2:12-CV-00147-RAJ, 2012 WL 5290158, *1303 (W.D. Wash. Sept. 18, 2012).

89. *See* 17 U.S.C. § 102(a) (2012).

almost exactly like Tetris.⁹⁰ The court there was presented with a question—given that Tetris consists of falling blocks that you fill into a grid and clearing lines—what point is that a function or mechanic that is not protectable? At what point are the expressions and way it was done protectable?⁹¹

The case presented very interesting questions, and I highly recommend it for you to read. The judge ended up finding—I love her phrase—the “squint test.”⁹² In the *Tetris* case, it was clear they used the *Tetris* game in their copying; that was an undisputed fact. They presented, through their experts, YouTube videos of the two games being played so the judge could see the feel and experience of both games. The judge said that without being told which is which, a common user could not decipher between the two games.⁹³ Any differences between the two were slight and insignificant.⁹⁴ If one has to squint to find distinctions only at a granular level, then the works are likely substantially similar.⁹⁵

She found that the look and feel were protectable, and because of that, it led to infringement.⁹⁶ The style of the falling pieces, the bright colors, and the shading of blocks were the same in both games. The judge said that infringes on things that are protectable, even though the two games shared common mechanics; there was a whole lot more there in terms of the expression of the game.⁹⁷

There was an interesting case from San Francisco in 2011 called the *Ubisoft* case where the court looked at a copyright infringement allegation against the *Just Dance* franchise.⁹⁸ Here, the Ubisoft team argued that both games had these same sorts of stylized figures with the white skin and the bright colors, and they struck similar dance poses.⁹⁹ There, the court found the characters were not substantially similar.¹⁰⁰

It is going to be a very fact-specific, case-specific analysis, and you are going to want to look at the very specific issues in your case. Judge Breyer pointed to the key differences in the avatars in that case: the look, size, and

90. *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 396 (D.N.J. 2012).

91. *See id.* at 403-04, 411.

92. *Id.* at 410.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Tetris Holding, LLC*, 863 F. Supp. 2d at 415.

97. *See id.* at 414.

98. *OG Int'l v. Ubisoft Entertainment*, No. C 11–04980 CRB, 2011 WL 5079552, *1 (N.D. Cal. Oct. 26, 2011).

99. *Id.* at *7.

100. *Id.*

prominence—and thus the overall appearance—were different.¹⁰¹ The color choices and the use of facial features were different; the similarities were less important, particularly given the functional reasons for many of the choices.¹⁰² That was an example where the court found that there was not a substantial similarity.¹⁰³

Here is the bottom line is on what is protectable and what is not: Ideas are not protectable;¹⁰⁴ functions and mechanics are not protectable;¹⁰⁵ the expression of an idea, the look and feel of the game, the overall experience of the game, and perhaps the progression of the game can be protectable.¹⁰⁶ This is a really fact-intensive analysis. You have to get in there and evaluate whether, on either side of the equation, the game is too close to that line, such that it is not worth the risk. Or, is this game so close that I want to try to take some action to enforce it?

Ms. Kerry Hopkins:

It is hard being in-house counsel and working with development teams on this. These guys put their life into building a game, and when the games get knocked off pretty quickly it is very emotional for them. They want a remedy. They want us to do something about it, and each time we have to go through this exercise.

We were involved in the *Tetris* case. We are the licensee for the Tetris mobile game, so we worked with the Tetris Company¹⁰⁷ on that case. That was a tough case for them, but in a game like that, you really have to look at what is protectable and whether it was copied. *Tetris* does not go past that, when other people make falling object puzzle games not using tetrominos.

We have a game similar to that called *Bejeweled*,¹⁰⁸ which is a matching game involving colored jewels, and we are very conservative about what we enforce against. They have to be very similar jewels, using the same colors, and have certain attributes of our game.¹⁰⁹ With that said, there is a game called *Plants vs. Zombies*, which is cloned ridiculously.¹¹⁰ We believe that if a game has plants and zombies, then it is probably infringing us. We go to bat on that all the time because the expression is so much more unique. It is

101. *Id.*

102. *Id.*

103. *Id.*

104. 17 U.S.C. 102(b) (2012).

105. *Id.*

106. *Id.* 102(a).

107. Tetris—Official Web Site, <http://www.tetris.com> (last visited Apr. 20, 2013).

108. Bejeweled, EA, <http://www.ea.com/bejeweled> (last visited Mar. 4, 2013).

109. *Id.*

110. *Plants vs. Zombies*, EA, <http://www.ea.com/plants-vs-zombies> (last visited Mar. 4, 2013).

not like falling objects, where there are only a couple ways to show it. It is tough to go back to a game team and tell them there is nothing to be done here.

Ms. Carolyn Luedtke:

I think the *Plants vs. Zombies*¹¹¹ point is a good one. The *Pac-Man* case uses a good example of two different things you can look at.¹¹² In *Pac-Man*, there was accused infringement of *Pac-Man*, and the court held that the maze and tunnel were not protectable.¹¹³ Fanciful things like ghosts, which are kind of like plants and zombies, are protectable.¹¹⁴ So you will see that in a lot of the case decisions, when things become fanciful, they become more protectable.¹¹⁵ It is something that is unique and expressive. It is something that is getting closer to protectability, in contrast with a maze, which is more difficult to label as something protectable.

Mr. Jonathan Blavin:

If you make a game that reflects reality, it is potentially less subject to copyright protection because a court is going to say that it mimics real life. How many ways can you actually express it? If you are doing something that is entirely arbitrary and much more imaginative than the real world, it is more likely to be subject to protection. Even in the *Tetris* case where it was just falling blocks, the court did say, that the “scenes a faire” doctrine, which essentially limits copyright protection to the extent of things that are standard in everyday life, did not really apply.¹¹⁶ The court said it did not have to consider the doctrine because the game involves a world of falling blocks that are multiple colors and can rotate; that is not in the real world, so the doctrine is inapplicable.¹¹⁷

Ms. Carolyn Luedtke:

There was a very famous case people often cite when they are looking at copyright infringement analysis involving a golf game.¹¹⁸ The court said that sand traps and water hazards are a fact of life for golfers, real or virtual, so a golf game is probably going to have sand traps and water hazards, and that is going to be a hard concept for you to claim as protectable.¹¹⁹ Now, you could certainly have a game that copies the look and feel of a golf game and copies

111. *Id.*

112. *Atari, Inc. v. N. Am. Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir. 1982).

113. *Id.* at 617.

114. *Id.* at 617–18.

115. *See, e.g., Pampered Chef, Ltd. v. Magic Kitchen, Inc.*, 12 F. Supp. 2d 785, 792 (N.D. Ill. 1998).

116. *Tetris Holding, LLC*, 863 F. Supp. 2d at 412.

117. *See id.*

118. *Incredible Techs. v. Virtual Techs.*, 400 F.3d 1007 (7th Cir. 2005).

119. *Id.* at 1015.

the way in which you have adopted and expressed golf. But a sand trap is inherent to a golf game, so you would not want to say the other game copied the sand trap from your game.

There is also a case involving karate.¹²⁰ If you had a karate game, you would not say, "I am trying to protect the concept of a black belt, a white outfit, and kicks," because those are fundamental and "scenes a faire" to a karate game. You could still have protectability of a karate game, as long as you had the same look, feel, and aspect in which it was done. Again, this is a very fact-specific analysis. This is part of what makes it a fun area of the law to practice, but it is probably somewhat maddening to those whom we advise. It is very hard to say what the rules are, and you cannot say that this is absolutely going to be okay, or not going to be okay, because it is very, very fact specific.

So, I am going to turn it over to questions from the audience.

Audience Member 1:

When you are working with Facebook,¹²¹ Google,¹²² Apple,¹²³ and arguing with their attorneys, are you ever concerned that they are going to retaliate against you once your game is up on their platform?

Mr. Marco Mereu:

No, because they want to make money. Our relationship with Facebook is not adversarial. It is a good relationship, but it is a lot harder than it needs to be when I am trying to get something taken down.

Google is difficult because it is just difficult to get someone at Google, at least for someone like me sometimes. Facebook also makes you jump through a lot of hoops: it is all automated, they have a huge scale, and it takes a lot of work to get an intellectual property attorney over there sometimes. Unless something is egregious, they are very liberal on what they will let other companies do because, frankly, they want advertising dollars. They are a business, and they want to make money, but they have never retaliated.

I have never had a real problem with Apple. I just think you have to know how to navigate Apple. It is not a personal thing. It is just a money thing.

Ms. Kerry Hopkins:

Apple is a huge partner. They all are huge partners for us, and sometimes it is actually more aggravating on our side to say, "We are a huge partner; can you help us? There is the *Plants vs. Zombies* clone out there, and *Plants vs. Zombies* is one of your biggest selling games. Why are you letting this happen? You are getting a substantial royalty from every copy we sell." It can be maddening, but I definitely do not think that there is any retaliatory

120. *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988).

121. FACEBOOK, *supra* note 31.

122. GOOGLE, *supra* note 32.

123. APPLE, *supra* note 77.

component to it. The groups are very separate there. My sense from dealing with all of them is that they are struggling with how to keep up with it. Apple has been implementing a new automated system to deal with incoming claims.

Mr. Marco Mereu:

I definitely think it is an issue of scale.

Ms. Kerry Hopkins:

It is very tough for them. They have taken some positions that I really disagree with. We have gotten into discussions about what the term “expeditious” means under the DMCA.¹²⁴ They say, “Thirty days can be expeditious,” and we say, “Thirty days is not expeditious.” I think they are trying. It can definitely be frustrating, but they would never hold that against a developer.

Mr. Marco Mereu:

I think they want to do the right thing. It is just very difficult for them. One example with Facebook involved a company against which we had a judgment for copyright infringement. They stole some of our code, re-skinned it, and released it as a game. Once we gave Facebook the judgment, they took everything down from that game. The pirate then re-skinned and re-named the game again within two weeks and re-marketed it on Facebook. I had to start at square one with Facebook again, reporting the game, getting them to look at the game, getting them to look at the ad, getting them the judgment, and explaining to them why the judgment should still apply to this game. They took it down, and then a month later, the pirate did it again, and I had to start at square one again. I actually got to the point where I was having regular meetings with Facebook. Basically, I had to create a presentation for Facebook on how these pirates operated, and I felt good about it at the end because Facebook’s intellectual property attorneys actually told me, “We’re going to change the way these guidelines work, this process works, because it is clearly not working. It needs to be easier for you guys to do this, especially for repeat offenders, than it is right now.”

Audience Member 2:

Can any of you recall any legal ethics issues that you encounter in counseling your clients?

Ms. Kerry Hopkins:

I do not feel like we have too many. The issues I deal with most often involve the ethics of representing the company and not sharing company confidential information. Our development and security guys want to connect with other security guys in other companies, and they want to start sharing information. I advise them about what we can and cannot do, and how we can and cannot partner with other people, especially given that so much of what we’re seeing in infringement now relates to user accounts and personal

124. DMCA, 17 U.S.C. § 512 (2012).

data. Our challenge is to teach our people how to partner with others and not violate company confidentiality in the process.

Ms. Carolyn Luedtke:

One of the most challenging parts of being a lawyer—both generally and in the gaming world—is the ethics of whom you represent. A lawyer at a gaming company, or outside counsel to a gaming company, often interacts with individuals at the company, game developers, and designers. As a lawyer, you are going to develop personal relationships and become friends with those people. There are going to be times where you have to conduct an investigation or where you are doing this evaluation in the green-lighting process, and you find out that someone has taken code from another game and put it in their game. You have to remember that you actually represent the company and not the individual. You have an obligation to do what is right for the company even if that individual is your friend.

I find that one of the most challenging things about being a lawyer is to always make sure everyone understands whom you represent. They need to know if they tell you that they just stole source code and put it in their game, it is not something you can just keep between the two of you. You are going to have to report that to the company. I find that to be a really ongoing and challenging thing to deal with.

Ms. Kerry Hopkins:

Regarding another area, we do send a ton of takedown notices and cease and desist orders (“CDOs”). Especially when coming from a big company, a CDO might scare a little company or an individual. We are very conservative. I do not want to assert a claim unless I feel very confident that we have a strong copyright or trademark claim. We do not hedge on that at all because getting a CDO from us might be a very scary thing, and I want to know that we feel confident about our claim before we send any of those letters.

Mr. Marco Mereu:

I have never really dealt with that at all.

Ms. Carolyn Luedtke:

One issue that arises for a lot of people who are counseling gaming clients is how to deal with the duty of candor when you are communicating in a negotiation. This applies whether it involves buying another gaming company, being bought by another company, how you negotiate the terms of that the purchase, communicating about litigation with a mediator, and how you are going to settle that. The ethical rules say that we, as attorneys, have duties of candor. You should not lie. But sometimes in a negotiation, you need to bluff; you do not want to just state all of your weaknesses and positions right out there on the table. The challenge involves where you draw the line on your duty of candor and your duty of honesty, without being an ineffective negotiator. I find that to be a challenging thing, too.

Mr. Jonathan Blavin:

It is a good idea to have lawyers involved in the gaming development process throughout both the early and later stages in the development of the game. If you are eventually sued for infringement, you have to be a little bit

careful. You may want to say you had a good faith basis for thinking the game wasn't infringing and you had lawyers involved.

If you are going to assert that defense in litigation, the other side may be entitled to all of the communications you had with your lawyers, and the privilege may be waived. They may be able to look at those communications to test whether or not you had a good faith basis to think your game wasn't infringing.

Ms. Carolyn Luedtke:

I believe that happened in *Tetris*.¹²⁵ The cloning company had to produce all of the memoranda they received from Durie Tangri LLP.¹²⁶ I think it was an open part of their defense that they had hired really strong counsel who had advised them, and they thought they were operating under the law.

Audience Member 3:

I would like to go back to the topic of getting copyrights and trademarks as early as possible. I make games using the StarCraft 2¹²⁷ platform. If I wanted to take one of those games and build it on another platform, am I losing my rights to copyright my games under the StarCraft 2 Terms of Use?

Ms. Kerry Hopkins:

One, you do own copyright on what you make as soon as you make it. You do not have to register it, so you own the copyright; you may not have a registration. If the game that you are making is based on a Blizzard game or some other game, it may be legally a derivative, which means you may own what you made. But they have underlying rights to the original work, and you cannot do anything with it.¹²⁸ I would suggest you talk to a lawyer to see if you can exploit what you're making. Making derivatives is one of the rights protected under copyright, so you are not allowed to make a derivative of someone else's work.

Blizzard would own the rights to the trademarks. You could not necessarily market it under that name. Those get complicated when you are doing modifications and add-ons to games. It really depends on what you are doing. They potentially infringe, but they may not infringe.

Audience Member 4:

Are there any cases relating to content?

Ms. Kerry Hopkins:

EA is involved in a number of content cases right now. One case relates to depictions of real-world helicopters in our games.¹²⁹ A few relate to like-

125. *See Tetris Holding, LLC*, 863 F. Supp. 2d at 399.

126. DURIE TANGRI LLP, <http://duriatangri.com/> (last visited Mar. 13, 2013).

127. StarCraft II, BLIZZARD, <http://us.battle.net/sc2/en/> (last visited Apr. 6, 2013).

128. 17 U.S.C. § 103(b) (2012).

129. *Electronic Arts, Inc. v. Textron, Inc.*, 2012 WL 3042668 (N.D. Cal. July 25, 2012).

nesses in games.¹³⁰ We were recently sued over the use of a tattoo in a game. Thank you, *Hangover 2* producers, for settling so quickly.¹³¹

My big objective for the last fiscal year was to do in-depth content training with all of our development teams. I have been to China, Sweden, and the UK to meet with all our development teams about content and what they can and cannot do with other content. Real-world content, other people's content, and parody are the focus of the trainings. It is such a complicated issue, and it is so much fun to do those training sessions.

Audience Member 5:

Were you present when Langdell sued EA over the use of the word "edge"?¹³²

Ms. Kerry Hopkins:

Yes. I think the judgment we got in that says it all. As a lawyer, it was a great case to be part of that case. We will probably never be fully done with that case, but we felt confident from Day One that our use of *Mirror's Edge* did not infringe Edge; we also felt confident that Mr. Langdell had no rights in the word "edge."¹³³

Audience Member 5:

Was there any questionable material that was created for the case?

Ms. Kerry Hopkins:

There was a lot of questionable material filed with the Patent and Trademark Office to get those trademark registrations. One of the items filed to support the use of that trademark was a cover of the game *Edge Magazine*,¹³⁴ which is a famous game magazine. The problem is that it was a mock-up cover. It was not the real *Edge Magazine*. Just remember that when you are in trademark cases, too. Not everything that gets through the Trademark Office is real.

Ms. Carolyn Luedtke:

Thank you for your attention. We appreciate it.

130. See, e.g., *Brown v. Electronic Arts, Inc.*, 722 F. Supp. 2d 1148 (E.D. Cal. 2010).

131. *HANGOVER PART 2* (Warner Bros. 2011).

132. *Edge Games, Inc. v. Electronic Arts, Inc.*, 745 F. Supp. 2d 1101, 1103 (N.D. Cal. 2010).

133. See *id.* at 1118.

134. *EDGE MAGAZINE*, <http://www.edge-online.com/magazine/> (last viewed Mar. 13, 2013).