

DORSEY LEGAL ARCADE

2022 Video Game Law Review

DORSEY LEGAL ARCADE



In This Issue: Loot Boxes and Consumer Protection!
IP Rights v. Video Game Realism! Jurisdiction and
Venue Issues for Foreign Companies! Cheat Software
Litigation! And Much More!

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Welcome to Issue 4 of the *Dorsey Legal Arcade*, our newsletter chronicling legal developments impacting the video game industry. At Dorsey & Whitney LLP, we have a strong international practice and an interest in changes in the law around the world that could affect our clients. That's why we chose to kick off this issue with a feature article discussing online child safety and video game regulations in China. Our second feature discusses a recent court decision asking the question, are video games works of art? Finally, this issue summarizes 25 United States court decisions from 2022 relating to such topics as loot boxes and consumer protection, the conflict between IP rights and video game realism, online harassment, jurisdiction and venue problems for foreign parties, cheat software, and others. The cases discussed in Issue 4 are collected in a document available to download here [LINK].

As engines for economic growth and technological advancement, video game companies encounter a variety of complex, multi-faceted legal issues that require creative and sophisticated solutions. At Dorsey, we have skilled attorneys who are familiar with the video game industry and experienced in IP, labor and employment, privacy and cybersecurity, corporate transactions, international law, and other areas relevant to game companies. Whether your company is in the Fortune 100 or in its early growth stages, our attorneys are ready to support your business needs. Please see our [Video Game Industry Practice Group web page](#) for more information.

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Thanks for reading Issue 4. Please stay tuned for Issue 5!



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TABLE OF CONTENTS

	Page
FEATURE ARTICLES	1
ONLINE CHILD SAFETY AND GAMING REGULATIONS IN CHINA.....	1
IN THE EYES OF THE LAW, DRIVING SIMULATION GAMES ARE WORKS OF ART.....	3
SUMMARIES OF LEGAL DECISIONS	5
<i>G.G. v. Valve Corp.</i> , 579 F. Supp. 3d 1224 (W.D. Wash. 2022).....	5
<i>Destefani v. Ubisoft Ent.</i> , No. 2:20-cv-10126-FLA (AFMx), 2022 U.S. Dist. LEXIS 20182 (C.D. Cal. Jan. 10, 2022).....	5
<i>Coffee v. Google, LLC</i> , No. 20-cv-03901-BLF, 2022 U.S. Dist. LEXIS 4791 (N.D. Cal. Jan. 10, 2022).....	6
<i>Twardzik v. HP Inc.</i> , No. 1:21-cv-00396-SB, 2022 U.S. Dist. LEXIS 13131 (D. Del. Jan. 25, 2022).....	7
<i>Ackies v. Scopely, Inc.</i> , No. 19-cv-19247, 2022 U.S. Dist. LEXIS 13086 (D.N.J. Jan. 25, 2022) and <i>Quinteros v. Innogames</i> , No. C19-1402RSM, 2022 U.S. Dist. LEXIS 55640 (W.D. Wash. Mar. 28, 2022).....	8
<i>Cheng v. Activision Blizzard, Inc.</i> , No. CV 21-6240 PA (JEMx), 2022 U.S. Dist. LEXIS 17674 (C.D. Cal. Jan. 30, 2022).....	9
<i>Skillz Platform, Inc. v. AviaGames Inc.</i> , No. 21-cv-02436-BLF, 2022 U.S. Dist. LEXIS 45187 (N.D. Cal. Mar. 14, 2022).....	9
<i>Infernal Tech., LLC v. Sony Interactive Entm't LLC</i> , No. 2:19-CV-00248-JRG, 2022 U.S. Dist. LEXIS 47747 (E.D. Tex. Mar. 17, 2022).....	10
<i>B.D. v. Blizzard Entertainment, Inc.</i> , 76 Cal. App. 5th 931 (2022).....	10
<i>Plutos Sama Holdings, Inc. v. Jagex Ltd.</i> , No. SACV 21-133 JVS (JDEx), 2022 U.S. Dist. LEXIS 89068 (C.D. Cal. Apr. 7, 2022).....	11
<i>NetEase Inc. v. PubG Corporation</i> , A160572, 2022 Cal. App. Unpub LEXIS 2439 (Ct. App. Cal. April 22, 2022) (non-precedential).....	12
<i>Bungie, Inc. v. Aimjunkies.Com</i> , C21-811 TSZ, 2022 U.S. Dist. LEXIS 76823 (W.D. Wash. Apr. 27, 2022) (<i>Bungie I</i>), <i>Bungie, Inc. v. Aimjunkies.Com</i> , C21-811 TSZ, 2022 U.S. Dist. LEXIS 116950 (W.D. Wash. July 1, 2022) (<i>Bungie II</i>), and <i>Bungie, Inc. v. Aimjunkies.com</i> , No. C21-0811 TSZ, 2022 U.S. Dist. LEXIS 205282 (W.D. Wash. Nov. 10, 2022) (<i>Bungie III</i>).....	12
<i>Gamevice, Inc. v. Nintendo Co.</i> , No. 18-cv-01942-RS, 2022 U.S. Dist. LEXIS 89509 (N.D. Cal. May 18, 2022).....	14
<i>Hayden v. 2K Games, Inc.</i> , No. 1:17CV2635, 2022 U.S. Dist. LEXIS 91566 (N.D. Ohio May 20, 2022).....	14

<i>Chaves v. Amazon.com Servs. LLC</i> , No. C21-1213-TL-BAT, 2022 U.S. Dist. LEXIS 94386 (W.D. Wash. May 23, 2022)	15
<i>Brooks Ent., Inc. v. Activision Blizzard, Inc.</i> , Case No. 21-CV-2003 TWR (MOD), 2022 U.S. Dist. LEXIS 123344 (S.D. Cal. July 12, 2022)	15
<i>Coy v. Lilith Games (Shanghai) Co.</i> , No. 19-cv-08192-JD, 2022 U.S. Dist. LEXIS 142625 (N.D. Cal. Aug. 9, 2022)	16
<i>Hanagami v. Epic Games Inc.</i> , No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823 (C.D. Cal. Aug. 24, 2022)	16
<i>Acceleration Bay LLC v. Elec. Arts Inc.</i> , No. 16-454-RGA, 2022 U.S. Dist. LEXIS 184429 (D. Del. Oct. 7, 2022) (<i>Acceleration II</i>), and <i>Acceleration Bay LLC v. Activision Blizzard, Inc.</i> , No. 15-453-RGA, 2022 U.S. Dist. LEXIS 193935 (D. Del. Oct. 25, 2022) (<i>Acceleration III</i>)	17
<i>Riot Games, Inc. v. Shanghai Moonton Tech. Co., Ltd.</i> , No. CV-22-3107-MWF (JPRx), 2022 U.S. Dist. LEXIS 216832 (C.D. Cal. Nov. 8, 2022)	18
<i>Treehouse Avatar LLC v. Valve Corp.</i> , 54 F.4th 709 (Fed. Cir. 2022)	18

FEATURE ARTICLES

ONLINE CHILD SAFETY AND GAMING REGULATIONS IN CHINA

Introduction

In August 2021, new online gaming laws and regulations were enacted in China due to concerns over online gaming and its impact on Chinese society, particularly on the younger population. The restrictions have arguably stifled the gaming industry that has been booming in recent years in China. The Chinese government has historically been wary of the adverse effects of the internet and video game addiction. Various laws have been enacted over the past two decades to address these concerns. This article aims to discuss the evolution of China's legal regime related to internet gaming and child safety online. In light of the newly enacted legislation, this article also aims to closely examine some of the newly enacted legislation and understand its implications.

China's Existing Legal Regime for Online Gaming

China's existing legal regime relating to online gaming focuses on two aspects. First, the majority of the laws and regulations are end-user focused, such as regulating the behavior of children as well as providing guidance for parents, schools and society with a strong emphasis on promoting physical and mental well-being of children. These include: (i) the Regulations on Internet Information Services (互联网信息服务管理办法) (the "**Regulations on Internet Information Services**"), (ii) the Laws of the People's Republic of China on the Protection of Minors (中华人民共和国未成年人保护法) (the "**Protection Laws of Minors**"), and (iii) Notice on Preventing Minors from Indulging in Online Games" (关于防止未成年人沉迷网络游戏的通知) (the "**Notice on Minors and Online Games**"). Second, certain laws and regulations are creator focused, targeted at game developers and creators with an emphasis on fostering social morality and responsibility towards the well-being of children. In particular, this includes the Provision on the Administration of Online Publication Services (网络出版服务管理规定) (the "**IPS Regulations**").

(i) *Regulations on Internet Information Services*

On September 25, 2000, the Regulations on Internet Information Services came into effect. This marked the beginning of China's legal and regulatory regime on gaming, which subsequently came to include child safety online as the online gaming industry continued to grow in China. Section 15 of the Regulations on Internet Information Services sets out eight content attributes that publishers are not allowed to publish, including: 1) content that opposes basic principles set out in the PRC Constitution; 2) content that advocates terrorism, extremism or ethnic hatred; 3) content that fabricates and transmits false information that adversely affects financial markets; 4) content that fabricates and transmits false information affecting social order; 5) content that disseminates false information in the name of state institutions or governmental authorities; 6) content that disseminates information to incite unlawful assemblies, associations or demonstrations; 7) content that transmits information that is deemed obscene, violent, gambling-related, murder-related and terrorism-related; and 8) content that insults or defames others, infringes on other's reputation, privacy, intellectual property rights or other legal rights, or endangers the physical and mental health of minors¹.

Child safety online and gaming was not an area of focus at the inception of the Regulations on Internet Information Services. However, due to the growth of the number of online gaming users in China and the growing concerns with regards to gaming addiction among youth, the Chinese government enacted a series of relevant laws and regulations to regulate the use of the internet and online gaming. The main goal of these laws and regulations was to provide better protection to minors in their activities online and to regulate the previously almost-unregulated gaming industry, which has since seen tremendous and rapid growth and has witnessed the birth and development of tech giants such as Tencent, one of the largest tech companies both domestically and internationally.

¹ *Regulations on Internet Information Service* (互联网信息服务管理办法), Section 15.

(ii) Protection Laws of Minors

The legal framework for child safety protection is encapsulated in the Protection Laws of Minors which came into effect in 1991 and was further amended and supplemented in 2006, 2012 and 2020. Chapter 5 of the Protection Laws of Minors sets out the framework of online child safety regulations and emphasizes the importance of child protection online. It provides that education and internet safety are the responsibilities of the state, society, schools and families and that content creators and developers on the internet should ensure that their online products and services are conducive to children's physical and mental well-being and should help prevent internet or gaming addiction.² To achieve this, government departments on public security, culture and tourism, press and publication, among others, are authorized to adopt reasonable methods to protect the physical and mental health of children and to prevent internet or gaming addiction.³

The Protection Laws of Minors also contains various practical measures applicable to schools, public facilities, parents and families, as well as service providers and game developers. For example, this includes mandates for the installation of child protection software on computers available in public facilities such as schools and libraries, mandates for parents to install child protection software, and mandates to limit screen time at home. The measures also require that online games not be made available to minors between 10 p.m. and 8 a.m. daily and that developers should not allow minors to access inappropriate games or game functions within the games. Minors below age 16 are prohibited from creating any accounts on online streaming platforms and minors below age 18 are required to obtain permission from their parents before any account registration.⁴

(iii) Notice on Minors and Online Games

In 2019, the government introduced the Notice on Minors and Online Games to further combat gaming addiction among the youth in China. The notice

mandates a blanket restriction applicable to minors where online gaming is limited to 3 hours for Saturdays, Sundays and public holidays and 1.5 hours on a weekday. In addition, consumption via online games by minors under age 16 are limited to RMB200 per month and RMB400 for minors aged 17 and 18.⁵ The notice also emphasizes that schools, families and society, in general, bear the responsibility of protecting children's mental health. Further, online game developers shall process and analyze relevant usage data with a goal to reduce gaming addiction for minors.⁶

(iv) IPS Regulations

The IPS Regulations are regulations that are creator focused. They mainly target domestic and foreign game developers as well as other types of gaming content creators. The implementation of such provisions and regulations relevant to online publishing are administered and supervised by the State Administration of Press, Publication, Radio, Film and Television ("SARFT"). SARFT is also responsible for the pre-approval of online publishing services nationwide.⁷

According to the IPS Regulations, publishing online games is regarded as a type of internet publishing services and therefore would be required to obtain the Internet Publishing service License from the government authorities.⁸ The IPS Regulations prohibit foreign-invested entities (including any wholly foreign owned enterprise ("WFOE") or joint venture entities) from providing internet publishing services in China.⁹

All developers are subject to the relevant regulations and must obtain relevant approval to publish games for public consumption in the PRC. In particular, the ISP Regulations underscore certain moral principles which are deemed significant by the government authorities including those relating to national unity and sovereignty, hatred and discrimination, disruption

² Laws of the People's Republic of China on the Protection of Minors (《中华人民共和国未成年人保护法》), sections 64 and 65.

³ Ibid, sections 67 and 68.

⁴ Ibid, sections 69 to 80.

⁵ Notice on Preventing Minors from Indulging in Online Games" (《关于防止未成年人沉迷网络游戏的通知》), sections 2 and 3.

⁶ Ibid, sections 4, 5 and 6.

⁷ Provision on the Administration of Online Publish Service (《网络出版服务管理规定》), article 4

⁸ Ibid, articles 2 and 7.

⁹ Ibid, article 10.

of social order, gambling, violence and anything that would endanger the social morality of China.¹⁰

New Gaming Legislation in China

On August 30, 2021, the “Further Imposing Strict Administrative Measures to Prevent Minors from Becoming Addicted to Online Games” (关于进一步严格管理切实防止未成年人沉迷网络游戏的通知) became effective (the “**Additional Measures**”). The Additional Measures limit the gaming hours for minors to one hour between 8pm to 9pm on Fridays, Saturdays, Sundays and statutory holidays. Further, the Additional Measures mandates online game developers and providers to implement an identity authentication system which requires users to register using their real names.¹¹ Since its adoption, the Chinese government has urged for strict implementation of the Additional Measures on real-name registration requiring online game providers to not provide any form of game services to users who fail to register and login using real identifications. Certain online game providers, such as Tencent Games, deployed facial recognition technology to implement requirements of the Additional Measures for purposes of identity authentication and limiting screen time for minors.¹²

Conclusions

Reform of the regulatory regime around online gaming has been a primary focus of the Chinese authorities in recent years. Upon implementation of the new regulations, the challenges presented to gaming companies, providers, and users became almost immediately apparent. The impact has also been far-reaching as it has affected every game that has ever been published in China and that can be downloaded or accessed online, be it mobile or PC games. However, some commentators believe that the long term effects of the new restrictions may be limited. In mid-2022, it was reported Chinese regulators approved a number of new online games as they would “support the healthy development of the [financial] market.”¹³ Experts believe that while the government will continue to focus on technology, data protection, security and education-

related regulatory reforms, experts note a more positive outlook starting to develop in China’s gaming industry.¹⁴

IN THE EYES OF THE LAW, DRIVING SIMULATION GAMES ARE WORKS OF ART

Sometimes, the best place to determine whether a work qualifies as art is in a courtroom. In a recent decision, Judge John H. Chun of the District Court for the Western District of Washington found that a driving simulator video game, *Spintires*, is an expressive work entitled to First Amendment protection. See *Saber Interactive Inc. v. Oovee, Ltd.*, No. 2:21-cv-01201-JHC, Dkt. 51 (W.D. Wash. Oct. 6, 2022). *Spintires* simulates driving through various wilderness tracks in a variety of real-world vehicles. While Oovee has licensed some of the vehicles depicted in *Spintires*, it has not licensed all of them. For the unlicensed vehicles, Oovee provides the following disclaimer:

All other trademarks are the property of their respective owners. All characters and vehicles appearing in *Spintires*® are fictitious (except where licensed). Any representations to real-life persons (living or dead), or real-world vehicle designs (except where licensed), is purely coincidental.

It is, of course, one of the unlicensed vehicles appearing in *Spintires*, the K-700, that is at the heart of the dispute in *Saber Interactive v. Oovee*.

In November 2015, Oovee released an update to *Spintires* that included, and seemed to emphasize, the K-700, which is a distinctive tractor with articulated steering. Peterburgsky traktorny zavod JSC, which is known under the brand name “Kirovets,” manufactures and sells the K-700. Kirovets exclusively licensed certain of its intellectual property rights in its vehicle designs to a video game developer called Saber, which sells its own driving simulation video game, *Mudrunner*. The license with Kirovets gives Saber the right to take legal enforcement action against infringers of Kirovets’s licensed IP rights.

Oovee’s unlicensed use of the K-700 in *Spintires* led Saber to sue Oovee on September 2, 2021. On April 26, 2022,

¹⁰ Ibid, article 24.

¹¹ *Further Imposing Strict Administrative Measures to Prevent Minors from Becoming Addicted to Online Games* (关于进一步严格管理切实防止未成年人沉迷网络游戏的通知), articles 1 and 3.

¹² “Balanced Online Entertainment System for Underaged Users” (see <https://www.tencent.com/en-us/responsibility/balanced-online-entertainment-system-for-underaged-users.html>)

¹³ “China approves new online games as crackdown eases” (see <https://www.ft.com/content/09a961fc-fe06-4d23-9b30-14377a38603f>).

¹⁴ “China claims youth gaming addiction resolved” (see <https://www.bbc.com/news/technology-63730316>).

Saber filed a Second Amended Complaint (“SAC”) which included three claims: (1) unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125; (2) unfair competition under Washington’s Consumer Protection Act (“WCPA”), Washington Revised Code (“RCW”) 19.86.010; and (3) unjust enrichment. Oovee moved to dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that the First Amendment bars Saber’s claims, and, even if it does not, Saber failed to plead facts sufficient to survive a motion to dismiss.

The SAC alleged that Oovee engaged in unfair competition under the Lanham Act by using Saber’s trademark and trade dress without authorization. Saber argued that the First Amendment does not bar its unfair competition claim because *Spintires* is not an expressive work, and *Spintires*’ disclaimer is misleading. In the Ninth Circuit, courts use the “likelihood-of-confusion” test when evaluating an infringement claim under the Lanham Act unless artistic expression is at issue. When the alleged infringement involves artistic expression, courts apply a test set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which balances the First Amendment interest in protecting artistic expression against the interest in securing trademark rights under the Lanham Act.

Rogers requires a defendant to make a threshold showing that its allegedly infringing use is part of an expressive work. If successful, the plaintiff then has the heightened burden of showing the likelihood-of-confusion test and one of *Rogers*’s two prongs: (1) the unauthorized use of the trademark has no artistic relevance to the underlying work whatsoever, or (2) the use of the trademark explicitly misleads as to the work’s source or content. Saber argued that *Spintires* is not an expressive work because it does not express ideas or social messages, it has no characters, dialogue, or plot, its music is simplistic and only in the background, and the simulated world is generic and computer-generated. Judge Chun cited a U.S. Supreme Court case and a Ninth Circuit case holding that video games may qualify for First Amendment protection, and then discussed another case in which the Ninth Circuit affirmed a district court’s conclusion that a race car driving simulation video game contained expressive elements such as the race car drivers being characters and the plot being the drama of the races. *VIRAG, S.R.L. v Sony Computer Entertainment America LLC*, No. 3:15-cv-01729-LB, 2015 U.S. Dist. LEXIS 111211 (N.D. Cal. Aug. 21, 2015), *aff’d*, 699 Fed. Appx. 667, 668 (9th Cir.

2017). In view of the case law, Judge Chun determined that many of the features of *Spintires* alleged in the SAC establish that *Spintires* is an expressive work, explaining that “[u]sers interact with the virtual world by selecting a vehicle (which is like a character) and by navigating the virtual environment (which is like a plot).”

As to the first *Rogers* prong, Saber failed to explain how Oovee’s use of the K-700 is artistically irrelevant, so the court did not consider the first prong. The court also determined that Saber could not meet the second prong, that Oovee’s use of the K-700 explicitly misleads consumers about its source or endorsement. The court concluded that Saber did not satisfy the second prong because it failed to point to an expressly misleading statement. The court noted that, while “the disclaimer is far from a model of clarity,” it does not explicitly mislead customers into thinking that Saber or Kirovets is associated with *Spintires*. Moreover, use of the K-700 mark alone is insufficient to satisfy the second *Rogers* prong.

The court dismissed Saber’s claim for unfair competition under the Lanham Act, because the First Amendment protects Oovee’s use of the K-700. Under the same rationale, the court also dismissed Saber’s claim for unfair competition under the WCPA. In addition, the court dismissed the trade dress claim because Saber failed to plead any facts to create a reasonable inference that the identified features of the K-700 are non-functional. Finally, the court dismissed the unjust enrichment claim because, under *Rogers*, Oovee did not impermissibly infringe Saber’s trademark rights and, therefore, did not receive a benefit at Saber’s expense. Accordingly, the court dismissed all claims against Oovee in the SAC but granted Saber leave to file a Third Amended Complaint.

Saber Interactive is a win for anyone seeking validation for the idea that video games can be works of art, just like books, movies, etc. This decision also shows that courts take a broad view about what constitutes an expressive work in the context of video games. Video games do not require a traditional narrative structure, a memorable soundtrack, or stunning visuals to qualify for First Amendment protection. If a video game lets the player select their own vehicle, hop in, and take a drive through an interactive environment, that’s probably enough.

SUMMARIES OF LEGAL DECISIONS

G.G. v. Valve Corp., 579 F. Supp. 3d 1224 (W.D. Wash. 2022)

Plaintiffs Galway and Shoss brought an action in the Western District of Washington against Valve Corporation for supporting illegal gambling in several of Valve's popular video games, including *Counter Strike: Global Offensive*, *Dota 2*, and *Team Fortress 2* through its Steam marketplace. The games in question incorporated a feature known as "loot boxes" that the Plaintiffs asserted "simulated an online slot machine and effectively constituted a gambling feature in what otherwise appeared to be normal video games."

The games allowed players to buy keys that opened a "loot box" that contained virtual guns, knives, and weapon skins that could then be traded or sold on Steam's online marketplace. Plaintiffs' children used their credit cards to purchase these keys without permission. Galway and Shoss asserted that Valve failing to adequately disclose the loot box feature violated Washington's Consumer Protection Act ("CPA").

Valve brought a motion for summary judgment which the court granted, dismissing all the Plaintiffs' claims with prejudice. The court dismissed the claims based on *Dota 2* and *Team Fortress 2* because both Plaintiffs admitted their children did not buy any virtual items in these games. As for the CPA claims involving *Counter Strike: Global Offensive*, the court conducted a multifactor analysis of the claim under the statute. "To prevail on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting the public interest, (4) injury to the plaintiff's business or property, and (5) causation."

Plaintiffs, to show an unfair or deceptive act, relied solely upon credit card statements showing payments to "Steamgames.com," "Steampowered.com," or "Steam Games." The Plaintiffs contended that because these payments did not adequately disclose they were for loot box purchases, Valve had misrepresented the purpose of the purchases. The court rejected this argument, finding that no reasonable factfinder could interpret the line item purchases on the Plaintiffs' bank and credit card statements as misrepresentations.

The court also rejected the Plaintiffs' assertion that Valve omitted material facts relating to loot boxes: "They argue that Valve's actionable omissions include 'deceptively embedd[ing] a gambling feature in what otherwise appeared to be a typical first-person shooter game'; 'conceal[ing] both the true odds of a loot box containing a given item and the value of various items contained within a loot box'; and 'conceal[ing] the harms and risks presented by loot boxes.'" The court explained that, because only the Plaintiffs' children had visited the Steam website to purchase loot boxes and not the Plaintiffs themselves, the Plaintiffs could not possibly have relied on the omissions in making any of their decisions. All claims were dismissed with prejudice and the Plaintiffs' motion for class certification was also denied.

Destefani v. Ubisoft Ent., No. 2:20-cv-10126-FLA (AFMx), 2022 U.S. Dist. LEXIS 20182 (C.D. Cal. Jan. 10, 2022)

The United States District Court for the Central District of California dismissed plaintiff Bill F. Destefani's Lanham Act claims for false endorsement, trademark infringement and unfair competition because Destefani did not sufficiently allege that defendant Ubisoft Entertainment, Ubisoft Inc., and Ivory Tower's (collectively, "Ubisoft") use of his trademarks explicitly misled consumers as to the source of the video game *The Crew 2*. However, the district court declined to dismiss the Destefani's publicity claims under California State and common law because his allegation that his name appears in script font in *The Crew 2* is sufficient to plead that Ubisoft appropriated Destefani's name and signature.

Destefani is the owner of the high-profile Strega racing airplane. The Strega features an identifiable paint job, a stylized number 7, and an image of the Italian flag. Additionally, Destefani's name appears in script underneath the stylized word STREGA.

Destefani owns an incontestable federal trademark registration for the stylized mark STREGA for "entertainment services in the nature of airplane racing." Additionally, he claims common law trademark rights in the STREGA word mark, his name BILL DESTEFANI, and the trade dress of the appearance of the Strega plane.

The defendants are video game developers, producers, and distributors of *The Crew 2*, which allows users to participate in virtual motorsports. According to Destefani, the game contains an unauthorized and identical recreation of the Strega.

In a trademark infringement case where the trademark at issue is part of an expressive work, the court must consider both the likelihood of confusion test and the *Rogers* test as articulated in *Rogers v. Grimaldi*, 875 F. 2d 994 (2d Cir. 1989). Using this test, a defendant must first prove that its allegedly infringing use is part of an expressive work. If it meets this threshold showing, the Lanham Act will not apply unless the plaintiff (1) satisfies the likelihood of confusion test, and (2) can show [a] that the trademark has no artistic relevance to the underlying work, or [b] if the trademark has some artistic merit, using the trademark explicitly misleads as to the source or content of the work.

Destefani did not contest the allegation that *The Crew 2* is an expressive work, or that Ubisoft's use of his trademarks have no artistic relevance to the video game. Likewise, Ubisoft did not argue that Destefani failed to satisfy the likelihood of confusion test, so the court only needed to consider the second prong of the *Rogers* test—whether Destefani sufficiently alleged that Ubisoft's use of his marks “explicitly misleads as to the source or content” of *The Crew 2*.

The court applied the rule established in *Gordon v. Drape Creative, Inc.*, 909 F.3d 257 (9th Cir. 2018), to determine whether Ubisoft's use of the mark explicitly misleads as to the source and content. *Gordon* added two additional considerations for determining whether a use is “explicitly misleading”: 1) how much the junior user uses the mark in the same way as the senior user; and 2) the extent to which the junior user has added his or her own expressive content to the work.

Here, the court ruled that Destefani had not sufficiently alleged that Ubisoft's use of his trademarks explicitly misleads consumers because 1) the trademarks are used in different markets, and 2) Destefani could not allege that *The Crew 2* did not add expression content beyond Destefani's trademarks, as the Strega was just one of many possible vehicles depicted in the game and thus is not a “centerpiece” of the game. Destefani's allegations show, at most, that Ubisoft's use of Destefani's marks implicitly suggest it endorsed or sponsored the game, which cannot suppress Ubisoft's First Amendment rights.

Ubisoft also argued that Destefani's right of publicity claims should be dismissed as he failed to state a claim under California State and common law, and any such claim would be barred by the First Amendment.

To adequately state a common law cause of action in California, a plaintiff must plead (1) a defendant's use of

the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage commercially or otherwise; (3) lack of consent; and (4) resulting injury.

The court found that the Destefani's allegations that his name is visible on the Strega airplane in *The Crew 2* adequately support his claim that Ubisoft had appropriated his name. Additionally, the court stated that it is a question of fact as to whether or not the allegedly infringing use was directly connected to the commercial sponsorship for which consent is required, and must be reviewed.

Finally, the court ruled that it could not dismiss the right of publicity claim on First Amendment grounds, as it could not conclude that Ubisoft's use of Destefani's marks contained “significant transformative elements” as established in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001).

Coffee v. Google, LLC, No. 20-cv-03901-BLF, 2022 U.S. Dist. LEXIS 4791 (N.D. Cal. Jan. 10, 2022)

On June 12, 2020, Plaintiffs filed suit against Google LLC in the Northern District of California, alleging that loot boxes in a number of games available for download in the Google Play store constituted gambling under California law, and the presence of these loot box mechanics in games offered via the Google Play store could subject Google to civil liability. Among other things, Plaintiffs asserted claims for violation of California's Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, et seq., violation of California's Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, et seq., and unjust enrichment.

In an order issued on February 10, 2021, the court granted Google's motion to dismiss the complaint with leave to amend, holding that, *inter alia*, Google was immune from suit under Section 230 of the Communications Decency Act of 1996 (“CDA”), 47 U.S.C. § 230, because the Plaintiffs were seeking to hold Google liable for publishing third-party content—i.e., the apps through which loot boxes were accessible. As to Plaintiffs' UCL claims, the court held that Plaintiffs failed to allege facts demonstrating economic injury—a requirement under the UCL. Because Plaintiffs could not explain how their purchase of virtual currency resulted in an economic loss, the Plaintiffs lacked statutory standing to sue. As to Plaintiffs' CLRA claims, the court held that the games at issue were downloaded for free and the sale of virtual currency through the games sold via the Google Play store

did not constitute a good or service under CLRA. As a result, Plaintiffs' claims fell outside the ambit of CLRA, which protects against "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the *sale or lease of goods or services* to any consumer." Notably, the court did not reach Google's arguments challenging Plaintiffs' characterization of loot boxes as illegal slot machines under California law.

Thereafter, Plaintiffs filed an amended complaint, restating much of their claims. On January 10, 2022, the court responded in kind—reaching many of the same conclusions it did in its prior written order and this time, with respect to the amended complaint, dismissed the action with prejudice. This time around, however, the court did address the parties' respective arguments concerning the Plaintiffs' characterization of loot boxes as illegal slot machines under California law.

The court notes that the outcome might be different if the prizes won from loot boxes could be traded or sold outside their respective games—although in this case, that argument would fail because Google's terms of use prohibited the sale or transfer of those items. The court held that, because the prizes awarded in connection with loot boxes did not provide a chance to win a "thing of value"—i.e., money or an item that can be easily converted to money—the loot boxes could not constitute illegal gambling under California law. Rather, the prizes awarded from loot boxes provide only an opportunity to acquire in-game items that provide for additional enjoyment to a player. In so holding, the court noted that the Northern District has already held that "any items obtained from loot boxes can only be used within the games themselves . . . [and] are not prizes that can be cashed out for real-world money to be spent elsewhere", *Coffee v. Google, LLC*, 2022 U.S. Dist. LEXIS 4791, at *39 (N.D. Cal. Jan. 10, 2022) (quoting *Mai v. Supercell Oy*, 2021 U.S. Dist. LEXIS 178949, 2021 U.S. Dist. LEXIS 178949, 2021 WL 4267487, at *4), and that other jurisdictions have already come to the same conclusion, *see, e.g., Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 880 (N.D. Ill. 2016) (finding that loot box prizes did not constitute things of value under the California Penal Code).

The court's decision provides some much needed clarity in an area that was quickly becoming a hotbed for class action litigation in the state of California. Subject to any subsequent appeals, this case makes clear that items

awarded from loot boxes should not constitute a "thing of value" for purposes of a gambling analysis. This case also makes clear that gaming platform providers are likely immunized under Section 230 for allegations of illegality arising out of in-game mechanics of the games sold on their platforms.

Twardzik v. HP Inc., No. 1:21-cv-00396-SB, 2022 U.S. Dist. LEXIS 13131 (D. Del. Jan. 25, 2022)

The ancient Latin warning of caveat emptor ("buyer beware") applies just as well to gaming hardware today as it did to the goods of Roman merchants. Mark Twardzik bought an HP-branded Envy 13 laptop to play video games while traveling, and believed third-party reviews that it was able to run games "in high settings a[t] the full resolution." However, Twardzik soon discovered that not only did the laptop fail to live up to his expectations, HP had purposefully lowered the speed of the laptop's installed NVIDIA MX150 graphics card in order to reduce power consumption and heat output (though the user could later adjust these settings to increase speed). In his first amended complaint, Twardzik brought a class-action suit against HP and NVIDIA, arguing they had fraudulently misled him into purchasing the laptop.

In response, the defendants argued that Twardzik lacked standing, and in the alternative, that he failed to adequately state a claim of fraud. The court ruled that Twardzik had bought a laptop that he believed was worth less than what he paid, and therefore he had indeed shown that he had standing to seek damages.

Twardzik's allegations of fraud did not fare so well. He asserted various claims, arguing that defendants had misrepresented and/or omitted material facts regarding the laptop. The bar to demonstrate misrepresentation is high, and a plaintiff must plead specific facts to demonstrate that a defendant has (1) made false statements (2) on which the plaintiff materially relied. Twardzik cited statements that the NVIDIA graphics card offers "up to 3x superior performance" and "supercharges your laptop for work and play," while the HP Envy 13 "was exceptionally powerful" and had "the power and responsiveness to help your productivity soar." However, Twardzik did not argue these statements were false, and in any case, they are mere exaggerations for the purpose of advertising, or "mere puffery." Furthermore, he did not explain how he relied on these statements. Indeed, he only argued that he had reviewed third-party promotions and reviews prior to buying the laptop. Thus, he failed to show that he materially relied on any of the defendants' statements.

Furthermore, he also failed to show that he had relied on the defendants' alleged omissions of material fact.

Accordingly, as Twardzik failed to adequately state a claim, even after being granted leave to amend his complaint, the court dismissed the case with prejudice.

As reliance on user reviews and recommendations continues to rise, Twardzik's predicament serves as a warning to those who seek action against gaming hardware manufacturers. Even if a product is rated highly by third parties, those third parties ultimately may not be liable for consumers' purchases of that product.

Ackies v. Scopely, Inc., No. 19-cv-19247, 2022 U.S. Dist. LEXIS 13086 (D.N.J. Jan. 25, 2022) and *Quinteros v. Innogames*, No. C19-1402RSM, 2022 U.S. Dist. LEXIS 55640 (W.D. Wash. Mar. 28, 2022)

Mobile video games have eliminated the traditional barriers to gaming. People no longer need a gaming computer or console, just a smart phone. While a larger consumer base can lead to more revenue for game developers, it can also expose them to more disgruntled players. This was recently the case for the developers of the popular mobile games, *Star Trek Fleet Command* ("STFC") and *Forge of Empires*.

In *Ackies v. Scopely*, Ackies instituted a class action against Scopely, the maker of STFC. STFC is a mobile game that is free to download and play, but players can spend real money through microtransactions. Through these microtransactions, players may purchase upgrades designed to improve the position of the player. Ackies alleged that over time Scopely would decrease the effectiveness and value of the upgrades. Ackies, on behalf of the putative class, claimed that Scopely's devaluation of the upgrades constituted a breach of contract and fraud, as well as violated New Jersey's consumer protection laws. After some discovery, Scopely filed a renewed motion to compel arbitration. Scopely explained that STFC's Terms of Service contained an arbitration clause that was enforceable against Ackies. Scopely supported its motion with several facts that the court found persuasive in determining whether Ackies assented to the arbitration clause.

First, Ackies was presented with a loading screen with the following notice: "By continuing to play, you agree to our Terms of Service" when he downloaded the game. The notice was in the center of the page, in a different font and color, and contained a hyperlink to the Terms of Service.

Ackies then proceeded to play STFC. Second, Scopely's lawyers informed Ackies about the Terms of Service in a meeting before Ackies initiated the class action. Ackies opted not to read the Terms of Service, but instead continued to play STFC, even subsequent to filing the class action. Notwithstanding Ackies' testimony that he did not see the notice, the court concluded that the STFC's loading screen notice was conspicuous and placed Ackies on constructive notice of the Terms of Service. Moreover, Scopely's lawyers placed Ackies on actual notice of the Terms of Service. Thus, Ackies assented to the arbitration clause. The court also concluded that the arbitration clause was enforceable against Ackies and granted the motion to compel arbitration.

Quinteros v. Innogames also involved a disgruntled player. Innogames owns popular mobile game *Forge of Empires*. *Pro se* plaintiff Quinteros sued Innogames in relation to her experience with the game and game moderators. Quinteros' claims cast a wide net, including negligence, fraud, and gender discrimination. The claims stem from two separate issues Quinteros had while playing *Forge of Empires*. First, Innogames failed to warn players about the alleged addictive nature of the game. Instead it profited from players' addiction, including Quinteros', by encouraging players to engage in microtransactions. Quinteros alleged she spent \$9,000 in *Forge of Empires*. Second, Quinteros alleged that the marketing around *Forge of Empires* does not foster a safe environment for women, and therefore encourages players to harass women. Quinteros alleged she was subjected to harassment by other players in the game and complained of these actions to Innogames' moderators. Despite her complaints, Innogames allegedly did nothing to prevent future harassment. Innogames moved to dismiss Quinteros' lawsuit twice for failure to state a claim. When Innogames first moved to dismiss, the court permitted Quinteros to amend her complaint, mainly because she was a *pro se* litigant. On the second motion to dismiss, the court considered all the facts in Quinteros's amended complaint and not only dismissed it for failure to state a claim, but also refused to give Quinteros leave to amend the complaint again, finding there was no way she could state a claim for relief.

If these two cases are indicative of litigation trends, then the biggest strength of mobile gaming—a larger consumer base—could become a point of weakness for game developers. Though both cases resulted in positive outcomes for the video game developers, they demonstrate that litigation from disgruntled players is inevitable and

can come with great legal costs. In *Ackies*, the game developer attempted to avoid litigation by speaking with *Ackies* prior to filing suit. *Ackies* nevertheless instituted a class action suit, and Scopely had to engage in discovery and move to compel arbitration twice before the court sided with it. Similarly, Quinteros, prior to suit, complained to Innogames' moderators about the harassment, but was dissatisfied with the response. Ultimately, she opted to sue, and Innogames had to move for dismissal on two occasions. As these lawsuits appear to be inevitable, game developers should keep in mind what kind of strategies they want to engage in to avoid incurring large litigation costs. This could include quick settlements, preemptively thinking about litigation arguments for claims based on game play, and ensuring there is an internal process for verifying that players are on at least constructive notice of arbitration clauses.

Cheng v. Activision Blizzard, Inc., No. CV 21-6240 PA (JEMx), 2022 U.S. Dist. LEXIS 17674 (C.D. Cal. Jan. 30, 2022)

This action was first commenced on August 3, 2021 against Activision Blizzard, Inc. The original complaint alleged that Activision made “materially false and misleading statements” regarding the impact of regulatory or legal proceedings on its business in SEC filings during the class period (defined as “persons or entities who purchased or otherwise acquired publicly traded Activision Blizzard securities between August 4, 2016 and July 27, 2021”). The first complaint was later amended to define the class period with different dates, but the asserted causes of action remained the same.

Union Investment Privatfonds GmbH. (“Union”) filed a Motion to Intervene (“Motion”) in the case “for purposes of vacating” a November 1, 2021 Order which (1) appointed one of the seven Plaintiffs, Jeff Ross, as Lead Plaintiff and approved his selection of Lead Counsel, (2) republished the Private Securities Litigation Reform Act (the “PSLRA”) Lead Plaintiff notice, and (3) set a new deadline for investors to seek to serve as Lead Plaintiff. The court ultimately denied Union’s Motion in full.

Union’s argument focused primarily on the Lead Plaintiff selection process. This process is governed by the PSLRA, which provides a three-step process for identifying the lead plaintiff, which consists of (1) publicizing the pendency of the action, the claims made, and the purported class period; (2) determining which movant is most capable of adequately representing

the class; and (3) giving the other plaintiffs an opportunity to rebut the presumptive lead plaintiff.

Union argued there was improper notice to class members because the original complaint was overbroad, the first amended complaint “materially altered the contours of the case,” and, as a result, Union was precluded from serving as the lead plaintiff due to its reliance on the class period of the original complaint. The amended class period would have resulted in a significantly larger total loss for Union.

The court was not convinced. Not only did Union have notice of the original complaint prior to the lead plaintiff deadline, but, as a “sophisticated institutional investor [with] extensive experience prosecuting complex securities actions,” it was fully responsible for its decision not to participate in the lead plaintiff process. There were no demonstrable changes in material facts or law after the court’s order appointing Jeff Ross as the Lead Plaintiff, and Union further failed to take advantage of the PSLRA’s built-in mechanism to timely move for appointment following the initial notice period once it discovered the amended class period would result in significantly higher total loss.

Echoing the sentiment of the Supreme Court’s decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), the court opined that granting Union’s motion would only encourage parties and institutional investors like Union to frustrate congressional purpose by bypassing the procedures laid out by Congress in drafting the PSLRA. Class members with adequate notice should not be permitted to frustrate the efficiency of class litigation.

Skillz Platform, Inc. v. AviaGames Inc., No. 21-cv-02436-BLF, 2022 U.S. Dist. LEXIS 45187 (N.D. Cal. Mar. 14, 2022)

Skillz Platform Inc. (“Skillz”) filed suit against AviaGames Inc. (“AviaGames”) in the Northern District of California for patent infringement of U.S. Patent Nos. 9,649,564 and 9,479,602 (collectively, the “Asserted Patents”). In its complaint, Skillz alleged that AviaGames’ mobile gaming platform, Pocket7Games, included game applications such as *Bingo Clash*, *Solitaire Clash*, *21 Gold*, *Explodocube*, and *Tile Blitz* that infringed upon both the Asserted Patents. AviaGames then moved to dismiss for failure to state a claim, arguing that both the Asserted Patents were directed to abstract ideas and were invalid.

The court granted dismissal of infringement claims under the '602 patent and denied dismissal of claims under the '564 patent. For both of the Asserted Patents, the court analyzed their validity using the Supreme Court's two-part framework established in *Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 573 U.S. 208 (2014).

For the '602 patent, the court found that all the asserted claims therein were invalid as directed to patent-ineligible subject matter. The court found that Claim 1 "is directed to generic technology used in its conventional capacity: for example, a 'processor' 'receiv[es]... data'; a 'geolocation system' provides 'data characterizing a location of the client'; a 'digital game' 'exchang[es] game data with a [remote] game server.'" The finding that Claim 1 was "directed to abstract ideas without an inventive concept to transform the unpatentable abstract ideas into patent eligible subject matter," led the court to also find that "claims 2, 6, 7, 9-11, 15-18, 20, and 24 of the '602 patent are also directed to patent ineligible subject matter."

Claims 3-5, 12-14, and 21-23 ("Broadcasting Claims") '602 patent, were similarly held to be patent ineligible. The court found that the Broadcasting Claims were "directed to the idea of storing, communicating, and displaying data," and were "implemented on generic hardware, and Skillz fails to argue that any of the claimed hardware is inventive or unconventional." Judge Freeman went on to state that "limiting the abstract ideas to the mobile gaming context is not sufficient to serve as an inventive concept for purposes of the § 101 inquiry."

The remaining claims of the '602 patent, Claims 8 and 17 ("Random Number Generation Claims"), were found to be patent ineligible as well, because "the claim recites that the software executing on the client 'provides' a random number seed to an operating system independent random number generator without any indication as to where the seed comes from, how it is derived, etc."

As for the '564 patent, the court found it "pertains to a plurality of client devices participating in a digital gaming competition by communicating with remote game servers. In order to ensure that all users have common gameplay, the clients generate pseudo-random number seeds using a unique match identifier common to all of them." The court found that it must accept the plausible factual allegations made by Skillz at this stage of litigation and that AviaGames failed to show that the '564 claims are directed to patent ineligible abstract ideas.

The court concluded its opinion by granting in-part AviaGames' motion to dismiss Skillz's infringement claim under the '602 patent without leave to amend, and denied in-part the motion to dismiss infringement claims under the '564 patent.

Infernal Tech., LLC v. Sony Interactive Entm't LLC, No. 2:19-CV-00248-JRG, 2022 U.S. Dist. LEXIS 47747 (E.D. Tex. Mar. 17, 2022)

In October 2021, a jury found that Defendant Sony Interactive Entertainment LLC ("SIE") had not infringed upon the patents of Plaintiffs Infernal Technology, LLC ("Infernal") and Terminal Reality, Inc. Following the jury verdict of noninfringement, the court ordered post-trial briefing "on whether or not the Asserted Claims were directed to an abstract idea under *Alice* step one and § 101." The court found that the patents at issue were not directed to an abstract idea under *Alice* step one, and Plaintiffs filed a Motion for a New Trial.

The court denied the motion. In the Motion for a New Trial, "[p]laintiffs identify two points of alleged error: (1) that the 'storing' step requires storing 'light image data' viewed from the light source's perspective is legally flawed; and (2) that SIE's noninfringement argument with respect to the 'sequence of steps' requirement of the Asserted Claims is legally flawed."

The court rejected both of Plaintiffs' arguments under the Federal Rules' standard for a new trial. The court ruled that the "storing" step issue brought in the motion had already been settled by the agreed-upon claim constructions. The court ruled similarly on the "sequence of steps" issue: "The plain language of the court's construction along with the claim language itself show that 'for each of said plurality of light sources' the comparing and storing steps are to be completed before the combining step. The court sees no error in the noninfringement theory advanced by SIE and finds that it is supported by the plain language of the agreed constructions and the claim itself."

The court also noted that the Plaintiffs had failed to raise an objection to SIE's noninfringement defense during trial. The court found that "there is sufficient evidence in the record to support the jury's noninfringement verdict on this issue," and denied the Plaintiffs' Motion for a New Trial.

B.D. v. Blizzard Entertainment, Inc., 76 Cal. App. 5th 931 (2022)

B.D. was a minor who played Blizzard's online game *Overwatch* and used money to make in-game purchases of loot boxes for a chance to get valuable virtual items. B.D. and his father sued Blizzard and alleged that selling loot boxes with randomized values constituted unlawful gambling in violation of California Business and Professions Code, Unfair or Unlawful Business Practices, seeking only injunctive relief, attorney fees, and costs. Blizzard moved to compel arbitration based on the dispute resolution provision in its online license agreement, but the trial court denied the motion for lack of inquiry notice of the agreement to arbitrate.

The appellate court disagreed. It explained that the most recent version of the agreement published before B.D. and his father filed suit was a "sign-in wrap" agreement in which a user signs up to use an Internet product or service, the sign-up screen states that the user must accept an agreement to use the product or service, a link is provided to the user, and the user can sign up without first indicating that they have read the agreement. Such agreements have generally been upheld by courts.

Blizzard's agreement was presented to users in an online popup window containing the entire agreement in a scrollable text box. That agreement displayed two "IMPORTANT NOTICE[S]" near the top: (1) notice that users may not use Blizzard's services if they do not agree to all terms of the license agreement and (2) notice that users should read the entire agreement including the dispute resolution section containing a binding arbitration agreement. The court noted multiple times that B.D. would have been presented with versions of the agreement and the notices. In addition, B.D. would have been required to acknowledge that he had read the license agreement by clicking a "Continue" button. Concluding that Blizzard's presentation of the agreement to B.D. multiple times, the notices in the license agreement, and the acknowledgement requirement provided sufficient evidence of conspicuous notice of the arbitration provisions, the court directed the trial court to enter an order granting Blizzard's motion to compel. Companies providing online games like *Overwatch* should consider conforming their notice practices to those undertaken by Blizzard to make sure users have proper notice of important clauses in their license agreements, such as arbitration provisions.

Plutos Sama Holdings, Inc. v. Jagex Ltd., No. SACV 21-133 JVS (JDEx), 2022 U.S. Dist. LEXIS 89068 (C.D. Cal. Apr. 7, 2022)

This case deals with a dispute of ownership of Jagex Limited ("Jagex"), a video game developer. The relevant Third Amended Complaint (hereafter, the "Complaint"), stated that Shanghai Fukong ("Fukong"), a publicly traded company on the Shanghai Stock Exchange, purchased Jagex in 2015 for \$250 million. One of Fukong's wholly owned subsidiaries, SHNT Ltd. ("SHNT"), then took over Jagex.

The plaintiff, Plutos Sama Holdings, Inc. ("Plutos") is a private equity company that focuses on distressed assets and companies. It acts as general partner for limited partners in purchasing highly distressed and contested assets. Defendant Platinum Fortune, LP ("Platinum") is a Delaware limited partnership allegedly formed for the purpose of acquiring SHNT and Jagex. Plutos alleged it was approached by the agents of one of the founders of Platinum with respect to the acquisition of SHNT. The process was fraught with complex factors and considerations, including the fact that one of the majority owners of Fukong, the parent of SHNT, was sanctioned by Chinese securities regulators. After receiving multiple assurances that Platinum was not acting for the benefit of persons connected to SHNT and Fukong, the auction proceeded as planned and Platinum submitted the winning bid for SHNT.

Before the transfer of SHNT and Jagex was finalized, Plutos sold its general partner interest in Platinum to Macarthur Fortune Holdings, LLC ("Macarthur") and exited from Platinum upon learning the assurances Platinum provided were not reflective of the truth. Through a series of twists and turns, Platinum ultimately took control of Jagex in April 2020, after the Chinese court had allegedly transferred ownership of SHNT to its creditors, Huarong and Minsheng. Plutos repeatedly attempted to acquire Minsheng and Huarong's shares of SHNT but failed in both respects, though it alleged it ultimately formed a binding contract with Huarong (which Huarong allegedly breached). In 2021, the Carlyle Group purchased Jagex and Plutos proceeded to file the First Amended Complaint a month later.

The present Complaint alleges a total of seven causes of actions, of which Platinum is only named in the third: conspiracy to violate federal civil RICO. Platinum brought a Motion to Dismiss this cause of action, and made two arguments to support its case: (1) Plutos failed to allege sufficient facts to establish standing for its substantive RICO claim, which requires a showing that the alleged racketeering caused injurious harm to Plutos's

business or property (reliant on California law) and (2) Plutos failed to allege sufficient facts to infer that Platinum agreed to a conspiracy.

Platinum presented multiple arguments within its broader case to support its motion to dismiss. Largely, these arguments focused on a lack of knowledge and intention with respect to the alleged conspiracy and interference that Plutos used as the basis of its cause of action against Platinum. The court ultimately found, however, that Plutos had alleged sufficient facts to (1) have standing to bring its RICO claim against Platinum and (2) state a claim under 18 U.S.C. Section 1962(d) establishing that Platinum agreed to participate in the alleged RICO conspiracy *after* the execution of the Membership Unit Purchase Agreement transferring Plutos's general partnership interest to Macarthur, but not before. In both cases, the court found that not only did Platinum proximately cause the failure of Plutos's negotiations with Minsheng and Huarong, but Platinum also caused injurious harm to Plutos's business and property, and cannot sufficiently argue that it did not know about or agreed to the alleged RICO conspiracy after Plutos had sold its general partnership interest to Macarthur.

NetEase Inc. v. PubG Corporation, No. A160572, 2022 Cal. App. Unpub LEXIS 2439 (Ct. App. Cal. April 22, 2022) (non-precedential)

NetEase Inc. (and related entities) is the owner of the battle royale games "Rules of Survival" and "Knives Out." PUBG Corporation (and related entities) owns the battle royale game "PlayerUnknown's Battlegrounds." Perhaps unsurprising given the parties' particular genre of video game, this California appellate court's decision is one of many in a long and bloody battle between NetEase and PUBG's predecessor in interest. PUBG filed suit in 2018 bringing claims for copyright infringement, trade dress infringement, and unfair competition. The parties settled in February of 2019 but PUBG filed suit in federal court six months later, alleging NetEase breached the terms of the settlement. The federal court case was dismissed on procedural grounds. NetEase then refiled in state court, seeking declaratory judgement that it had not breached the settlement agreement. The state court eventually granted a preliminary injunction, barring NetEase from taking certain actions before the conclusion of the case.

Via a series of dueling motions, the injunction worked its way up to the appellate division, all surrounding the issue of how to interpret the prohibitions laid out in the settlement agreement. The parties disputed the temporal

significance of conduct. NetEase argued that conduct which began before a certain date cannot be prohibited by the settlement agreement. PUBG argued that *continuing* conduct is barred by the settlement, regardless of when the conduct started. The appellate court sided with PUBG, asserting there is no temporal limit in the settlement as written. NetEase argued that conduct predating the settlement was somehow released by the settlement. The court rejected this reasoning, asserting the relevant inquiries were whether consumers will be confused and whether PUBG will be harmed by that confusion, regardless of timing.

After embarking on a thorough, albeit meta-discussion of the settlement agreement's terms and the district court's rulings, the appellate court upheld the preliminary injunction. The appellate court gives a master class in contract interpretation. The painstaking blow-by-blow, which no doubt glosses over even more skirmishes between the parties, serves as a cautionary tale of how courts address settlement disputes. To uphold the PUBG's preliminary injunction, the court held that disagreements about a settlement agreement's prohibitions supported a conclusion that PUBG would likely be harmed (i.e., because the defendant would continue to violate the agreement based on its belief specific conduct did not violate the agreement). Furthermore, NetEase's attempts to assert it would be harmed by an injunction were undercut by NetEase's attempts to comply with the injunction itself. NetEase found itself on the wrong side of an ambiguous settlement agreement and an unsympathetic court.

Bungie, Inc. v. Aimjunkies.Com, No. C21-811 TSZ, 2022 U.S. Dist. LEXIS 76823 (W.D. Wash. Apr. 27, 2022) ("*Bungie I*"), *Bungie, Inc. v. Aimjunkies.Com*, No. C21-811 TSZ, 2022 U.S. Dist. LEXIS 116950 (W.D. Wash. July 1, 2022) ("*Bungie II*"), and *Bungie, Inc. v. Aimjunkies.com*, No. C21-0811 TSZ, 2022 U.S. Dist. LEXIS 205282 (W.D. Wash. Nov. 10, 2022) ("*Bungie III*")

Bungie, Inc., owner of the Destiny video game franchise, brought a slew of infringement, tort, and contract claims against defendant Aimjunkies.com, the website marketing, advertising, and selling cheat software for Bungie's games. Phoenix Digital, the alleged owner of the Aimjunkies website, and four individuals affiliated with Phoenix Digital were also named as defendants. The district court issued two opinions covered here, first assessing the defendant's motion to dismiss in *Bungie I*

and then granting a limited preliminary injunction to Bungie in *Bungie II*.

The district court initially whittled down Bungie's claims via the arbitration clause of Bungie's software license agreement, sending the majority of the claims to arbitration, save the trademark infringement and false designation of origin claims. *Bungie I* is notable in the district court's leniency towards Bungie, giving the plaintiff another bite at the apple by dismissing certain claims but allowing Bungie to amend its complaint further. For example, Bungie's complaint did not include sufficient facts connecting the individually named defendants (members of Phoenix Digital) to the alleged infringement. Furthermore, Bungie's complaint did not explain how creating a cheat software copied Bungie's copyrighted software. The defendants won hollow victories on these claims in *Bungie I*. Finally, *Bungie I* is notable in the district court's refusal to send the false designation of origin claim to arbitration. The court reasoned that for unregistered trademarks, a false designation of origin claim is essentially a trademark infringement claim, which was expressly excluded from mandatory arbitration under Bungie's software license agreement.

The day after the court's ruling in *Bungie I*, a third party published an article alleging that the Aimjunkies website would shortly be sold to investors in the Ukraine. Bungie requested confirmation of this fact from the defendants regarding the sale, and filed an amended complaint and motion for preliminary injunction when the defendants failed to reply. Aimjunkies and Phoenix Digital then published a press release, alleging the sale was complete.

The *Bungie II* court granted Bungie a very limited preliminary injunction, barring defendants from selling the cheat software for *Destiny 2* (the most lucrative of the Bungie's games) based on theories of direct and contributory copyright infringement. Specifically, the court ruled that the defendants likely copied Bungie's software because the cheat software displayed distinct visual features and functions of gameplay that could only be replicated by copying Bungie's software. In other words, each time the defendants created a new copy of the cheat software, they were also creating copies of the Bungie software used to create those distinct visual features and functions. The court also granted the injunction based on contributory infringement, ruling that Bungie raised serious questions about the defendant's benefit from and control over the infringement of Bungie's

software by individual consumers using the cheat software. Looming in the background of *Bungie II* is the court's doubt regarding whether the defendants actually sold Aimjunkies, or merely claimed to in an effort to avoid liability.

Bungie III demonstrates the importance of alleging facts to sufficiently cover each element of a claim rather than relying on vague or conclusory statements. In that decision, the court considered Bungie's motion to dismiss certain of the defendants' counterclaims for failure to state a claim upon which relief can be granted. Specifically, defendant James May brought three counterclaims against Bungie for alleged violations of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, and one counterclaim for alleged circumvention of technological measures under 17 U.S.C. § 1201(a). May based those counterclaims on allegations that Bungie accessed his personal computer without authorization and circumvented technological measures used to protect his computer at least 104 times. In addition, defendant Phoenix Digital brought one counterclaim against Bungie for breach of contract and a second counterclaim for circumventing technological measures under 17 U.S.C. § 1201(a). Phoenix Digital based its counterclaims on Bungie's allegedly improper access to, and reverse engineering of, Aimjunkies' cheat software and distribution software in violation of their Terms of Service.

The court dismissed May's three CFAA counterclaims because, while he alleged that he had suffered "irreparable injury and damage," he failed to specifically allege that his loss exceeded \$5,000 during a one-year period as required by the statute. Moreover, May failed to allege sufficient facts to support his claim that Bungie accessed his personal computer. While May referenced one document produced by Bungie to support his claims, he failed to explain how that document evidenced that Bungie accessed his computer and downloaded his personal information. Thus, May's factual allegations were insufficient to support his CFAA claims.

The court also dismissed May's and Phoenix Digital's anti-circumvention counterclaims because, under 17 U.S.C. § 1201(a), claimants must allege that the accessed work is protected by the Copyright Act, and the defendants failed to do so. In addition, Phoenix Digital failed to allege that its distribution software was even protected by a technological measure. Phoenix Digital merely recited the

technological measure element, but it provided no factual allegations for support.

Finally, the court dismissed Phoenix Digital's breach of contract counterclaim because it conclusorily alleged that the breach "has caused and is continuing to cause harm and damage," but it failed to allege any specific injury or damage.

Since the deadline for amending pleadings had not yet passed, and in view of the liberal standard for allowing parties to amend their pleadings, the court dismissed each of the counterclaims without prejudice and granted leave to amend.

Gamevice, Inc. v. Nintendo Co., No. 18-cv-01942-RS, 2022 U.S. Dist. LEXIS 89509 (N.D. Cal. May 18, 2022)

In March 2018, Gamevice, a manufacturer of handheld controllers for use with mobile phones and tablets, filed suit against Nintendo for allegedly infringing two of its patents. In the same month, Gamevice also filed a complaint in the International Trade Commission ("ITC") against Nintendo alleging infringement of the same two patents. The parties stipulated to a stay of the district court action pending the resolution of the ITC action. The Administrative Law Judge ("ALJ") overseeing the ITC action construed the claims. After briefing and a hearing, the ALJ rejected many of Gamevice's proposed constructions. The ALJ then entered a Summary Determination of Non-Infringement and an Initial Determination of No Violation against Gamevice. Gamevice appealed the ALJ's decisions to the full ITC Commission and the Federal Circuit, but it lost. Gamevice filed a second ITC action against Nintendo for alleged infringement of a newly issued patent, but it lost again.

When the ITC proceedings and appeals ended, the district court lifted the stay. Gamevice opted to move forward with its infringement argument, despite its previous losses before the ITC. Nintendo moved for sanctions under Rule 11, alleging that, because Gamevice's infringement arguments had lost twice before the ITC, those same infringement arguments in the district court case were meritless. However, the district court noted that a party is not precluded from litigating issues in district court that previously arose during ITC proceedings. Moreover, the district court explained that granting sanctions at that early stage of the litigation would require the court to evaluate the merits of the case before claim construction briefing and argument. Accordingly, the district court dismissed Nintendo's Rule 11 motion without prejudice. The court

informed the parties that, "[s]hould developments in the case make clear that such sanctions are indeed warranted without requiring the Court prematurely to delve into the merits, Nintendo may again move for sanctions." This case serves as a reminder that patents can be litigated in both district court and the ITC in parallel proceedings, and the resolution of a dispute in one proceeding is not necessarily dispositive of the same issue in the other proceeding.

Hayden v. 2K Games, Inc., No. 1:17CV2635, 2022 U.S. Dist. LEXIS 91566 (N.D. Ohio May 20, 2022)

Continuing a discussion in Volume 1, Issue 1 of the *Dorsey Legal Arcade* regarding copyrighted tattoos appearing in video games, this case concerns the admissibility of survey evidence. The popular *NBA 2K* series of basketball simulation video games features realistic portrayals of NBA players, including their tattoos. Tattoo artist James Hayden owns copyright registrations for designs inked on LeBron James, Danny Green, and Tristan Thompson, and brought a copyright infringement action against defendants 2K Games Inc. and Take-Two Interactive Software, Inc. for including these tattoos in the *NBA 2K* series of games.

To rebut Hayden's claims, the defendants retained survey expert E. Deborah Jay, Ph.D. and her survey company Jay Survey Strategics. The experts conducted a survey assessing whether consumers purchased an *NBA 2K* video game because of LeBron James, Danny Green, and Tristan Thompson's tattoos. Hayden objected to the admissibility of the survey results and Jay's accompanying expert report, filing a motion to exclude the evidence. Hayden argued the survey and report were "unreliable, misleading and more prejudicial than probative;" in short, the survey methodology was unreliable and did not satisfy the *Daubert* standard of evidence.

The *Daubert* standard of evidence requires that expert testimony and evidence be based on scientifically valid reasoning that can properly be applied to the facts at issue. However, errors in survey methodology do not necessarily render expert testimony inadmissible—instead, these errors should only affect the weight that a jury may give the testimony. Thus, the court denied Hayden's motion to exclude.

This case is yet another in a long line of infringement actions regarding realistic depictions of tattooed people in video games, reiterating the fact that the portrayal of any real person, including their personal features, may have

legal implications. Furthermore, this specific ruling reiterates the challenge of excluding expert testimony, rather than attacking it on the merits.

Chaves v. Amazon.com Servs. LLC, No. C21-1213-TL-BAT, 2022 U.S. Dist. LEXIS 94386 (W.D. Wash. May 23, 2022)

Amazon prevailed in a dispute over whether it could tax the sale of “Robux” cards when the district court granted Amazon’s motion to dismiss the plaintiffs’ complaint for failure to state a claim. The plaintiffs represented a class of consumers who had purchased cards on Amazon containing 800 Robux, an in-game currency used in the videogame *Roblox*. The cards were sold by Amazon for \$10 (plus sales tax) and allowed the owner to access items and features in the *Roblox* game world. The plaintiffs argued that the cards could not be taxed for two reasons: (1) the cards were gift cards; and (2) the cards were “digital goods” or “virtual goods.” The court rejected both arguments and dismissed the claim with prejudice.

The court ruled that cards that grant the purchaser access to digital items and features through the use of in-game currency are taxable. Gift cards are exempt from taxation because they have monetary value that creates a taxable event when they are exchanged. Taxing the sale of gift cards would thus create two instances of taxation: one at the moment of purchase and another at the moment a card is exchanged for goods or services. However, when a player exchanges the in-game currency Robux for digital items, no taxable event occurs. The game simply grants access to the items and reduces the player’s Robux accordingly. The *Roblox* website explains that Robux give the owner a limited license to certain things in the game and that the cards have “no value in real currency.” Therefore, the district court reasoned, “Robux are the goods or services that have been purchased.” They are distinguishable from “dollar value cards” that give the owner a specific dollar amount that can be spent on additional game content (these dollar value cards are untaxable gift cards).

Cards that grant in-game currency are also not untaxable “digital goods” or “virtual goods” under New York and Massachusetts law. Rather, they are taxable “tangible personal property.” The New York State Department of Taxation and Finance (NYSDF) has declared prewritten computer software as a type of tangible personal property, and has stated that computer games and online gaming networks fall into this category as well. The Code of Massachusetts Regulations (CMR) holds the same to be

true. 830 Code Mass. Regs. § 64H.1.3(3)(a), 64H.1.3(5). Since the Robux only create a limited license to in-game content, they fall under the “tangible personal property” category and are therefore taxable.

As a secondary issue, the plaintiffs alleged that PlayStation Plus 1-Month Membership cards were also untaxable for the same reasons as the Robux cards. The district court rejected this argument as well. The PlayStation Membership cards, which grant members access to monthly free games and PlayStation’s online multiplayer network, differed in function from monetary gift cards and fell into the “tangible personal property” category of taxable goods.

While in-game currency has been present in videogames for quite some time, the sale of that currency for real money—separate from the sale of the game itself—represents a growing trend in the industry. This case holds that the in-game currency purchased through these sales is fundamentally different from the cash-value of a gift card. While the district court only ruled that this meant the cards were taxable under New York and Massachusetts law, the underlying reasoning would imply that, potentially, the sale of in-game currency cards might not be subject to any of the regulations governing the sale of gift cards or when they expire.

Brooks Ent., Inc. v. Activision Blizzard, Inc., No. 21-CV-2003 TWR (MOD), 2022 U.S. Dist. LEXIS 123344 (S.D. Cal. July 12, 2022)

Plaintiff Brooks Entertainment, Inc. sued Activision Blizzard, Inc. and Rockstar Games, Inc. in the Southern District of California alleging copyright, trademark, and right of publicity infringement based on Activision’s inclusion of a character named “Sean Brooks” in its *Call of Duty: Infinite Warfare* game (“COD”). Notably, Brooks had been founded by a person named Shon Brooks, and it owned a trademark for “Shon Brooks.” Before filing suit, Brooks had contacted Activision and Rockstar to request, among other things, that they pay Brooks 10% of game sales. Rockstar responded that it did not produce or develop COD and did not derive any revenue from the game. Brooks then sued.

Shortly thereafter, Activision put Brooks on notice that if Brooks was unwilling to withdraw the complaint, then Activision would move for sanctions under Rule 11 for failure to conduct an adequate pre-litigation investigation. Activision eventually filed its motion, followed by Rockstar’s own motion for sanctions. Brooks’ counsel

contested the motions, asserting that it had a good faith basis to believe the complaint was grounded in the facts and law, through activities such as meetings with its client, reviewing copyright and trademark records, watching the COD trailer, and conducting internet searches. As far as the connection between Activision and Rockstar, Brooks had been corresponding with an individual at Rockstar several years before the lawsuit who eventually moved to Activision, so Brooks believed this individual took information gained at Rockstar that benefitted Activision's COD game.

In examination of the merits of the claims, the court found the trademark claim to be baseless, because video games are expressive works and there is no indication of similarity between the "Sean Brooks" in COD and the Shon Brooks associated with the plaintiff. With respect to the copyright claim, the court indicated that the similarities of the works at issue are so "broad and generally applicable to the videogame industry that they could not be protected by copyright." Finally, as to the right of publicity claim, the court concluded that the defendants did not use the plaintiff's name, voice, signature, photograph, or likeness in any manner, noting that "Shon Brooks is an African American financial consultant from New Jersey, while (the differently spelled) 'Sean Brooks' is a Caucasian, Solar Associated Treaty Organization Marine, from Ireland voiced by an Irish actor."

Accordingly, the court determined that sanctions against Brooks are warranted due to Brooks' counsel's failure to investigate numerous key issues prior to filing the complaint. The court awarded the defendants attorneys' fees and costs and dismissed the complaint with prejudice. The lesson here is to make sure you do your diligence before launching a strike at the courthouse.

Coy v. Lilith Games (Shanghai) Co., No. 19-cv-08192-JD, 2022 U.S. Dist. LEXIS 142625 (N.D. Cal. Aug. 9, 2022)

This case shows that the deceptive use of loot boxes and games of chance are still a potential target for consumer claims, but those claims must be supported by more than speculation. Keith Coy, James Moran, and Casey Megs filed a putative class action against Lilith Games based on alleged deceptive practices in a mobile game, *Rise of Kingdoms* ("ROK"). According to the three plaintiffs, Lilith Games tricked them into spending thousands of dollars on in-game purchases of gems to play loot box card and wheel games with odds rigged against the players.

When they played those games, the players alleged that they did not win prizes at the statistically expected rate, although none of the games specifically disclosed odds of winning. Therefore, they brought claims under the California Consumer Remedies Act, California Business and Professions Code (Unfair or Unlawful Business Practices and Unfair or Unlawful Contest or Sweepstakes), California's False Advertising Law, and breach of the covenant of good faith and fair dealing.

Lilith Games moved to dismiss the First Amended Complaint for failure to state a plausible claim and for lack of standing. The plaintiffs based their allegations mainly on hyperlinks to Facebook and YouTube videos made by third parties claiming that the games in ROK are fixed. Since Lilith never actually posted odds for winning the ROK games, the district court found that it had not misrepresented anything about the games to the plaintiffs. Moreover, the court found that the hyperlinked videos amounted to Internet gossip and were too speculative to support the plaintiffs' claims. Similarly, plaintiffs' other allegations about being attacked by accounts sponsored by Lilith Games or Lilith Games' selective enforcement of its terms of service were too speculative to defeat a motion to dismiss. Accordingly, the court dismissed plaintiffs' claims but granted them leave to amend their complaint one last time. It did not decide the motion to dismiss based on standing.

Hanagami v. Epic Games Inc., No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823 (C.D. Cal. Aug. 24, 2022)

Kyle Hanagami, a professional choreographer and dance instructor, brought this action against Epic Games alleging copyright infringement and unfair competition. Hanagami had published a YouTube video of himself and others dancing to the song "How Long" by Charlie Puth. He registered the choreography of the video with the Copyright Office. Hanagami alleged that Epic Games infringed his rights in the choreography by incorporating it into the "It's Complicated" emote in Epic Game's *Fortnite* game. Emotes are animated dances that players can perform in the game and can be purchased from *Fortnite*'s in-game marketplace. Epic Games moved to dismiss each of Hanagami's claims.

On the copyright claim, the court determined that the individual steps in Hanagami's choreography are unprotectable, but the way the steps are expressed in the choreography is protectable. However, when comparing the choreography to the "It's Complicated" emote, the

court determined that the works did not share any protectable creative elements, and thus dismissed the copyright claim. With respect to the unfair competition claim, Epic Games asserted that preemption under the Copyright Act should apply. The court agreed, holding that Hanagami’s claim that the “It’s Complicated” emote introduced an additional element of false endorsement does not transform the nature of the action. The takeaway here is that it remains incredibly hard to assert infringement claims related to choreography used in video games.

Acceleration Bay LLC v. Elec. Arts Inc., No. 16-454-RGA, 2022 U.S. Dist. LEXIS 184429 (D. Del. Oct. 7, 2022) (“*Acceleration II*”), and *Acceleration Bay LLC v. Activision Blizzard, Inc.*, No. 16-453-RGA, 2022 U.S. Dist. LEXIS 193935 (D. Del. Oct. 25, 2022) (“*Acceleration III*”)

Acceleration II and *Acceleration III* both involve motions for summary judgment of non-infringement by collateral estoppel based on a prior case, *Acceleration Bay LLC v. Take-Two Interactive Software, Inc.*, No. 16-455-RGA (D. Del.) (“*Acceleration I*”). *Acceleration I*, *II*, and *III* were all before United States District Judge Richard G. Andrews. In *Acceleration II*, only two of plaintiff’s infringement theories still survived: (1) infringement by all accused products of U.S. Patent No. 6,732,147 (“’147 patent”) under the doctrine of equivalents (“DOE”); and (2) literal infringement by the accused *NHL* and *Plants vs. Zombies* games of U.S. Patent Nos. 6,701,344 (“’344 patent”) and 6,714,966 (“’966 patent”). Electronic Arts argued that Judge Andrews should grant summary judgment of non-infringement as to Acceleration Bay’s remaining infringement theories due to collateral estoppel from the court’s prior summary judgment as to non-infringement in *Acceleration I*.

Acceleration Bay had also asserted the ’147, ’344, and ’966 patents against certain accused video games in *Acceleration I*. In the prior case and in *Acceleration II*, the court construed, among other terms, “m-regular” to mean “[a] state that the network is configured to maintain, where each [participant or computer] is connected to exactly m neighbor [participants or computers].” Judge Andrews subsequently granted summary judgment of non-infringement in *Acceleration I* after adjudicating three issues:

(1) The player movement issue. Acceleration Bay argued that players’ avatars share more data when close to each other, thus causing an m-regular network to arise naturally

as plays move throughout the game. Judge Andrews rejected this argument, finding that a network must be configured to maintain an m-regular state and is not m-regular if the participants just happen to occasionally achieve that state.

(2) The all-connected server issue. The plaintiff argued that a server connected to all virtual players is not a “participant” in the game and does not preclude m-regularity. The court disagreed, stating that while a server is not a player in a game, it is a participant in the network because it transfers data between network participants.

(3) DOE argument. Finally, plaintiff argued a network performs substantially the same function as an m-regular network by optimizing the entire network processing of the network by limiting each participant’s network connections so that data are distributed in a balanced fashion over the network. Judge Andrews rejected this argument because it would effectively read the m-regular limitation out of the claims.

Electronic Arts contended that these three issues were actually litigated, were determined by final and valid judgment, and were essential to the prior judgment, and Acceleration Bay did not contest that these elements were met as to these issues. Judge Andrews found that the accused products in *Acceleration II* were the same as the *Acceleration I* products for purposes of the player movement issue, the all-connected server issue, and plaintiff’s DOE argument. Accordingly, the court found that all collateral estoppel elements were met for all three arguments, and the plaintiff was precluded from advancing those arguments in *Acceleration II*.

In *Acceleration III*, the plaintiff had two last infringement arguments: (1) infringement by the *Call of Duty* and *Destiny* games of the ’147 patent and U.S. Patent No. 6,910,069 (“’069 patent”); and (2) infringement by the *World of Warcraft* game of the ’344 and ’966 patents. These four patents had previously been asserted in *Acceleration I* as well, and Activision moved for summary judgment of non-infringement based on collateral estoppel. However, in contrast to *Acceleration II*, Judge Andrews found that collateral estoppel applied only to DOE, but not to the plaintiff’s other infringement theories.

Activision argued that the plaintiff’s literal infringement theories for *Call of Duty*, *Destiny*, and *World of Warcraft* were collaterally estopped based on the player movement and all-connected server issues. Plaintiff’s expert established a genuine issue of fact as to the player

movement issue by explaining that *Call of Duty*, *Destiny*, and *World of Warcraft* maintained their networks' m-regularity regardless of in-game player actions. Moreover, while Activision argued that all participants in *Call of Duty*, *Destiny*, and *World of Warcraft* were connected to a particular server which would make m-regularity impossible, Acceleration Bay demonstrated a genuine issue of fact by providing evidence that all participants were not always connected to that particular server or that the server was not a network participant. Thus, Acceleration Bay demonstrated genuine factual disputes that precluded summary judgment as to *Call of Duty*, *Destiny*, and *World of Warcraft*.

Acceleration I, II, and III demonstrate the impact a prior, related case, especially before the same judge, can have on subsequent patent cases. For parties accused of infringement, past and co-pending litigations can be a treasure trove of powerful defenses, such as collateral estoppel. But such cases can be a liability for patentees. To offset potential liabilities, patentees should consider filing multiple infringement suits in multiple jurisdictions or filing a first suit in a fast docket as a test case. Of course, the best way for a patentee to mitigate risk is to develop strong, well-supported infringement and claim construction arguments.

Riot Games, Inc. v. Shanghai Moonton Tech. Co., Ltd., No. CV-22-3107-MWF (JPRx), 2022 U.S. Dist. LEXIS 216832 (C.D. Cal. Nov. 8, 2022)

Moonton is a Chinese game developer who had released the mobile game *Mobile Legends: Bang* ("MLBB") in 2016. Riot Games distributes two games named *League of Legends* ("LoL"). Riot is a wholly owned subsidiary of Tencent Holdings Ltd., which is the owner and publisher of a game named *King's Glory*.

Initially, Tencent sued Moonton in 2017 in China alleging that Moonton's MLBB infringed Tencent's copyrights in *King's Glory*. Also in 2017 while the China action was pending, Riot filed suit in the Central District of California alleging that MLBB was a copy of LoL (the "Riot 1 Action"). The court dismissed the Riot 1 Action on the grounds that China was a more appropriate forum for litigation. Thereafter, Tencent withdrew the 2017 Chinese action and re-filed in the same court in 2021. The 2021 complaint is substantively identical to the Riot 1 Action complaint.

Moonton moved to dismiss the current U.S. action based on the doctrine of *forum non conveniens*. To prevail on

such a motion, the defendant must prove that an adequate alternative forum exists and that the balance of private and public interest factors favor dismissal. The court found that an adequate alternative forum exists in China because the parties each have a presence in China, China has a copyright regime and courts that adjudicate copyright claims, and the fact that the current action involves the same issues as the Riot 1 Action. The court also concluded that the private interest factors favored dismissal and the public interest factors were neutral. Finally, the court noted that any deference accorded to the plaintiff's choice of forum is offset in this case by the countervailing concerns of fairness and practicality.

Treehouse Avatar LLC v. Valve Corp., 54 F.4th 709 (Fed. Cir. 2022)

Treehouse owns U.S. Patent No. 8,180,858 ("858 patent") which discloses a method of collecting data from an information network in response to user choices from a plurality of users navigating character-enabled sites on the network. Valve owns two video games accused of infringement: *Dota 2* and *Team Fortress 2* ("TF2"). Both are multiplayer, team-based games in which users download software for the games onto their computer. The downloaded content includes images, sounds, text, and characters with varying abilities that the user can select and customize. Users can purchase additional items created by Valve or third parties through Valve's online marketplace.

At the Federal Circuit, Treehouse appealed the district court's grant of a motion to strike portions of Treehouse's infringement expert's report as well as the grant of summary judgment of noninfringement. Both issues related to the construction of "character-enabled (CE) network sites" ("CE limitation"), a term that appears in the asserted independent claims of the '858 patent. In a prior *inter partes* review ("IPR") proceeding, the Patent Trial and Appeal Board ("Board") construed the term to mean "a network location, other than a user device, operating under control of a site program to present a character, object, or scene to a user interface." The parties agreed to, and the district court adopted, that construction for the federal court litigation.

In his report, Treehouse's expert purported to apply the plain and ordinary meaning of the CE limitation rather than the agreed-upon construction. Valve moved to strike Treehouse's expert infringement report for failure to apply the proper construction. At the same time, Valve moved for summary judgment of noninfringement, arguing that

its accused video games could not meet the properly construed CE limitation because the characters, attributes, etc. displayed on the user interface were stored on the user's computers, not Valve's servers. Treehouse's opposition to the summary judgment motion consisted of just two paragraphs and appeared to concede that Valve was entitled to summary judgment if the motion to strike were to be granted. The district court subsequently granted both motions, and Treehouse appealed.

The Federal Circuit affirmed the grant of the motion to strike, because Treehouse's expert relied on a claim construction that was materially different from the construction adopted by the parties and district court. The Federal Circuit also affirmed the district court's summary judgment of noninfringement, because, in the absence of the properly stricken expert testimony, Treehouse failed to present evidence of a genuine issue of material fact regarding infringement.

This case demonstrates that parties should be mindful of the potential consequences of agreed constructions. Here, Treehouse was not required to agree to the Board's construction of the CE limitation because the Board's standard for constructing claim terms during IPR differs from the standard employed by federal courts. And attempting to side step the agreed construction (presumably after Treehouse decided that it was unfavorable) by relying instead on the "plain and ordinary" meaning was doomed to fail, given that opposing counsel and the court are unlikely to overlook such an obvious and improper substitution.