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## The Law & the Future of Gaming

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# The Law & The Future of Gaming

## SYMPOSIUM PANEL IV

### Panelists

*Mr. Jeff Becker, Haynes and Boone, LLP*

*Ms. Roxanne Christ, Latham & Watkins, LLP*

*Mr. John Cabeca, United States Patent and Trademark  
Office*

#### **Professor Xuan-Thao Nguyen:**<sup>1</sup>

Good morning. I am so delighted that you are back here for the second day of the Game::Business::Law Conference. First, I want to recognize some of the attendees. Some came all the way from Mexico. I am so honored that you flew up here. We also met one person who traveled from Chile. I believe that is the furthest distance of any attendee. One year we had somebody from Portugal who learned about the Conference on the Internet, bought a ticket, and flew over here just for the Conference. We are delighted to have each of you here.

This is a special conference because the attendees are so important. The attendees are the ones that make the conversation. Over the last four years we have found that many of the attendees know as much as the panelists. I want to make sure that the conversation will continue in the second day as well.

I want to open the second day with a panel discussion on the future of gaming and gaming law. My colleague, Professor Keith Robinson will be the moderator this morning.<sup>2</sup> This afternoon we will have two more panels that you will love. So stay around and enjoy.

#### **Professor Keith Robinson:**

Thank you, Professor Nguyen. Good morning everyone. It is my pleasure to kick off the morning with our first panel. We are calling it 'The Law and the Future of Gaming'. Essentially, we will try to understand the legal issues in video gaming law that will arise in the future and explore the opportunities that are involved with those issues.

I am lucky enough to have three great panelists joining me today. We have Jeff Becker who is a partner at Haynes and Boone.<sup>3</sup> Jeff is the chair of the firm's intellectual property and technology transactions section.<sup>4</sup> He

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1. *Xuan-Thao Nguyen*, SMU DEDMAN SCH. L., <http://www.law.smu.edu/faculty/nguyen> (last visited Feb. 26, 2013).
  2. *Walter Keith Robinson*, SMU DEDMAN SCH. L., <http://www.law.smu.edu/Faculty/Full-Time-Faculty/Robinson.aspx> (last visited Feb. 26, 2013).
  3. *Jeffery M. Becker*, HAYNES & BOONE, [http://www.haynesboone.com/jeffrey\\_becker/](http://www.haynesboone.com/jeffrey_becker/) (last visited Feb. 26, 2013).
  4. *Id.*

counsels clients on emerging technology and branding trends.<sup>5</sup> Immediately to my right is Roxanne Christ, who is a partner at Latham & Watkins.<sup>6</sup> It is safe to say that Roxanne is an expert in video game law.<sup>7</sup> Her practice focuses on intellectual property, technology, and media transactions.<sup>8</sup> Last, but certainly not least, we have John Cabeca from the United States Patent and Trademark Office (USPTO).<sup>9</sup> John is the senior advisor to the Undersecretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.<sup>10</sup> He is a veteran of the USPTO, and he has dedicated much of his career to inventor outreach and assistance programs.

The three topics that we want to address today are video game gambling, several intellectual property issues affecting video games, and the opening of the regional patent office in Dallas. Also, we will discuss how these topics will affect the video game industry and developers. I would like to start with John Cabeca who will tell us about what the USPTO is doing and give us some news on the opening of the regional office here in Dallas.

**Mr. John Cabeca:**

Thank you, Keith. Good morning everyone. It is my distinct pleasure to be here today. I think I am the only one here with the '.gov' at the end of their email address. On behalf of the USPTO, it is definitely a pleasure to be here. I wanted to focus on two things today. First, I will tell you a little bit about the regional office and what it will bring to the Dallas area. Second, though it is a slightly broader than gaming per se, I will talk about the initiatives that we have under way at the USPTO on software related inventions.

If you have not yet heard, on September 16, 2011, the President signed the America Invents Act (AIA).<sup>11</sup> It was the most transformative change to patent law since 1836. To say it was monumental is an understatement. In the past year, the amount of rule packages that have gone forward to make changes in the patent processes and the trial and appeal board have been comprehensive and quite operations-changing, to say the least.<sup>12</sup>

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5. *Id.*

6. *Roxanne E. Christ*, LATHAM & WATKINS, <http://www.lw.com/people/roxanne-christ> (last visited Feb. 26, 2013).

7. *Id.*

8. *Id.*

9. *Patent Technology Centers Management*, USPTO, <http://www.uspto.gov/web/patents/contacts/tcmgrs.htm> (last visited Feb. 26, 2013).

10. *12-30 USPTO Seeks Nominations for Patent and Trademark Advisory Committees*, USPTO (May 4, 2012), available at <http://www.uspto.gov/news/pr/2012/12-30.jsp>.

11. Leahy-Smith America Invents Act, 35 U.S.C. § 1 (2011).

12. *See, e.g., 12-02 Ahead of Schedule, USPTO Publishes Proposed Rules to Implement Four Provisions of the America Invents Act*, USPTO (January 06, 2012), available at <http://www.uspto.gov/news/pr/2012/12-02.jsp> html; *12-07*

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At the USPTO, we have been extremely busy over the past few months bringing our employees up to speed on the different changes in the law and reaching out to stakeholders. In the past year, we have held over 400 speaking engagements to update stakeholders on the changes of the provisions; but I am not going to go through all of them today in order to save you a few hours.

I will talk about one of the provisions in that law: the USPTO established at least three satellite offices.<sup>13</sup> The concept of a satellite office for the USPTO is not new; it is something that we have actually been working on and discussing for several years. However, it took an act of Congress for us to get our act together. We opened the Detroit satellite office in July<sup>14</sup> and around that same time; we announced that we would open three new offices: Silicon Valley, Denver, and Dallas.<sup>15</sup>

You might ask why we would need all of these satellite offices. Even though these satellite offices will be smaller; they will still become a magnet for technology and innovation in the regions. This is a historic expansion for the agency. Over the past several years (I have been with the agency twenty-four years) we have more than quadrupled in size. We have realized that not all engineers and scientists want to live in Washington D.C. When hiring goals exceeded 1500 new scientists and engineers per year, it became quite a challenge to meet the goals. So having satellite offices opens up a new realm of highly-qualified candidates across the country. It also helps us to better retain our employees. Many years ago, our first-year employees had an attrition rate of upwards of 20%.<sup>16</sup> Now our attrition rate for the agency is around

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*USPTO Publishes Proposed Rules for Supplemental Examination and to Revise Reexamination Fees*, USPTO (January 25, 2012), available at <http://www.uspto.gov/news/pr/2012/12-07.jsp>; *12-35 USPTO Publishes Proposed Rules to Implement Micro Entity Status for Paying Discounted Patent Fees*, USPTO (May 30, 2012), available at <http://www.uspto.gov/news/pr/2012/12-35.jsp>; *12-44 USPTO Publishes Proposed Rules Governing First-Inventor-to-File*, USPTO (July 26, 2012), available at <http://www.uspto.gov/news/pr/2012/12-44.jsp>; *12-50 USPTO Publishes Final Rules for Administrative Trials Under America Invents Act*, USPTO (August 13, 2012), available at <http://www.uspto.gov/news/pr/2012/12-50.jsp>.

13. 35 U.S.C. § 1.
14. *12-41 U.S. Patent and Trademark Office Opens First-Ever Satellite Office in Detroit, Michigan*, USPTO (July 13, 2012), available at <http://www.uspto.gov/news/pr/2012/12-41.jsp>.
15. *12-40 U.S. Commerce Department to Open Four Regional U.S. Patent Offices That Will Speed Up the Patent Process and Help American Businesses Innovate, Grow, and Create Jobs*, USPTO (July 2, 2013), available at <http://www.uspto.gov/news/pr/2012/12-40.jsp>.
16. See 2011-2015 Strategic Human Capital Plan, USPTO, available at [http://www.uspto.gov/about/stratplan/USPTO\\_2011-2015\\_Strategic\\_Human\\_Capital\\_Plan.pdf](http://www.uspto.gov/about/stratplan/USPTO_2011-2015_Strategic_Human_Capital_Plan.pdf).

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4%.<sup>17</sup> Our increasing ability to retain top talent shows that we are heading in the right direction.

I will talk briefly about the regional office model. One goal for the satellite offices is that we want every office to take on its own culture and its own needs. We want it to be the Dallas USPTO not the USPTO in Dallas. While this is how we established the Detroit office, we are still working out nuances for the Dallas office and the other regional offices. One thing that seems to be working is only hiring employees that have had experience in the intellectual property field. Those employees come up to speed much quicker and produce at a faster rate. This helps us dig into our backlog at a faster rate as well. Also, they do not spend as much time in training. The sooner they leave the training academy, the sooner we can train another class to become employees.

The examiners coming on board have experience in intellectual property. Again, this was the model for Detroit and it seems to be working really well. So we may use it for the other regional offices. We hire twenty-five examiners per class and we try to keep them in related technologies because it makes it easier to train them. For example, if one of the supervisory trainers is a mechanical engineer but the examiner is a chemical engineer, it may cause a training burden or difficulty. The examiner would constantly have to reach out to headquarters to trainers in their field. So we try to lump like technologies together. That said, examiners still report back to their home supervisor at headquarters to get the assistance and the final training that they need. The supervisor will review their work and provide any additional feedback.

The Detroit office opened in July.<sup>18</sup> It is called the Elijah J. McCoy USPTO.<sup>19</sup> We had a grand opening where Senators, Congressmen, and Secretaries of the Department of Commerce were present to welcome the USPTO into Detroit.<sup>20</sup>

Every examiner hired into a regional office actually reports to their supervisor back at headquarters. This was one thing that we thought was very important: keeping the line of communication open. Many of the supervisors' staff in Alexandria are actually working in a hotel from home. So the supervisors are used to working and managing in a remote workforce. The new employees working in the regional offices also have a supervisory trainer who is by their side every day to make sure that they have all of the resources they need and that they are properly trained.

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17. *Id.*

18. *12-41 U.S. Patent and Trademark Office Opens First-Ever Satellite Office in Detroit, Michigan*, *supra* note 14.

19. *Detroit*, USPTO, <http://www.uspto.gov/about/contacts/Detroit.jsp> (last visited Feb. 26, 2013).

20. *12-41 U.S. Patent and Trademark Office Opens First-Ever Satellite Office in Detroit, Michigan*, *supra* note 14.

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The other question I receive a lot—actually I had it asked a couple of times yesterday—is “Can you file applications and papers in the regional offices?” The answer to that is no. All applications and incoming papers, if not filed electronically, will still have to be filed at the Alexandria headquarters. We do not expect to have our grand openings for the other satellite offices just yet, but we are actively hiring and have already brought on board patent trial and appeal board judges for every one of these offices. Consequently, we have had to seek temporary office space until a more permanent space has been setup and approved. We are working closely with our general services administration.

In Denver, we actually obtained a temporary space just two weeks ago. In Silicon Valley, we are just about to close our temporary space and are now actively looking for permanent space. The good news for Dallas is that the Santa Fe Federal Building will be our temporary space beginning March 1, 2013. Our final space, ready sometime in 2014, will be in downtown Dallas in the Terminal Annex Building (the old Postal Service Center).<sup>21</sup>

The initial goal for the Detroit office was to bring 100 patent examiners on board within the first year, and we are well on track to do that.<sup>22</sup> As I mentioned, the Patent Trial and Appeal Board has really been hiring full speed ahead as well. They have already hired three for Dallas who have already started working in the region. Four more have been hired and approved with start dates in the next few weeks. Five more were just signed by the Secretary last week. We are working on their start dates. If my math is correct, I think that is twelve, yet we still do not have our temporary space. So the Board is actively hiring for this region. The primary reason for this is that they have a backlog of cases on appeal that they are trying to work through. Moreover, the AIA implemented several new trial proceedings that they also need to staff.<sup>23</sup> By statute, these proceedings—the post grant review<sup>24</sup>, the inter parties review<sup>25</sup>, and the covered business methods review<sup>26</sup>—must be completed within one year. These are some of the services we offer in Detroit.

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21. *12-70 USPTO Announces Location for Dallas-Fort Worth Regional Satellite Office* USPTO (November 29, 2012), available at <http://www.uspto.gov/news/pr/2012/12-70.jsp>.

22. *11-02 USPTO Creates “E-mail Hotline” For New Detroit Office Hiring News*, USPTO (Jan. 7, 2011), available at [http://www.uspto.gov/news/pr/2011/11\\_02.jsp](http://www.uspto.gov/news/pr/2011/11_02.jsp).

23. See 35 U.S.C. § 1.

24. 35 U.S.C. § 303.

25. 35 U.S.C. § 311.

26. 35 U.S.C. § 321(a)(1).

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At the Alexandria headquarters, we have a public search room.<sup>27</sup> It has about 150 to 200 terminals that give access to the exact same search system that the examiners use every day. It also has an expanded set of databases to search.<sup>28</sup> This is not available through the USPTO's search engine on their website or anywhere else on the internet. Every satellite office will have access to this system.<sup>29</sup> We are in the process of upgrading this system across the board.

Also, if your application is not being examined by an examiner in your region, you can still go to your regional office and set up a video conference call with the examiner back at headquarters or whichever satellite office they are in. This was our attempt to make sure that the transition was as seamless as possible—providing access and reducing the cost on the applicants for having to travel all around the country to get to the examiner. We also provide the audio-visual equipment to be able to reach out to examiners as quickly as possible.

Another thing we have started in Detroit is Saturday seminars to educate the small inventor and the small businesses that are not intellectual property savvy. We assist them with their intellectual property questions and their application processes,<sup>30</sup> which have been going very well. We have started expanding this to our outreach coordinator in New York City and she is starting to do these Saturday seminars as well. We plan to bring these seminars into each of the regional areas.

It is critical that the USPTO expand into the different areas across the country. The Intellectual Property Intensive Industries Report that came out last year shows that over \$5 trillion in value added from the GDP was focused on intellectual property-intensive industries.<sup>31</sup> Also, over 40 million jobs were directly or indirectly attributable to the most intellectual property-intensive industries.<sup>32</sup> Creating these innovation ecosystems across the country will foster job growth and strengthen partnerships with the local industries so they can flourish. Also, we now have satellite offices in every time zone. The bottom line: we are here to help.

We have had several programs over the past couple of years. The one I really want to highlight is the Intellectual Property Pro Bono Program that

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27. See Public Search Facility, USPTO <http://www.uspto.gov/products/library/search/index.jsp> (last visited Feb. 26, 2013).

28. *Id.*

29. *Id.*

30. See *Saturday Seminar at the Detroit Office*, USPTO, [http://www.uspto.gov/inventors/events/Detroit\\_Sat\\_Seminar.jsp](http://www.uspto.gov/inventors/events/Detroit_Sat_Seminar.jsp) (last visited Feb. 26, 2013).

31. *Intellectual Property and the U.S. Economy: Industries in Focus*, USPTO, vii, (Mar. 2012), available at [http://www.uspto.gov/news/publications/IP\\_Report\\_March\\_2012.pdf](http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf).

32. *Id.*

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assists financially-under-resourced inventors and small business.<sup>33</sup> We are actively working with Tech Com in Arlington, Texas to open the program in the Dallas region. They have already had attorneys sign on from Austin, Dallas, and Houston. If you want any more information on the Pro Bono Program, there is information on our website.<sup>34</sup>

Another program I will highlight is our Patents for Humanity Program.<sup>35</sup> This program was a challenge in four technology areas: medical technology, food and nutrition, clean technology, and information technology.<sup>36</sup> The nomination period for this challenge closed on October 31, 2012.<sup>37</sup> We should be able to announce the winners in the next month or so. The winners will receive accelerated processing at no additional cost; this was the initiative of the program.<sup>38</sup>

The last ones I wanted to focus on, as far as outreach, is the USPTO's extensive STEM (Science, Technology, Engineering, & Mathematics) outreach and intellectual property education outreach programs that we do locally in Alexandria. We hold regional independent inventor conferences across the country. With the opening of the Detroit office and the announcement of the additional satellite offices, we have started focusing our attention to the specific regions. In fact, this morning we were talking about the several events coming here to SMU. On February 26, we will hold a roundtable on requests for compact prosecution and ways to improve the RCE practice at the Patent and Trademark Office. Regardless of the topics, part of this outreach is to engage the stakeholder community.

One area that we really are focusing on this year is software. I am sure many of you have your own opinions of software patents. We have several initiatives underway this year to clear up any misunderstandings of the meaning and scope of software. The term "software patent" is pretty broad. However, like all patents, it is some form of innovation currency. It is an ecosystem that enables and allows the creation of jobs and has been very successful.

That said, there have been some concerns with respect to software quality. So over the past two years, we have had extensive internal training within the Patent and Trademark Office. We have strengthened our guidelines for what is eligible for protection under 35 U.S.C. § 101.<sup>39</sup> We have clarified and

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33. *Pro Se and Pro Bono*, USPTO, <http://www.uspto.gov/inventors/proseprobono/index.jsp> (last visited Feb. 26, 2013).

34. *See generally id.*

35. *See generally Patents for Humanity*, USPTO <http://patentsforhumanity.challenge.gov/> (last visited Feb. 26, 2013).

36. *Id.*

37. *Id.*

38. *Id.*

39. 35 U.S.C. § 101 (2006).



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provided comprehensive review of the clarity and scope in applications—primarily focusing on the written description requirement in 35 U.S.C. § 112.<sup>40</sup> Since that time, we have seen an increase of 20% in the number of rejections made with respect to claim clarity and scope. A lot of these issues are being resolved through examiner interviews. Last year we held over 170,000 hours of examiner interview time on applications across the USPTO. So the examiners have really started to focus on engaging with applicants. They are trying to resolve issues without having to do the traditional back and forth that we have previously seen.

One other program that we have is called the PETTP, the Patent Examiner Technical Training Program.<sup>41</sup> Last year we had thirty different training programs specifically in the software area to help examiners in the different areas and disciplines across the software technologies. We reached out to the stakeholders and they volunteered to come to the USPTO to train examiners on specific technologies in those respective disciplines.<sup>42</sup>

In 2010, we initiated new patent quality metrics.<sup>43</sup> We traditionally have had two: the quality of allowances and the quality of in-process reviews.<sup>44</sup> We have added five more and now have seven metrics.<sup>45</sup> This quality program has become the most comprehensive for any patent system across the world.

The last one I will note is the best practices guide. This is something that is still in the works. We are working with stakeholders to provide a best practices guide both from the stakeholder's perspective and from the examiner's perspective. We plan to publish these within the next few months. There is also currently an open comment period for the examination best practices. We are reaching out to stakeholders to see what steps applicants can take when filing their applications that would prevent the common misunderstandings and snags we see in the application and prosecution process.

Given the criticism that the software have received over the past few years, we are very pleased with what the AIA has brought to the USPTO and to the Patent System. We are hoping that the new procedures within the AIA will help to even further strengthen software patents and patents across the board.

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40. § 112.

41. *See generally Patent Examiner Technical Training Program*, USPTO, <http://www.uspto.gov/patents/pettp.jsp> / (last visited Feb. 26, 2013).

42. *Id.*

43. *Adoption of Metrics for the Enhancement of Patent Quality Fiscal Year 2011*, USPTO, available at [http://www.uspto.gov/patents/init\\_events/qual\\_comp\\_metric.pdf](http://www.uspto.gov/patents/init_events/qual_comp_metric.pdf).

44. *Id.*

45. *Id.*

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The roundtables engage the software community by addressing topics relevant to the industry. Earlier, there was an open comment period to discuss applications and best practices. There is also a very popular roundtable that addresses the formation of a software partnership. Next month, we will hold one roundtable in Silicon Valley and another in Manhattan to address the specific issues affecting software patents. Specifically, the roundtables will focus on how to claim software related inventions and highlight the common issues that arise during the examination of applications and after the patent issues. One thing that the roundtables will not discuss is whether software is patentable. Only the courts and Congress can settle this debate. However, the roundtables will address the full range of issues within their statutory authority.

Over the next year the roundtables will address several more industry issues. A roundtable will likely be held in Dallas because of its regional importance. One issue the roundtable must address is how to deal with claims that involve the complex and functional language common in software related patents. Another issue to explore is what applicants can do to facilitate the drafting and examination of their patent applications. These connected issues can be addressed in a single roundtable that focuses on how to facilitate the application's drafting stage. Lastly, the roundtables will be able to address other issues that the partnerships want to further discuss.

**Professor Keith Robison:**

Thank you, John. I am sure that everyone joins me in welcoming the Patent and Trademark Office to Dallas. We look forward to cooperating and working with you in the future. Now, I will turn it over to Jeff Becker who is going to talk about some emerging intellectual property issues related to video games.

**Mr. Jeff Becker:**

Professor Robison, it is a pleasure to be here this morning. I am here to talk about the recent updates in intellectual property law affecting the gaming industry.

I have broken my discussion into five sections. First, following on John's presentation, I will discuss patents. Many people in the gaming industry do not appreciate the important role played by patents. I am going to give you two reasons why they should focus on patents: the market values them and they can be very important to a business. Then I will address intellectual property issues more common in the industry, like copyrights and trade dress. Also, I will talk about the *Tetris* case in order to show how a business can effectively use intellectual property rights to shut out a competitor.<sup>46</sup> Third, I will talk about the First Amendment.<sup>47</sup> In the last few years, the industry has seen some great case law that shows how the First Amendment can enable

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

47. U.S. Const. amend. I.

developers to build more realistic game environments. However, the First Amendment is not a *carte blanche*—granting an unlimited right to copy. For example, one opinion published a few months ago held that trademark rights can trump the First Amendment. Next I will give some examples of contracts between industry players that have gone bad in the past year to uncover lessons to help avoid some of those problems. Finally, I will quickly discuss the expanding domain-name space. Trademark lawyers know of the new GTLDs, the Generic Top Level Domain names. Conversely, others in the industry are not aware of the exciting developments that will change user interaction over the web. No longer will websites be limited to the dot-com, dot-gov, or dot-edu. Anyone will be able to apply for any stream. Already, 1,900 applications have been filed.<sup>48</sup> The first will start going live this summer. Many of the new GTLDs could have a real effect on the gaming industry.

First, patents can affect the industry in unexpected ways. Even a patent rumor has value. For example, a stock chart from January 3rd shows a major decline in GameStop's stock solely because of the publication of Sony's patent application.<sup>49</sup> When the patent application came to light, a reporter noticed it and wrote about it online. Then the story went viral, and within minutes, GameStop's stock dropped 6%.<sup>50</sup> This decreased GameStop's market capitalization by \$185 million. So patents are certainly valued.

Despite this dramatic drop in stock price, this patent application was not even new. It was filed back in 2010 and had even been published a year ago by the PCT. No one noticed at the time, but the USPTO's publication brought the application to light. The reasons it caused such upheaval is that the patent would prevent gamers from using a game cartridge on subsequent consoles.<sup>51</sup> Purchasers would be able to play the game all they wanted on their own Playstation; but if they took the game to a friend's house, they would be unable to play it on their friend's console. Regardless, Sony has not even announced an intention to implement this technology. But the publication of the application alone caused a drop in GameStop's price because if a purchaser can no longer reuse a game cartridge, the GameStop model starts to look different. A great presentation yesterday showed GameStop's desire to move towards a digital form of distribution. However, this stock plummet shows that the market truly does value patents.

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48. Loeb & Loeb LLP, *ICANN Counts 1900 Plus*, MONDAQ (June 15, 2012), <http://www.mondaq.com/unitedstates/x/181952/Trademark/ICANN+Counts+1900+Plus+gTLD+Applications+Announces+Revised+Schedule+For+NearTerm+Program+Milestones+But+Leaves+Key+Questions+Unanswered>.

49. U.S. Patent No. 2013/0007892 (filed Sept. 12, 2012).

50. *GameStop Historical Prices*, YAHOO! FINANCE, <http://Finance.yahoo.com/q/hp?s=GME+Historical+Prices> (last visited Mar. 20, 2013).

51. 892 Patent, *supra* note 49 at [2].

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Another quick example relates to a Nintendo patent application.<sup>52</sup> Again, the application was not new, but it was amended a couple months ago. Nintendo actually tried to patent some aspects of its gameplay. When it initially filed the application, the claim scope was very broad. Nintendo wanted to give players the ability to interact with content created in massively multiplayer online first-player games, but their broad claim was rejected.

One reason to revisit this application is that Nintendo recently responded to the Office action limiting its claim in an interesting way. Nintendo's new claim seeks to protect the changing market conditions within the simulated virtual environment.<sup>53</sup> Under the patent, if Player One creates attributes or tools—like a sword or a shield—then a second player can buy those things. If word spreads in a game that the tool is useful or if Valentine's Day is approaching and player wants to give gifts, the price may fluctuate. If Nintendo gets the patent issued, its broad claim could keep other game developers from creating competing supply and demand metrics in their individual games. Therefore, patents have strong, and sometimes unexpected, effects on the gaming industry.

Turning next to copyright, I will address the *Tetris* case.<sup>54</sup> This case arose because Xio created a game almost identical to Tetris with only minor differences. Xio acknowledged that Tetris was a great game and simply wanted to improve upon it by making it multiplayer. In Xio's game, as a player clears rows on his screen, garbage rows are thrown on other players and vice versa. It is an interesting enhancement. As was discussed yesterday, Xio was very candid about copying Tetris.<sup>55</sup> Xio intended to copy, thus there were no factual disputes in the two cross motions for summary judgment. The parties simply asked the court to determine the legal question of whether Xio could copy Tetris without violating Tetris's copyrights.<sup>56</sup>

Xio had very strong legal counsel. It retained Professor Mark Lemley who argued that Xio had the right to make this game because it only copied non-protectable ideas. Many previous cases suggested that Xio's act would not be considered copyright infringement. It had only copied gameplay and functional rules, but I highlight the same quote brought up yesterday: "Without being told which is which, a common user could not decipher between the two games."<sup>57</sup> When looking at pictures from the game, the judge stated that he could not tell the difference and did not think other people could tell

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52. U.S. Patent No. 2011/0190062 (filed Feb. 2, 2010).

53. *Id.* at [1].

54. *Tetris*, 863 F. Supp. 2d at 394.

55. *Id.* at 397.

56. *Id.* at 396.

57. *Id.* at 410.

the difference either.<sup>58</sup> With that observation, he concluded that there must be something protectable in the copied content. The court went on to find that Xio had copied many Tetris features.<sup>59</sup> The issue was not the substantial similarity between the games; it was whether the copied elements were protectable. They clearly were, and the court found much of the content to be protectable.

In addition to finding copyright infringement, the court found that Xio violated Tetris's trade dress.<sup>60</sup> Another form of intellectual property protection—trade dress—allows a company to protect the look or feel of its games if it is unique, consistent, understandable, and recognizable by a consumer. Trade dress can be very effective, even on summary judgment.

Whenever I talk about copyright infringement and how to design without violating copyrights, I focus on one basic message: it is not the differences that matter; it is the similarities. Often clients will list the differences between their new game and an existing game and ask if the differences are enough to avoid copyright infringement. This is not the right question. Even if there are many differences, if similarities remain, courts can still find copyright infringement. The plaintiff can point to even small similarities and claim the game is copied. So, it is important to always think about the similarities, not the differences.

Recently there has been some great case law for game developers centering on the First Amendment. As developers have tried to create more realistic games and environments, the First Amendment has been a very important tool. In 2008, a court decided the *Grand Theft Auto* case.<sup>61</sup> The developers of *Grand Theft Auto* wanted to create a realistic Los Angeles scene. So they found a strip club in East Los Angeles and tried to parody it in their game.<sup>62</sup> The real club is the Play Pen, but when they put it in the game, they renamed it the Pig Pen.<sup>63</sup> It had a very similar look and feel to the real club. The similarities between the real and game-based clubs would have been obvious—at least to people in East Los Angeles. The strip club sued, but the makers of *Grand Theft Auto* asserted their First Amendment rights. Even though the game copied elements of the real club, the court of appeals agreed with the trial court that the First Amendment protected the copying because the game was an expressive work.<sup>64</sup>

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58. *Id.*

59. *See Tetris*, 863 F. Supp. 2d at 412–13.

60. *Id.* at 416.

61. *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).

62. *Id.* at 1097.

63. *Id.*

64. *Id.* at 1101.

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Another important case is the Supreme Court's decision in *Brown*.<sup>65</sup> It received a lot of press and was discussed by Professor Robinson in last year's conference. In this case, the United States Supreme Court clearly held that video games get the same broad First Amendment protection that movies, TV shows, books and other types of expressive works get.<sup>66</sup> This decision clearly gave game developers the confidence to recreate reality without fear.

The newly clarified right has proven less sturdy than the *Brown* decision suggests. As Carrie mentioned yesterday, Electronic Arts ("EA") is involved in ongoing litigation with Textron, which has proved to be very interesting.<sup>67</sup> For its *Battlefield* game series, EA had historically licensed the intellectual property rights from Textron so it could reproduce Textron aircraft and helicopters for use in the *Battlefield* games. For the newest version, the licensing negotiations did not go as planned, and the parties did not sign a license. However, EA launched the game anyway. EA likely looked at cases such as *Brown* and concluded that it could copy the real world under the First Amendment's protection.

Specifically, EA copied Textron Helicopters.<sup>68</sup> Its reproductions were very realistic, and anyone familiar with military vehicles would know the products and names EA used. Still, EA was confident about its First Amendment protection. It was so confident, in fact, that its lawyers actually filed a motion to dismiss rather than a motion for summary judgment.<sup>69</sup> EA believed that a judge could base his decision solely on the pleadings because, in its eyes, the First Amendment protected its recreations. The court disagreed and denied the motion to dismiss. It concluded that Textron's allegations that the helicopters have a particular prominence in this game were sufficient to defeat the motion to dismiss.<sup>70</sup> Unlike *Grand Theft Auto*, where the strip club was "incidental" to the game play, Textron helicopters are central to EA's game.<sup>71</sup> People may buy the game just to play with the helicopters. The case is ongoing and currently in the discovery stage. It will be interesting to see how it turns out.

Turning to another topic, I would like to talk about failed contracts within the industry. One example is seen in *Silicone Knights v. Epic*

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

66. *Id.* at 2733.

67. *Elec. Arts, Inc. v. Textron Inc.*, 2012 WL 3042668, at \*1 (N.D. Cal. July 25, 2012).

68. *Id.*

69. *Id.*

70. *Id.* at \*5.

71. *Compare Elec. Arts, Inc.*, 2012 WL 3042668, at \*4, with *E.S.S. Entm't 2000*, 547 F.3d at 1101.

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*Games*.<sup>72</sup> Epic Games had developed an engine called the Unreal Engine 3. It licensed the engine to other game developers that used it to develop their games.<sup>73</sup> In this case, Epic had licensed the engine to Silicon for use in developing its *Too Human* game. After using it for a time, Silicon claimed that the engine was performing terribly and sued Epic for breach of contract.<sup>74</sup> Silicon asserted that they had needlessly spent millions trying to use Epic's engine and that it had to spend even more to find alternatives.<sup>75</sup>

Epic strongly disagreed and claimed Silicon had breached.<sup>76</sup> It pointed to the fact that Silicon actually used its code not just for *Too Human* but also for a bunch of games. If it had really performed so poorly, why did Silicon use the engine in all these other games? The case went to trial, and the jury ruled in Epic's favor. Just recently, the judge doubled the damages and held that, as part of the injunction, Silicon must recall and destroy all unsold copies of the *Too Human* and all other games that incorporated some of Epic's code.<sup>77</sup> Silicon has just perfected their appeal, so they could get relief from this drastic punishment; but they may not.

So what is the lesson in these contract cases? The panel yesterday talked about best practices for developing games while avoiding third-party intellectual property rights. In Silicon's case, it failed to manage its developers. The developers were given access to the Unreal Engine. Even if Silicon told its developers only to use the engine for *Too Human*, the instructions were obviously not clear enough and the procedures were not effective and due to this failing, Silicon's problems became much worse.

In another smart tactic, Epic pointed to errors in its code that Silicon copied.<sup>78</sup> Regardless of whether Epic intentionally placed the errors or left them in the code accidentally, the fact remains that they were in the code, and Silicon needlessly copied them. Phone book companies used to do this. They would have fake listings so they could claim copyright infringement when someone copied the fake numbers. Since the companies that copied the phone book would have copied the fake listings too. Such tactics are important to think about. The other lesson from this case is that a company should not file suit if it is the bad guy. Often I have clients who immediately want to sue if they are harmed; however, they must take time to step back and assess

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72. *Silicon Knights, Inc. v. Epic Games, Inc.*, 2012 WL 6809721, at \* 1 (E.D.N.C. Nov. 7, 2012).

73. *Id.*

74. *Id.*

75. *Silicon Knights, Inc. v. Epic Games, Inc.*, 2012 WL 1596722, at \* 2 (E.D.N.C. May 7, 2012).

76. *Silicon Knights*, 2012 WL 6809721, at \*1.

77. *Id.* at \*23.

78. *Id.* at \*9.

the possible risks. A company must make sure it has done all the right things before it sues.

A second case involving a contract issue is *Timegate Studios v. South Peak Interactive*, where my firm represented Time.<sup>79</sup> In this case, Timegate developed the *Section Eight* game and entered into a contract with South Peak Interactive's predecessor to publish the game.<sup>80</sup> The contract set up a traditional developer-publisher relationship. However, the relationship soured, and both sides claimed that the other side had breached.<sup>81</sup> Timegate actually sued first, but South Peak cross-sued, asserting that Timegate had breached the contract.<sup>82</sup> Rather than go to trial, the parties went to arbitration.<sup>83</sup>

There are pros and cons to arbitration. Arbiters have a greater leeway because they are not as tightly bound by the rules of procedure and evidence, or precedent. The problem is that they can go off the reservation. That is what happened here; the arbiter went off the reservation. To encourage arbitration, the law makes it very difficult to get an arbitration award overturned. Nevertheless in this case, the decision was so bad that a judge decided there was no rational basis for the remedy.<sup>84</sup> The arbitrator decided that the publisher—who was never intended to have any intellectual property rights—had been granted a perpetual right to all of the intellectual property rights in the game.<sup>85</sup> Thus, the publisher could create its own sequels, which the parties never intended. Even though the contract said nothing of the publisher's perpetual rights, the arbiter created them anyway.

There are some important lessons in the case. For one, many clients view arbitration as a cheaper way resolve a case. But they do not realize there are real risks to arbitration because the arbiter has so much power and leeway. A company is usually better off relying on the courts where it is easier to predict an outcome based on the certainty of court rules and precedent. At the very least, a company should avoid the arbiter that decided the Timegate case.

And finally I will address the new GTLDs, the Generic Top Level Domain names. These include the traditional dot-com, dot-edu, dot-xxx; but Iann, the organization that oversees domain names, has said the supply of domain names is dwindling.<sup>86</sup> In response, the organization completely re-

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79. *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 860 F. Supp. 2d 350 (S.D. Tex. 2012).

80. *Id.* at 352.

81. *Id.* at 352–53.

82. *Id.*

83. *Id.* at 353.

84. *Timegate Studios*, 860 F. Supp. 2d at 362–63.

85. *Id.* at 355.

86. ICANN, <http://www.icann.org> (last visited Mar. 23, 2013).



vised the system, and companies can now register anything as a string. There have been over 1900 applications, but the ones relevant to this industry include: dot-app, dot-casino, dot-dev, dot-poker, dot-game, and dot-games.<sup>87</sup> Initially, Icann was not going to allow dot-game and dot-games, probably because the two are a closely resemble each other. A company like EA could still keep EA.com as their main website, but they might want to have a developer site at EA.dev and an online gaming site at EA.play. Those in the industry must be aware of these developments because they provide ways to market games and to interact with customers. Also, developers and partners may change based on the changes in the domain space. The new GTLDs will begin appearing in July or so. While only Amazon has applied for dot-dev, there have been multiple applications for most other GTLDs. So Icann will have to hold an auction to determine who receives a particular GTLD. It will be a very interesting development in the Internet space that could affect the industry.

That is it. Thank you very much. I will turn it over to Roxanne.

**Professor Keith Robinson:**

Thank you, Jeff. So I noticed that two of the domain names that you listed were dot-casino and dot-poker. As if there are not enough ways to spend money playing games on the internet, it looks like gambling is going to become a reality very soon. With that, I would like to turn it over to Roxanne to talk about video-game gambling.

**Ms. Roxanne Christ:**<sup>88</sup>

Thank you very much. When I think of the future of gaming right now, I think of gambling and gaming together. When I say “online gaming”, I am referring to online video games and when I say “online gambling” I am referring to online gambling. Although, the gambling industry calls it gaming, so when you hear these terms spoken by a casino, they mean gambling. It is quite confusing. I think online gambling is meeting online gaming and I will tell you why. There have been three important legal developments in the area of online gaming. Just for the crowd, let me use a different nomenclature. First of all, the DOJ did a u-turn on the meaning of the Wire Act.<sup>89</sup> Traditionally, the Wire Act, which is a law that has been on the books for decades, has been interpreted to outlaw all gambling and all online gambling of any kind.<sup>90</sup> As some of you may recall, courts had interpreted the UIGEA (Unlawful Internet Gambling Enforcement Act) to apply to any credit card

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87. Loeb & Loeb LLP, *supra* note at 3.

88. Roxanne Christ, *supra* note 6.

89. Memorandum Opinion for the Assistant Attorney General, Criminal Division from the Department of Justice, Whether Proposals By Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to in-State Adults Violate the Wire Act (Sept. 20, 2011) (“DOJ Opinion”), available at <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>.

90. 18 U.S.C. § 1084 (2006).

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processing and any rendering of ancillary services to someone involved in online gambling.<sup>91</sup> The UIGEA shut down a lot of illegal online gambling sites possibly because of the credit card payment processing that was taking place which came to an end.

The first change was when the DOJ reversed its view on the Wire Act, the UIGEA ceased being the extreme threat that many perceived it to be.<sup>92</sup> Although, I think the threat of UIGEA was a little overstated. So on December 23, 2011, the DOJ announced the Wire Act does not apply to lotteries and only applies to sports-related betting. This arose in the context of an opinion on whether a state lottery could do certain features of the lottery online.

The second change occurred when Nevada passed an online interactive gambling statute and an accompanying set of regulations—which took place within a day of the first change.<sup>93</sup> I was assured by Mark Lipparelli, the former chairman of the Gaming Control Board in Nevada, that there was no coordination between the two whatsoever. It is hard to imagine, but nevertheless, Nevada has a law and a set of regulations which I think will end up being the model for a lot of other states to enable online interactive gambling.

The third development occurred in August 2012. Judge Weinstein, who has done a lot of criminal court work prosecuting gangsters and mobsters, was the presiding judge for *United States v. DiCristina*.<sup>94</sup> In that case he ruled that poker is predominately a game of skill, not a game of chance, and therefore, it does not constitute gambling for purposes of the Illegal Gambling Business Act.<sup>95</sup> This was ironic because New York happens to be one of the states which say poker is gambling, but he was not interpreting New York state law. Rather, he was interpreting what is gambling under the Illegal Gambling Business Act.<sup>96</sup> So Judge Weinstein, who is in charge of prosecuting mobsters in a state where poker is illegal, said poker is not a game of chance, but a game of skill.<sup>97</sup> I think that was quite an important development. The reason *United States v. DiCristina* matters is because of the sheer size of the economic and commercial opportunities. The online gambling industry is huge. These are the forms of gambling that can be played online: a variety of sports wagering, poker, casino games, slots, bingo, and lotteries.

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91. 31 U.S.C. §§ 5361–67 (2006).

92. DOJ Opinion, *supra* note 3, at 1–2.

93. A.B. 114, 77th Leg. Sess. (Nev. 2013), available at <http://www.leg.state.nv.us/Session/77th2013/Bills/AB/AB114.pdf>.

94. *United States v. DiCristina*, 886 F. Supp. 2d 164, 164 (E.D.N.Y. 2012).

95. *Id.* at 235.

96. 18 U.S.C. § 1955 (2006).

97. *DiCristina*, 886 F. Supp. 2d at 235.

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I have my own personal theory, which some people disagree with, but I view this as a spectrum where social games are at one end and games that are moving toward real money gambling online at the other end. On this spectrum, we start with social games, which are a big economic opportunity considering Zynga's IPO, notwithstanding has not happened since the IPO.<sup>98</sup> Social video gaming was worth \$8.2 billion in 2012 and analysts project it to be an industry worth \$14.6 billion in 2015. This is just social video gaming; not *Mafiaville*, not *Cityville*, and not *Farmville*, but the games played through your web browser, or on a mobile platform.

"Social casino gaming" is actually a term of art, but who knows how widely it will be adopted. It is not yet a real model. Social casino gaming could be where you are playing for value, but you are not able to take the money out of the game. You are putting real money into the game, but you are not yet able to take it out. We all know that, while you are not supposed to, you can get money out of the game by selling an account on IGE or on eBay. This type of gaming is also growing and projected to be pretty big.

So where does that lead you? I think it leads you to the convergence of social gaming and casino gaming. If you think about it, each has its own legal issues to bring to the other. Attorneys have managed, if not mastered, these issues in each business. There are strategic benefits to this merger as well.

Think about what casinos do well. They have location-based, periodic-limited engagements with players. However, this is not what online gaming is about; if you are moving to online gambling, this is not really the name of the game. Rather it is about attracting people, not keeping your spots occupied twenty-four hours per day, seven days per week. Attracting people is what online gaming does so well.

Online gaming is much more about content, much more immersive, and much more about a story. Arguably, online casino-based gambling is branded games with pictures behind the games—but it is not necessarily about the story. It is not quite as immersive, but it will need to be if they are going to keep people engaged. As I mentioned, the economic market models are very different. On the casino side, they have learned how to manage under the protection of a highly regulated industry. On the gaming side, it is more or less the Wild West.

More importantly, it is their approach to the consumer base they have worked with that distinguishes gaming from gambling. On the gaming side, it is much more collaborative. As we heard last night at the Cinema, the user community and the user-generated content base of gaming is as much of a business as publishing and development. For example, in games, like *Dota* or *Dota 2*, users are writing their own maps and they are given software devel-

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98. Robert Hof, *Zynga IPO Goes SplatVille. What Went Wrong?*, FORBES (Dec. 16, 2011, 12:45 PM), <http://www.forbes.com/sites/roberthof/2011/12/16/zynga-ipo-goes-splatville-what-happened/>.

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opment tool kits to modify the game how they want.<sup>99</sup> However on the casino side, it is more of the booby model: here it is, take it, and give it back to us when you are done. Although, the casinos do something that game companies do not do as well—their loyalty program. Casinos are brilliant at keeping people engaged through the concept of a loyalty program, rather than through content, and the proof is in the pudding.

There are several recent deals that show social games preparing for this convergence. For instance, Zynga recently bought OMGPOP.<sup>100</sup> Even more obviously, Caesars purchased Playtika.<sup>101</sup> Playtika has the backbone for acknowledging what can be used for online gaming and gambling. Another deal was IGT's purchase of Double Down for \$500 million.<sup>102</sup> These are just some of the deals which were announced, but several more are obviously in the works.

Now we will discuss the law and its framework. There are four online gambling laws: the Unlawful Internet Gambling Enforcement Act,<sup>103</sup> the Illegal Gambling Business Act,<sup>104</sup> the Travel Act,<sup>105</sup> and Wire Act.<sup>106</sup> UIGEA is the law that outlaws ancillary service providers—with the target of the law being credit card companies—from processing transactions for illegal online gambling<sup>107</sup> but it does not apply unless there is illegal online gambling occurring. The law itself does not illegalize gambling. There also a pretty broad Safe Harbor Rule provided by the UIGEA.<sup>108</sup> So a lot of payment processors are looking at whether they can start processing payments for online gambling transactions under the Safe Harbor Rule surprisingly, this rule has received no attention. So if you have clients that are concerned about violating UIGEA, be sure to read the Safe Harbor Rule.

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99. DOTA, Playdota.com (last visited Mar. 23, 2013).

100. Liana B. Baker and Sarah McBride, *Zynga Buys OMGPOP Games Company for \$200 million: source*, REUTERS (Mar. 21, 2012), <http://www.reuters.com/article/2012/03/21/net-us-zynga-idUSBRE82K1BX20120321>.

101. A.J. Glasner, *Playtika Acquired by Caesars Entertainment Casino Group for \$80M to \$90M*, INSIDE SOCIAL GAMES (May 19, 2011), <http://www.insidesocialgames.com/2011/05/19/playtika-acquired-by-caesars-entertainment-casino-group-for-80m-to-90m/>.

102. A.J. Glasner, *International Game Technology Buys Double Down Interactive for \$500M*, INSIDE SOCIAL GAMES (Jan. 12, 2012), <http://www.insidesocialgames.com/2012/01/12/international-game-technology-buys-double-down-interactive-for-500m/>.

103. 31 U.S.C. §§ 5361–67 (2006).

104. 18 U.S.C. § 1955 (2006).

105. *Id.* § 1952.

106. *Id.* § 1084.

107. 31 U.S.C. §§ 5361–67.

108. *Id.*

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Also, there is the Illegal Gambling Business Act (“IGBA”).<sup>109</sup> This makes it a crime to finance an illegal gambling business, provided there are at least five people involved and more than \$200,000 is paid in a single day.<sup>110</sup> So, your backroom poker room is not going to be illegal by virtue of the Illegal Gambling Business Act.

This is the law at issue in the *United States v. DiCristina* case.<sup>111</sup> As I mentioned, Judge Weinstein said Texas Hold’em was a game of skill, not chance.<sup>112</sup> This analysis should be read and studied by anyone who is looking for what constitutes a game of skill and not chance. Interestingly, when Judge Weinstein found that just because the IGBA says that it is not going to be illegal unless the gambling at issue is illegal under a state or federal law, does not necessarily mean illegal gambling causes a violation of the IGBA.<sup>113</sup> Rather, it means that it is eligible to violate the Illegal Gambling Business Act. This was a principal that no one had before articulated. Everyone thought these federal statutes more or less federalized illegal gambling under state law; but Judge Weinstein said no, this is not just a federalization of this state crime.

Then he continued and cited the DOJ opinion when finding that the Wire Act only applies to sports-related gambling. The DOJ opinion had previously stated that the Wire Act only applies to sports-related gambling and does not apply to lotteries; but this was just a non-binding DOJ opinion and, as a practical matter, the DOJ can change its mind. It would be hard for the DOJ to decide to prosecute this, but it is still only an opinion. So, the court held the Wire Act is as narrow as the DOJ said.

One of the more interesting issues is virtual sports. If you are betting on a virtual sport, is that online gambling? Is it a sport or even sports-related? There were 10,000 people at Galen Center watching people play *League of Legends*. I think you could argue that that is a sport—especially if chess is a sport. There is also the Travel Act.<sup>114</sup> The Travel Act, along with the Illegal Gambling Business Act,<sup>115</sup> and UIGEA<sup>116</sup> only apply if the gambling at issue is already illegal. If gambling is not illegal, then it is not going to violate these federal laws. So that is why it is important for Nevada and other states to illegalize interactive gambling. If it is not illegal in the state, then it is not going to be illegal under federal law unless it is sports-related.

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109. 18 U.S.C. § 1955.

110. *Id.*

111. *DiCristina*, 886 F. Supp. 2d at 168.

112. *Id.* at 235.

113. *Id.* at 225–26.

114. 18 U.S.C. § 1952.

115. *Id.* § 1955.

116. 35 U.S.C. §§ 5361–67.

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In *United States v. DiCristina*, Judge Weinstein scaled back the reach of the Illegal Gambling Business Act because the legislature originally passed the law to curb the mob influence in the gambling industry.<sup>117</sup> Back when it was passed there was a lot of intrastate gambling that was not being prosecuted even though it was illegal. There was a lot of mob influence and it was highly corrupt. There was an absence of robust state enforcement, but that is not an issue today. Also, they passed RICO at the same time.<sup>118</sup> So, today you can reach a lot of conduct that they intended the Illegal Gambling Business Act to cover through the RICO statute without expanding the federal gambling statute.<sup>119</sup>

So, there are four main points with regards to federal law. First, online sports-related gambling is still illegal under federal law.<sup>120</sup> It is illegal in every state. Second, online betting that violates state law is still potentially illegal under federal law, but is subject to the interpretation of the Illegal Gambling Business Act.<sup>121</sup> Third, there are no new Safe Harbors by virtue of this DOJ opinion.<sup>122</sup> Finally, there have been a couple of efforts to introduce an overarching federal law regulating online gambling and legalize it in certain circumstances.<sup>123</sup> Judge Reid is behind it, which means that Caesar's and every other major casino are behind.<sup>124</sup> However, nobody thinks that is going to pass very soon—if at all. Most people have turned their attention to the states on the assumption that it is something that is going to happen on a state-by-state level.

A really important point to consider that often gets lost: the role of the tribes. Tribes can have gambling activities on their lands because they have their own laws, regulations, and sovereignty; but there is a question about the role tribes play in this debate over state-by-state online gambling. This could impact their business, particularly the revenue that tribal lands generate from the casinos on their properties. This concerns the tribes; but it is definitely a subject area that is beyond my expertise.

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117. *DiCristina*, 886 F. Supp. 2d at 235.

118. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986) (2006).

119. *See id.*

120. 18 U.S.C. § 1084.

121. *See DiCristina*, 886 F. Supp. 2d at 235.

122. *See* DOJ Opinion, *supra* note 3.

123. Bruce Walker, *Reid Seeks Federal Online Gambling Law*, THE NEW AMERICAN (Oct. 3, 2012), <http://www.thenewamerican.com/usnews/congress/item/13086-reid-seeks-federal-online-gambling-law>.

124. *Id.*

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Every state, including the District of Columbia, regulates lotteries. In fact, Nevada has legalized online gambling.<sup>125</sup> Also, Delaware has passed a law to legalize online gambling. Though both of these laws apply only to poker, they are clearly written with plans to expand to other forms of gambling. California has reintroduced legislation that would legalize online poker.<sup>126</sup> There is a lot of debate over it—especially from the tribal representatives who are not wild about it. But I think the action is going to be in cross-state compacts. Nevada has introduced a law that would allow the Nevada Gaming Commission to enter into a deal with neighboring states to form compacts between the states.<sup>127</sup> Think about it: Nevada has essentially no people, but lots of casinos; California has no casinos, but lots of people; it is the perfect compact. If California would step up and legalize gambling, then you would have California and Nevada. Who needs anything else?

There are several states that define gambling to include poker. This could be a problem. They are going to have to change this if they want to legalize online poker. Nevada's regulatory scheme is very interesting from a technology perspective. First, it is limited to online poker. It has two pieces of legislation: one is interactive gaming and the other is mobile gaming.<sup>128</sup> However, mobile gaming is not what you think; it is not like a cell phone. It just means you are moving around a casino—you are mobile within the casino. That is what mobile gaming means under the regulatory scheme in Nevada. The focus is really on interactive gaming.

There are three main types of licenses you can acquire. One is an operator license.<sup>129</sup> This is the equivalent of being Caesar's on the strip: you can do anything. It costs like \$250,000 and is the hardest to get. You go through the suitability review to determine whether you are suitable to hold the license. Every senior executive must disclose and share every financial fact with the gaming commission. So, a lot of foreign entities are not too comfortable applying for these. They are not as transparent in their executives' backgrounds and financial pictures as our domestic companies.

A second kind of license is a service provider license.<sup>130</sup> A payment processor or someone who performs an outsourced function for a casino would need and might not need, much more than, this license.

The third would be a manufacturer license.<sup>131</sup> This is necessary if you are making the online gambling equipment. There are some rules under this

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125. Assemb. 114, 77th Leg. (Nev. 2013) (enacted) *available at* <http://www.leg.state.nv.us/Session/77th2013/Bills/AB/AB114.pdf>.

126. *See* S. 1463, (Cal. 2012).

127. Assemb. 114, *supra* note 125.

128. NEV. REV. STAT. §§ 463.730, 463.750.

129. *Id.* § 463.765.

130. *Id.* § 463.677.

131. *Id.* § 463.660.

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scheme that require you to have the equipment in Nevada. You cannot put the equipment in another state or offshore; some of it needs to be in Nevada. Interestingly, the law imposes geo-location and patron identification requirements. The law only allows you to play online poker under Nevada law if you are in Nevada. You cannot play poker from California in Nevada, even if someone in Nevada is facilitating your poker play from California. If you are on a boat playing poker online in the middle of Lake Tahoe, it becomes illegal as soon as you cross the line.

That raises the question: if there is a violation of the state law, even if it is really inadvertent, does it violate the federal statute? There are a lot of unanswered questions. This assumes that there is really good technology that allows an interactive gaming operator to know the location and identity of their players. But identity authentication is one of the huge challenges in this industry. There is definitely a common ground to come up with this technology, and these laws assume it can be more or less mastered.

Interestingly, Zynga has applied for an online gambling license.<sup>132</sup> It will be very interesting to see how much trouble they have because a lot of people think that Zynga games have been online gambling already. If you have already engaged in online gambling without a license, the regulators use that as a reason to not grant you a license. So, it will be very interesting to see how difficult it is for them to acquire a license.

The regulations are complicated. The bottom line is: it is very difficult for an online gaming company to go into Nevada and have an online gambling offering. As a practical matter, our gaming clients are going to need a partner with a casino—someone who is already there and in business. The fact that Zynga has not done this, and they are doing this alone, makes me wonder whether someone has decided that they are too toxic to enter a partnership. It will be very interesting to follow their application and see where they come out. Just because you have been in business with someone who has had issues does not mean you will not be able to acquire a license. Bwin, for example has had its issues under Nevada law, yet some of its partners have still been able to acquire licenses.<sup>133</sup>

So this is a huge opportunity for a lot of companies. Fertitta Interactive is a very interesting company. Fertitta Interactive is a subsidiary of the company that owns Station Casinos.<sup>134</sup> Fertitta Interactive also owns Ultimate Fighting Championship, and they focus on the interactive space more than a

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132. ZYNGA, <http://www.zynga.com> (last visited Mar. 24, 2013).

133. Renee, *Boyd Bags Nevada Online Poker License*, TIGHT POKER (Oct. 19, 2012), <http://Investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=142200350>.

134. Steve Green, *Station Casinos Reports \$11.2 Million Profit, Buys Controlling Interest in Fertitta Interactive*, VEGAS, INC. (Nov. 13, 2012 1:56 PM), <http://www.vegasinc.com/news/2012/nov/13/station-casinos-reports-112-million-profit-3rd-qua/>.



lot of these other casino companies. So what is the result? The future gaming and business trends will drive more merger and acquisition (“M&A”) activity for transactional lawyers and in 2012, M&A activity was up almost 20%.<sup>135</sup> The volume was down, but that just means the deal size was bigger. So, 2012 was pretty active.

Also there will be a lot of start-up companies and a lot of ventures between two established companies. They will want to spin off and either exit or go public. The question is: what is the exit strategy for those companies recognizing there will be a lot in the online gaming space?

IPOs over the last twenty years have dropped precipitously and the size of them has become bigger. Why was that? Sarbanes-Oxley has made it much more expensive and difficult to become a public company so more investors are not getting out by way of an IPO.<sup>136</sup> Instead they are selling. As you have seen IPOs drop; you have seen M&A activity rise. M&A activity has become the mirror image of the IPO trend. The question will be: is this something that continues to be driven where online gaming meets online gambling? Or will you see some IPO activity as a result of the commercial opportunities and by virtue of the JOBS Act—which has a feature that makes IPOs easier?<sup>137</sup> With that, I will stop and answer questions.

**Professor Keith Robinson:**

Thank you so much Roxanne. With the time we have left, we will open it up for questions. I will start with a question for John. John, a lot of our video game development companies are probably pursuing software patents or business method patents. Jeff mentioned those types of patents, or patents in general, can have value. Can you talk a little bit about the Patent Office’s efforts to reduce the pendency time for software and business method applications?

**Mr. John Cabeza:**

Yes, I did want to highlight one thing that I forgot to mention earlier. Yesterday I noticed that there was a really good discussion on trademarks and copyrights and having to procure third parties to review the code to see if the code has been swiped by a competitor. One thing that is nice about patents is you do not have to do that. The patent is going to protect what it is doing. And if they change the code, you are still protected. It actually gives you an extra layer of protection.

One of the things we have seen over the past ten to twelve years is a dramatic rise in the number of applications filed in the computer software and hardware areas. Also, the covered business methods are another area that

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135. *Global Manager M&A up 22% in 2012*, PENSIONS & INVESTMENTS, [www.pi-online.com/article/20130102/DAILYREG/130109985](http://www.pi-online.com/article/20130102/DAILYREG/130109985) (last visited Mar. 24, 2013).

136. *See generally* Sarbanes-Oxley 15 U.S.C. §§ 7201-7266 (2006).

137. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

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has seen a rise, but it has recently stabilized. Because of this we have hired 1500 people a year to try and tackle that backlog. In 2009, when the current Undersecretary came on board, our backlog was over 750,000 applications. Due to the efforts that we have taken—the patent examiners’ bargaining unit, the intensive hiring programs, and the experienced intellectual property hires—we have been able to get the backlog down to around 600,000 applications. It is a dramatic decrease in a very short period of time.

We have also focused on making sure that we have restructured our processes. We are now focused on doing the oldest applications in the core before we pick up ones that are newer. Though we previously did that in specific technology sectors, it was not uniform; some technology areas had a five-year backlog and others only had a ten-month backlog. Through an initiative, we have balanced this out over the past two years. Right now, is the first time our average pendency to first action, if I am not mistaken, is hovering around eighteen months, and we are well on our way to get to our goal of ten months by 2017.

**Professor Keith Robinson:**

That is great. I will open it up to the audience for any questions for our panelists.

**Audience Member 1:**

Does the arbitration agreement specify that the arbitrator be familiar with intellectual property law? Or is it more like a general arbitration clause?

**Mr. Jeff Becker:**

That is a great question. I do not know without having it in front of me, but I think a lot of people drafting agreements just throw in generic arbitration clauses. If you are going to leave the court system to go to arbitration, I would not have a generic provision. You must think through your own business goals.

**Professor Keith Robinson:**

Professor Nguyen.

**Professor Xuan-Thao Nguyen:**

This question is for John and the USPTO as well. Will the USPTO open its criteria for some of these guys if they want to be an examiner in this industry?

**Mr. John Cabeca:**

We have been requiring for years an engineering or computer science degree to be a patent examiner, but you do not necessarily need a law degree to become a patent examiner. We will teach the specifics of the law to employees coming on board with science and technology backgrounds and understand the nuances of technology. With the covered business methods area, we have seen some exceptions during the peak of that boom where we brought people in with advanced business degrees to look at those types of applications; it is definitely worth considering for the software gaming area as well.

**Audience Member 2:**

If someone has a technical background and then takes intellectual property classes in law school, does that count as the intellectual property experience?

**Mr. John Cabeca:**

Yes.

**Audience Member 3:**

Are trademark examiners accessible to the trademark applicant for questions and concerns regarding the registration of the application?

**Mr. John Cabeca:**

I will tell you on the patent side we are pretty responsive to the stakeholders. I am a patent person so I cannot answer the trademark question. If someone raises that concern, our trademark organization has a few proposed rules to try and clarify the accuracy of the register. They are trying to stay on top of the other intellectual property and trademark offices around the world.

**Professor Keith Robinson:**

Jeff or Roxanne, have you guys had experience with that problem?

**Mr. Jeff Becker:**

First of all, if you call the examiner and explain that it actually is in commerce—though they may need to see something—they will accept the specimen. I think the examiner was concerned because a lot of people put up a prototype of a label or the graphic design but not the actual one. But if you show that it is actually in consumers' hands, they will allow it.

There is a lot of case law about movies and TV shows that are shot in real locations, but usually the trademark and copyright issues are dismissed because the place is only in the background of the shoot—it is not instrumental to the show. I think the gaming industry will use those cases to say that if it is background—like the Play Pen—then it is not going to infringe. It will only be a problem when it is material to the content of the game.

*The Devil's Advocate* is a good example.<sup>138</sup> In the devil's office in that movie, he has a painting that is the portal to hell. It is a pretty dramatic part of the film, and the artist claimed copyright infringement. Though I cannot remember exactly, I think he won. The show had to change the painting for its DVD release among other things. The picture was instrumental to the show unlike in *George of the Jungle*, where Caterpillar tractors were visible.<sup>139</sup> Caterpillar did not have a case. If you are just trying to create what is really real when creating your virtual environment and it is not that highlight of the content, you are going to be okay.

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138. *THE DEVIL'S ADVOCATE* (Warner Bros. 1997).

139. Laura Hodes, *Caterpillar Versus Disney*, *FIND LAW* (Oct. 23, 2003), [http://writ.news.findlaw.com/commentary/20031023\\_hodes.html](http://writ.news.findlaw.com/commentary/20031023_hodes.html).

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**Professor Keith Robinson:**

So Roxanne, I just want to clarify one thing. If I want to play my friends online in Texas Hold'em for money, do we all have to be located in a state where it is legal?

**Ms. Roxanne Christ:**

It kind of depends on how you are doing it. You can play poker with your friends over phone, and no one as a practical matter can do anything about it. If you have a league of a thousand players, you might attract attention, but they are really focused on the commercial, large-scale enterprises. So I do not think that you need to worry about it too much.

This is an interesting area from an ethical perspective. If a client asked if they were engaged in the unlawful business of online gambling, and you said "yes," you would be violating UIGEA.<sup>140</sup> If a foreign company that was acting legally under their own laws asked if they could have online gambling in the United States we could not even give them that advice. Maybe we were being too cautious and conservative, but it posed some really sticky issues from legal and ethical perspectives

**Professor Xuan-Thao Nguyen:**

Jeff can you clarify for us; what is the difference for protection for look and feel under trade dress versus look and feel under copyright? We have seen *Apple v. Samsung*. How difficult is this for game developers to be able to obtain legal protection?

**Mr. Jeff Becker:**

You can have common law trade dress protection, and you can also go to the USPTO and get a trademark registration for your trade dress. You do not have to have the registration, although it is a nice thing. It is important to make sure that it is identifiable and consistent. Unlike copyright where you create it and it exists, trade dress rights are only going to exist if it is a source identifier—if it acts like a trademark. So when you see it, it signifies it is a certain game developer or a certain game just by looking at it. The hard part on trade dress is making sure that there is a consistent look and feel so that it is identifiable as a source identifier, as opposed to copyright look and feel.

**Professor Xuan-Thao Nguyen:**

How would a game developer demonstrate that the look and feel was a source identifier?

**Mr. Jeff Becker:**

Well, just like other trademark cases, you can do consumer surveys to show that a certain trade dress does make you think of a particular game based on the percentages in the survey results.

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140. Unlawful Internet Gaming Enforcement Act, 31 U.S.C. §§ 5361–5367 (2006).

**Professor Keith Robinson:**

Alright, before I close I just want to thank the panelists. If you have any questions, all three people up here are very accessible, open, and willing to answer your questions after the panel concludes. Please join me in thanking our panel for coming today.