As far as significant gaming law developments are concerned, 2011 was a tough act to follow. Last year saw a new paradigm emerge with the Hart test being applied to lawsuits involving celebrities’ publicity rights in video games, and the Supreme Court, in Brown, validating a new art form. There seems to be an important trend that, while not new to 2012, certainly continued in a big way: the video game industry is becoming more mainstream. As video games continue to cross demographic lines and become more ubiquitous, the producing companies start to look more and more like the companies of other industries. Because of the industries’ growth, 2012 saw many of last year’s contentious lawsuits settle as a result of risk-focused business decisions.

As the scope of a business expands, the variety of its contracts tends to expand as well. Video game companies faced everything from old-fashioned employment disputes, to licensing deals with A-list celebrities gone awry.

While numbers continued to fall and the market continued to expand, companies were plagued by intellectual property (IP) litigation from competitors and non-practicing entities (NPE) alike. The well-known threat of intellectual property infringement claims not only affected the largest players, but even the smallest mobile app start-ups were


subject to troll-like claims. Plaintiffs discovered new IP mediums to litigate over; some even taking pages out of old IP portfolios in order to find new defendants.

Almost every company is hurting from the slow growth in the economy, and the shift to the less profitable world of mobile gaming. This trend could explain why some companies are beginning to litigate against competitors in more ways, and on a greater scale, than we have ever seen before. And the evolution of the industry to one more populated with businesspeople and investors could explain why more of these suits are settling out of court.

I. Patent Infringement

In 2012, the video game industry seemed to avoid the mass patent troll attacks that characterized 2011, but NPEs are still pressuring some major players. Also, several cases between practicing entities threatened some of the very foundations of the industry. Indie developers and start-ups usually avoid the major patent traps, but giants like Nintendo and Microsoft are consistently dragged into the courtroom over their console technologies; sometimes at the mercy of smaller technology companies. As we’ve seen, wise counsel must clear new technologies early or risk ending up in court years down the line.

*Microsoft Corp. v. Motorola, Inc.*

2012 gave us a collection of suits that threatened the Xbox, iPhone and every gadget in between. Back in 2010, after Google acquired Motorola, they flexed some muscle and sued Microsoft and Apple over their H.264 video compression and wireless
After making initial headway with the ITC, the FTC began an anti-trust investigation of Google’s conduct, and Federal district judges denied Google’s injunctions against the Xbox and other products. Now, the Xbox’s fate seems somewhat secure as, recently, Google dropped the video-encoding patents from the investigation. This comes on the heels of the settlement resulting from the FTC’s antitrust investigation that ruled Google must cease seeking injunctions against competitors using standard-essential patents (such as the H.264 patent) and, instead, continue third-party negotiation. There are several patent related district court cases still going on, however, and experts say that although negotiations have been spurred on, a conclusion is not close at-hand.

Worlds, Inc. v. Activision Blizzard, Inc. et al

On March 30th, 2012, Worlds Inc., a non-practicing entity, was at it again, suing


World of Warcraft and Call of Duty masterminds Activision Blizzard. The patents allegedly infringed are U.S. patents nos. 8,082,501, 7,493,558, 7,945,856 and 7,181,690; titled "System and Method for Enabling Users to Interact in a Virtual Space." These patents arguably give Worlds a monopoly on the technology at the core of most MMO's. The patent claim construction hearing, also called a Markman hearing, is set for June 27, 2013. If this hearing construes the patent as broad as its title suggests, hundreds of other games and their creators could be liable. It is probable that this lawsuit will settle with a licensing deal, however, and Worlds could continue to sue other MMOs that use similar technology.

*Tomita Technologies USA, LLC et al v. Nintendo Co., Ltd.*

2012 gave us our first in-depth look at an augmented reality patent infringement case when Seijiro Tomita, the founder of Tomita Technologies and holder of a glasses-
free 3D patent, sued Nintendo.\textsuperscript{12} The Nintendo 3DS’ 3D imaging and augmented reality capabilities seems to be similar enough to patent no. 7,417,664, titled “Stereoscopic Image Picking Up and Display System Based Upon Optical Axes Cross-Point Information”, for the Federal District Court of the Southern District of New York to deny Nintendo summary judgment.\textsuperscript{13} Nintendo seems to be hit at least twice a year with patent infringement cases, especially centered on the Wii and its peripherals; this will, however, be the first time its 3D applications have been targeted.\textsuperscript{14}

\textit{Uniloc v. Everyone}

At least one patent troll plagued the game industry this year, as Uniloc USA filed no less than 50 lawsuits in the Eastern District of Texas in 2012 alone.\textsuperscript{15} Among the defendants were every kind of tech company, including several game developers: Mojang, Minecraft creator; Halfbrick, the makers of Fruit Ninja; Gameloft, mobile game mogul; Madfinger, maker of mobile FPS like Shadowgun; and even Square Enix and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Uniloc – Lawsuit History, RFC EXPRESS, https://www.rfcexpress.com/search.asp?page=6&partyName=uniloc&caseTypes='P','C',%20'T'.
\end{itemize}
\end{footnotesize}
Electronic Arts. Uniloc owns US patent no. 6,857,067, titled “System and method for preventing unauthorized access to electronic data”, and asserts that mobile games, like Minecraft - Pocket Edition, use their patented process for server authorization (which includes “a portable licensing medium configured to communicate with the electronic device and to store license data”). As of Dec 27th, 2012, Uniloc has also filed suit against Take-Two Interactive and 2K Games over U.S. Patent No. 5,490,216, “System for Software Registration”, mentioning Borderlands as a culprit. The litigation is still ongoing, but Minecraft creator, Markus "Notch" Persson, has vowed he “will throw piles of money at making sure they don't get a cent.” If Notch keeps his word (admittedly this is a quote from Twitter, of all places) then we could possibly see a patent infringement ruling, a key to future patent defense.

Wildcat Intellectual Property Holdings LLC v. Wizards of the Coast LLC

A different patent troll has filed an infringement case against a game over 10 years old, this time in the Northern District of Texas. Wildcat Intellectual Property


Holdings of Dallas sued Wizards of the Coast, LLC on November 1st, 2012 for Magic the Gathering: Online, which they claim infringes on U.S. Patent no. 6,200,216, “Electronic trading cards”. Interestingly enough, this is a suit that Wildcat brought back in 2011, then against numerous defendants who have all but one been dismissed without prejudice. Wildcat is asking the judge for an injunction to immediately take down the site, which is a cash cow for Wizards of the Coast. The details of the settlement from the last case have not been released, but it seems Wildcat did not get dealt the hand they actually wanted.

Walker Digital and Lodsys v. Everyone

Last year, GBL’s 2011 Year in Review reported on pending patent litigation in hopes of educating the conference on the trends in patent law. Somewhat expectedly, most of the suits are still being fought and few actual court opinions have been handed down. However, we have learned that Non-Practicing Entities, such as Walker Digital, LLC and Lodsys, LLC, are vicious and a constant threat to video game developers, large and small. Walker Digital’s infamous 2011 deluge of 15 patent infringement cases


against over 100 defendants included almost every major player in the video game industry, while Lodsys’ near 40 suits attacked iOS developers. This type of behavior by patent trolls has apparently prompted some indie developers to move to Europe. This is a shift to be watching as video game copyright law is constantly changing in the EU. But more often, developers simply pay up to avoid the costs of the long, drawn-out litigation that we have seen here.

**Impulse Tech. v. Microsoft/ ThinkOptics Inc. v. Nintendo of America**

However, patent litigation not involving NPEs was more focused and seemed to resolve more quickly. Some closure was had in 2012 from litigation when console


makers, Microsoft and Nintendo, and even their developers and retailers, were sued over motion-tracking peripherals such as the Wii Remote and the newly introduced Xbox Kinect. The suit, brought by Impulse Technology in the Northern District of Ohio, was voluntarily dismissed after the Court’s Markman hearing constructed the claim in favor of the defendant. A plaintiff victory was had, however, when another company, ThinkOptics, Inc., sued Nintendo because of the Wii remote in 2011. One must wonder why it took these companies 5 years to attack the Wii, but in the end, motion-controlled virtual bowling lives on. Nintendo settled with ThinkOptics and is now licensing their patent in order to continue to sell Wiis.

II. Copyright and Trademark Infringement

Copyright and trademark law in the video game industry has always been interesting and often entertaining; this year was no exception. It seems that as the industry grows, the subject matter being litigated grows wider and more diverse as virtual


31 Impulse Tech. V. Microsoft, 2012 WL 4794635 (Slip Copy).


tattoos, video game plot lines, depicted helicopters, and more are accused of infringement.

_Tetris Holding, LLC v. Xio Interactive, Inc_

The most important development in video game copyright law in 2012 was perhaps the victory Tetris had against Xio, makers of a Tetris clone for the iPhone. In response to the Tertris’ complaint, Xio admitted that they were copying but claimed “the only similarities between the games are elements not protected by copyright law.” While code and graphical elements of a game are copyrightable, the rules and mechanics are not. As the Court stated, the “doctrine is simple to state—copyright will not protect an idea, only its expression—but difficult to apply.” The Court proffered what might come to be known as the “the Squint Test” when it declared “[i]f one has to squint to find distinctions only at a granular level, then the works are likely to be substantially similar.” In applying the Squint Test, the Court found “the overall look and feel of the two games is identical” and thus Xio had almost _per se_ copied the “visual expression” of Tetris, infringing its copyright. With copying in the industry being as commonplace as it is, this opinion will surely cause companies to rethink their strategies of avoiding suit.


In April, many industry professionals and gamers alike were troubled to hear that the popular Assassin’s Creed series may have lifted its entire premise from the pages of a
self-published novel called “Link”, written by John L. Beiswenger in 2003. The novel, which predated the first game by five years, included familiar touchstones such as a machine that allowed characters to re-live their ancestors’ memories and analogous spiritual and Biblical overtones. Beiswenger sued Ubisoft, the makers of Assassin’s Creed, for copyright infringement but dropped the suit without prejudice only a month later. This prompted Ubisoft to immediately counter-sue for a declaratory judgment to end the dispute. The ruling of this case would have interested other developers that would possibly “borrow” a few ideas from a favorite sci-fi novel, but the case settled fairly quickly in August, this time with prejudice.

Matthew Hawkins, Author Suing Ubisoft Based on Claims that ‘Assassin’s Creed’ was His Idea, http://www.nbcnews.com/technology/ingame/author-suing-ubisoft-based-claims-assassins-creed-was-his-idea-722586


Ross Dannenberg, Case Update: Beiswenger v. Ubisoft (Assassin’s Creed), (June 26 2012 7:00 AM), http://www.patentarcade.com/2012/04/new-case-beiswenger-v-ubisoft-assassins.html


Id.
Electronic Arts Inc. v. Zynga Inc.

 Copying between competing developers in the social game sphere has gone from a game’s basic concepts to blatant copy-pasting of code, but how much is too much is still a legal grey area. In June, Zynga revealed one of its most ambitious projects yet, The Ville, only to be hit with a lawsuit a month later from EA for infringing on Sims Social.\(^{39}\) Zynga, geared up for what could be the biggest infringement lawsuit yet between the companies, counter-sued in three parts.\(^{40}\) The most important claim asserted that EA originally stole Sims Social from their own CityVille, a game they released a year and a half before.\(^{41}\) However, Professor Eric Goldman is of the belief that this is a lawsuit that “EA [cannot] afford to win.”\(^{42}\) The legal precedent in copyright law allows copying of


\(^{42}\) Eric Goldman, *EA’s Copyright Infringement Lawsuit Against Zynga is Dangerous – For EA*, FORBES, Aug. 6, 2012,
the basic game concept and even the general appearance of the game. EA needs to push the boundaries of what is considered infringement, if EA does not want to start completely from scratch on its next social game, it will be much easier for copyright owners to win on these types of claims. Further complicating the suit, Zynga is sun setting the Ville. What this means for the pending litigation remains to be seen, but we can only guess that a settlement is just around the corner.

*Electronic Arts, Inc. v. Textron, inc.*

In what seems to be déjà vu, Textron, the maker of Bell helicopters, again claimed trademark infringement against EA games in January over the helicopters depicted in the Battlefield series. Back in 2006, the same suit settled with a licensing agreement, but surprisingly the negotiations for licensing the Bell trademark for

http://www.forbes.com/sites/ericgoldman/2012/08/06/eas-copyright-infringement-lawsuit-against-zynga-is-dangerous-for-ea/  

43 *Id.*  
44 *Id.*  
Battlefield 3 seems to have gone awry. EA’s Motion to Dismiss claimed First Amendment protections like those given to video games in the Supreme Court’s *Brown v. Entertainment Merchants Ass’n* decision but was disappointed to see it denied in July. This litigation is ongoing and could provide a first look at how courts will handle the *Brown* decision. However, chances are that EA will steer clear of that minefield and end up settling with new licensing terms.

**Tattoo Cases**

Infringing tattoos seems to be one of the next trends of copyright law as two tattoo suits have cropped just in the last few months. There is little precedent in this area, but legal scholars suggest that tattoos meet the definition of a work of art fixed in a


tangible medium, subject to copyright protection, even if that medium is someone else’s body.

**a. Chris Escobedo v. THQ, inc.**

When THQ recreated UFC fighters for UFC: Undisputed 3, probably the last thing they thought of was licensing the copyrighted tattoos on each fighter from each of their respective tattooists. But perhaps it should have because Chris Escobedo, a tattoo artist whose work was recreated on fighter Carlos Condit in the game, sued THQ. This may sound similar to Mike Tyson's infamous face tattoo, created by artist Victor Whitmill, who sued Warner Brothers over their recreation of his design in The Hangover II. The suit predictably settled, giving little precedent to stand on, but legal experts believe that tattoos are copyrightable.

**b. Stephen Allen v. Electronic Arts**

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51 *Id.*
Just days ago, Stephen Allen sued EA because Ricky William, a former NFL runningback, and his tattoos appeared on the cover of NFL Street, a game from 2004. Allen, a tattoo artist from Louisiana, carved on Williams, so the tattoos are technically his, not Ricky’s. It remains to be seen if this lawsuit will spark more claims from tattoo artists from all over the country whose works are prominently displayed in sports games. At any rate, general counsel for developers need to start to recommend licensing deals with tattoo artists or significant changes to tattoos recreation in-game.

*EMI April Music, Inc. v. 4MM Games,*

Musical video games created an exciting collision of two of the edgiest sectors of the entertainment industry, however, this intersection could bring about trouble when it comes to copyright infringement. EMI filed a suit against 4MM Games, the maker of the *Def Jam Rapstar* music video game, an alleged copyright infringement. The complaint claimed that the developer used certain songs in which EMI had an interest without obtaining the proper permissions. EMI only owned portions of some of the songs it


53 *EMI April Music, Inc. v. 4MM Games, LLC,* No. 12 CV 2080 (S.D.N.Y.) (Filed March 12, 2012).

claimed infringement upon, including the game's use of Kanye West's *Stronger*, which samples the EMI-owned *Better, Faster, Stronger* by Daft Punk. EMI claimed statutory damages of $150,000.00 per violation, as well as net profits of the game, and also asked for an injunction.

Games like *Rock Band* and *Guitar Hero* have left a well-blazed trail in the world of music licensing for video games, but some commentators believe that because rap songs generally have a more complicated ownership portfolio, with their often multiple contributors and sampled tracks, the legal legwork that is needed is much more complex. Obviously, EMI's claim was that the necessary work was not done, which resulted in infringement. The industry needs to watch this case, and consider the added costs of this part of the market before attempting to expand music-based video games there.

*SocialApps LLC v. Zynga Inc*

Throughout 2011, patent trolls and a recently public Zynga were ever-present in the courtroom. On both sides of cease and desist letters, Zynga is still in the midst of numerous lawsuits. One such suit involved SocialApps, LLC, creator of a game called myFarm on the Facebook API, where players send their friends gifts of farm animals and plants to raise and grow on their virtual farms. Zynga began negotiations to buy or license myFarm from SocialApps but after they shared their source code in accordance with

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55 Id.
56 Id.
57 Id.
with due diligence, Zynga created Farmville.\textsuperscript{58} The suit quickly followed, and as of 2012 SocialApps overcame Zynga’s Motion to Dismiss claims of breach of implied contract, confidence, and implied covenant.\textsuperscript{59} The damages demanded were $100,000 of punitive damages, a permanent injunction and, Zynga's FarmVille profits (estimated at over $500,000).\textsuperscript{60} If most of the complaint is true, SocialApps has a strong case. Zynga may have a hard time not getting slapped with willful copyright infringement unless they settle, which usually happens in copyright litigation.

\textit{The Learning Company v. Zynga Inc.}

Case in point, one of Zynga’s lawsuits was settled December 18, 2012. In May 2011, Zynga was also accused of infringing on the trademark of a game that introduced many children to PC gaming, the Oregon Trail.\textsuperscript{61} Their Frontierville expansion called


\textsuperscript{59} Joe Osborne, FarmVille Could Owe a lot (of cash) to myFarm for its Success in Lawsuit, (Feb. 17, 2012, 12:30 PM), http://blog.games.com/2012/02/17/farmville-myfarm-zynga-socialapps-lawsuit/


Oregon Trail was the last straw for The Learning Company, which sued them for trademark infringement.62 This suit recently settled on December 18, 2012, just in time for Christmas.63 However, the details of the settlement have yet to be divulged. During the suit, Zynga voluntarily removed Oregon Trail from any products, and the Court ordered this to remain the status quo throughout the litigation, so it is likely that Zynga will not use this bit of history in any future game development.64

_Augusta National, Inc. v. CustomPlay Games Ltd. / Atari Interactive, Inc. v. Wan_

GBL reported on two other cases from 2011 that were rare among the ubiquitous pack of social game infringement suits; a trade dress case about a virtual rendition of a golf course and a copyright infringement case that involved knock-off Ataris.65,66 First,

62 _Id._


66 Compl. at 6, Atari Interactive, Inc. v. Wan, 2:11-cv-05224 (C.D. Cal. Filed June 22, 2011); _see also_ Frank Cifaldi, _Bootleg Consoles Attract Lawsuit From Atari_, (July 6, 2011),
Augusta National Inc. sued CustomPlay Games after a cease and desist letter did not yield removal of their golf course’s map and notable locations in their game, CPG Golf. However, that same year, CustomPlay Games folded and a settlement was drawn up with the other defendants. Sadly, no legal merits have been authored of this trade dress claim in the 11th circuit, but it is known that other defendants resolved to settle with Augusta in some fashion. Secondly, in the Atari case, defendants John Wan and Tommi, Inc. ended litigation in 2012 and resulted in the licensing of copyrights and trademarks from Atari. The evidence suggested that the defendants were clearly in the wrong in this suit and were wise to settle as soon as possible.

III. Right of Publicity

Unlike 2011, which saw massive changes in the right of publicity landscape with the landmark Hart case and its "transformative test," 2012 was fairly quiet in comparison.

No Doubt v. Activision


No Doubt’s long-running dispute with Activision came to an end this year, settling on undisclosed terms.\textsuperscript{70} The suit was over No Doubt's licensing of their images and selected songs to Activision for the game \textit{Band Hero}.\textsuperscript{71} No Doubt claimed that Activision improperly used their likenesses and exceeded the terms of the licensing agreement by allowing players to “unlock” the band’s virtual avatars to play any song in the game (including songs the band says they would never perform), allowing players to make the lead singer, Gwen Stefani, sing in a male voice, and by allowing players to make the band members perform individually by splitting them up.\textsuperscript{72}

A California appeals court had already ruled that there could be no First Amendment protections for Activision under the \textit{Hart} "transformative" test because the band members' avatars could not be edited or transformed in the game.\textsuperscript{73} Because the case was settled, any further legal impact the case would have had is, of course, unknown.\textsuperscript{74}

\textbf{IV. Contract Disputes}

\textit{Silicon Knights, Inc. v. Epic Games Inc.,}


\textsuperscript{71} No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 402-03 (Cal. Ct. App. 2011), review denied (June 8, 2011).

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.} at 410-11.

\textsuperscript{74} Kidd, \textit{supra} note 69.
2012 saw the apparent conclusion of the five-year-long lawsuit between Silicon Knights, Inc. and Unreal Engine, the creator of Epic Games. This litigation was actually started by Silicon Knights, but Epic Games ended up with a large judgment in its favor based on several different claims.

Silicon Knights, a licensee of the Unreal Engine 3, sued maker Epic in 2007 for fraudulent misrepresentation, claiming that the UE3 engine contained so many flaws that it was unusable for its game, Too Human. Silicon Knights went on to claim that it was forced to create a proprietary engine of its own for the game in order to meet its planned timelines. But Silicon Knights, which originally claimed upwards of $63 million in damages, now must pay Epic Games nearly $10 million.


76 Wesley Yin-Poole, *Silicon Knights Ordered to Recall and Destroy*, Eurogamer.net (Nov. 9, 2012), (http://www.eurogamer.net/article/2012-11-09-silicon-knights-has-a-month-to-recall-and-destroy-all-unsold-copies-of-too-human-x-men-destiny-more.)

77 Complaint at 1, Silicon Knights, Inc. v. Epic Games, Inc., No. 5:07-CV-275 (W.D.N.C. filed July 8, 2007); *See* Order on Motion for Miscellaneous Relief, *Silicon Knights, Inc.*, No. 5:07-CV-275-D (W.D.N.C. Dec. 22, 2011).

78 *Id.*

79 Order on Motion for Miscellaneous Relief at 2, *Silicon Knights, Inc.*, No. 5:07-CV-275-D.
In response to Silicon Knights's claims, Epic counterclaimed under theories of breach of contract (The UE3 Licensing Agreement), copyright infringement, and trade secret misappropriation, claiming that Silicon Knight's new engine, SKE, used portions of UE3's code and thus violated Epic's copyrights, trade secrets, and the licensing agreement.\(^{80}\)

Once the time came to compare the SKE code to the UE3's, clear evidence of copying came to light.\(^{81}\) The court was aided in its decisions by a showing at trial that Silicon Knights not only copied Epic's functional code but also some of its non-functioning programmer comments, which even contained the typographical errors left intact by Silicon Knights.\(^{82}\)

On May 30, 2012, the jury returned a verdict for Epic Games in the amount of $2.65 million for its breach of contract counterclaim and $1.8 million for its copyright infringement and trade secret misappropriation counterclaims.\(^{83}\) The court entered a judgment reflecting this verdict the same day.\(^{84}\) Per federal and local court rules and state and federal laws, the court also awarded Epic costs ($277,852.13), attorney's fees for the copyright infringement and trade secret counterclaims (but not for BOC counterclaim)


\(^{81}\) *Id.* at 18.

\(^{82}\) *Id.*

\(^{83}\) *Id.*

\(^{84}\) *Id.*
($2,091,722.83), prejudgment interest ($2,302,147.96), and all but denied expert witness fees ($650). (In total, a pittance of $680 was awarded out of over $1,000,000.00 claimed). 85 Silicon Knight was also required to wipe all Unreal code from its engine and to recall and destroy any existing copies of games in which Unreal Engine code could be found, including Too Human, The Box/Ritualist, The Sandman, X-Men:Destiny, and Siren in the Maelstrom. 86

This case shows that even "borrowing" portions of code or ideas from copyrighted software can be a very expensive proposition.

**Gate Five, LLC v. Beyoncé Knowles-Carter**

In 2011, Gate Five filed suit against singer Beyoncé for allegedly breaching a contract related to the in-development game Superstar: Beyoncé. 87 The conflict arose when Beyoncé terminated the contract she had negotiated to license her image and songs for Gate Five's game, Superstar: Beyoncé—a move that cost Gate Five $6.7 million in previous investment and 70 jobs. 88 Beyoncé claims that she merely exercised a financing contingency in the contract, which required Gate Five to raise a certain amount of capital for the game by a deadline; if Gate Five did not raise the capital in time, Beyoncé could

85 *Id* at 47.

86 Order on Post-Trial Motions at 40-41, *Silicon Knights, Inc.*, No. 5:07-CV-275-D.


88 *Id.*
back out of the deal. Gate Five did not, in fact, meet the deadline but countered with an estoppel argument, saying essentially that Beyoncé waived her right to financing contingency based on representations she and her representatives made, namely that the financing arrangements, though late, were acceptable to them.

It now seems that this case may proceed to trial, as Beyoncé's motion for summary judgment was denied by the New York court hearing the case, and the denial has been confirmed by the appellate division. Gate Five is seeking to recover the lost investment and lost profits (which it estimates at $100 million) and to enjoin Beyoncé from working on any competing video game. As one commentator noted, this case could be significant in showing the disconnects that can occur between the talent and


91 Ron Dicker, Beyoncé Lawsuit: $100 Million Claim Against Singer Over Dance Video Game Gets Go-Ahead, HUFFINGTONPOST.COM (Updated: 11/20/2012 3:36 PM), http://www.huffingtonpost.com/2012/11/19/beyoncé-lawsuit-100-milln_2158954.html; See id.

92 Complaint, Gate Five, LLC v. Beyoncé Knowles-Carter, No. 0651094-2011 (N.Y. Sup. filed May 9, 2011).
video game industries and could indicate that an especially high level of communication is needed for joint ventures, such as the game at the center of this case.\textsuperscript{93}

\textit{Zynga v. KIXEYE}

A war of words that began with a KIXEYE recruiting video lobbing thinly-veiled criticisms at Zynga has culminated in an equally-vitriolic lawsuit between the two. The legal dispute centers on Dan Patmore, a former programmer on Zynga's popular \textit{CityVille} free-to-play who was hired by KIXEYE.\textsuperscript{94} In Zynga’s complaint, which claims breach of contract and misappropriation of trade secrets, the social games giant accuses Patmore of violating his employment agreement and engaging in "wholesale theft" of Zynga documents and secrets.\textsuperscript{95} Zynga originally just sued Patmore; but, it has since amended its complaint, naming KIXEYE as a co-defendant.\textsuperscript{96}

This lawsuit is still in the early stages, but could be the bellwether of things to come. The demand for talent in the industry, especially for social-games programming


\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.}
talent, is well-publicized. If the known-to-be-litigious Zynga continues to lose talent to competitors, lawsuits such as this one could become the story of the next year.

**Bethesda v. Interplay**

Bethesda and Interplay settled their long-running dispute at the turn of the New Year. Bethesda had sued Interplay for breach of contract and trademark infringement stemming from Interplay's use of Bethesda's *Fallout* brand. Interplay—which created the *Fallout* series and sold it to Bethesda in 2007—retained the rights to sell preexisting *Fallout* games and also licensed back the series so that it could develop a *Fallout* MMORPG. Bethesda claimed that Interplay had failed to seek its approval on marketing materials for the preexisting titles and that Interplay entered into licensing agreements for those titles with distribution channels, such as Steam; both actions could


100 *Id.*
have been in violation of the licensing agreement between Bethesda and Interplay.\(^{101}\) In a somewhat unusual development, settlement details are expected to be (at least partially) announced later this year.\(^{102}\)

**Antonick v. Electronic Arts, Inc.**

EA is locked in a legal battle with Robin Antonick, a longtime employee and creator of the software that allowed the football teams in EA's *Madden* series to use eleven-man teams rather than five; this feature of course plays a huge part in *Madden*’s realism, and thus arguably its popularity.\(^{103}\) Antonick ultimately signed a few employment contracts, including one in 1986 that guaranteed him royalties “on not only the versions of the *Madden* game developed by him but also any derivative works and any works ‘derived’ from derivative works.”\(^{104}\) Antonick claims this contract was modified over subsequent years, though never voided or expired.\(^{105}\) The case centers on whether the more recent *Madden* games are derivative works of the ones Antonik worked on and whether EA deceived Antonick in any way about this aspect of them.\(^{106}\)

\(^{101}\) *Id.*

\(^{102}\) *Id.*

\(^{103}\) Complaint for Breach of Contract and Fraud at 1, 4-5, Antonick v. Electronic Arts, Inc., No. 3:11-cv-01543 (N.D. Cal. filed March 30, 2011).

\(^{104}\) *Id.* at 1.

\(^{105}\) *Id.* at 8, 19.

\(^{106}\) *Id.* at 1, 19-20.
The case also mentions several other EA sports titles which may contain vestiges of Antonick's engine.\footnote{107} Antonick alleges that EA told him that the new games were based on new code, which did not include any of his work; he further claims that he remained unaware until 2009—a fact that is critically important to the case because of statute of limitations considerations.\footnote{108} In fact, EA did file a motion to dismiss on statute of limitations grounds, but the court found that the statute of limitations did not begin to run until Antonick's discovery in 2009.\footnote{109} In theory, this should be a relatively simple case, comparing Antonick's code to that of the EA games alleged to be using it,. However, the financial consequences for EA could be dire, as the Madden series of games has made about $4 billion for EA, and Antonick could have a claim to royalties from his contract based on that figure.\footnote{110} 2012 saw the case tangled in continuance motions and delayed hearings. Currently, EA's motion for Summary Judgment will be heard in late January.\footnote{111}

\textit{West v. Activision Publishing, Inc.}

\footnote{107} \textit{Id.} at 23.

\footnote{108} \textit{Id.} at 1-2, 21-22.

\footnote{109} Order Denying Motion to Dimiss at 1, 9-10, Antonick v. Electronic Arts, Inc., No. 3:11-cv-01543 (N.D. Cal. Filed March 30, 2011).

\footnote{110} \textit{Id.}

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

In 2002, Activision acquired Infinity Ward Studios, which was founded by West and Zampella and had been responsible for the popular Modern Warfare and Call of Duty titles. The two signed employment agreements that let them retain creative control over Infinity Ward and that laid out compensation terms, including royalty payments for Modern Warfare 2. However, Activision terminated West and Zampella for insubordination on March 1, 2010, which was just weeks before the royalty payments for


113 Id.

114 Id.


116 Id. at 5, 7-8.
Modern Warfare 2 were set to begin. West and Zampella sued, alleging that the termination was pre-textual and meant to help Activision avoid making those royalty payments. Activision countersued West and Zampella and later added EA based on interference grounds. This was precisely the type of high-stakes, very personal case that many assumed would go through to trial; but ultimately, a settlement was able to be reached.

Financial Review of 2012

As more gamers moved to mobile and social gaming, retail sales continued to slip in 2012 as they have been since 2008. Console gamers are now outnumbered

117 Id. at 8, 10.
118 Id. at 9-10.
considerable but spend an average of 35 percent more than the mobile gamer.\textsuperscript{121} The decline leveled off in the fourth quarter as Halo 4, Assassin’s Creed III, and Call of Duty: Black Ops 2 were released for the holiday season.\textsuperscript{122} These games actually sold better than games in the top five last year.\textsuperscript{123} The problem was the titles outside of the top five did not show quite as well.\textsuperscript{124} Overall, 2012 was the continuance of a trend that includes a wider, more diverse market but perhaps a less profitable one.

Unfortunately, a bleak 2012 saw a few game companies fold, most notably THQ and 38 Studios.\textsuperscript{125} The 38 Studios collapse actually became quite a mainstream story, due in part to the fact that the company was owned by sports legend Kurt Schilling. Also tied up in this bankruptcy was the issue of state support for video game development. Schilling, who played perhaps his most storied seasons for the Boston Red Sox, was lured

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\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.}

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out of Massachusetts to Rhode Island by millions of dollars in preferential loans issued by the Rhode Island government.\textsuperscript{126} 38 Studios defaulted on the very first payment of these loans, and subsequently, laid off all of its workforce, some 400 employees.\textsuperscript{127} It was said that 38 Studios would have needed to sell two million copies of its game, \textit{Kingdoms of Amalur: Reckoning}, in order to stay solvent; but ultimately, it only shipped between 1.3 and 1.4 million.\textsuperscript{128} When paired with the chilling of the MMO market—which negatively affected investment prospects of 38 Studios’ main in-development title, \textit{Copernicus}—this lackluster performance doomed 38 Studios, which ultimately filed for chapter 7 bankruptcy.\textsuperscript{129} Precisely what affect this debacle will have on government involvement in video game funding remains to be seen, but it certainly stands as an example of how things can go very wrong.\textsuperscript{130}


\textsuperscript{127} Id.


\textsuperscript{129} Id.

THQ, which had been in financial trouble for most of the year, filed for bankruptcy protection on Dec. 19, 2012. Originally set to be quickly sold in its entirety to investor Clearlake Capital for around $60 million, Bankruptcy Judge Mary Walrath declared earlier this year that she was "not convinced that we are under the gun" to have a quick sale, and ultimately postponed the sale. Now, THQ's various studios and titles will be bid upon separately on January 22, 2013, and will be sold separately if the net bids of the individual assets generate more than the $60 million that Clearlake bid for the whole package. Perhaps the most interesting aspect of this case will be seeing where beloved THQ franchises, such as Saints Row, Red Faction, and Darksiders, will end up as well as whether any investor will pick up and carry on any of THQ's in-development projects, which include South Park: The Stick of Truth, Company of Heroes 2, and Metro: Last Light.

partnerships/ (for viewing an in-depth discussion of state-sponsored programs for tech and video game development).

131 Licht, supra note 124.


134 See Bathon, supra note 131.
1 Def. Motion at 2, Tetris Holding, LLC v. Xio Interactive, LLC. No. 09-6115 (D. New Jersey)


3 Id. at 410.

4 Id. at 410.