

Esports and the Law

News, case summaries, articles, and strategies concerning esports and the law

Presented by Skadden

Players Take a Stand and Secure a Legal Victory in Esports Case

By Ellen M. Zavian, Esq.

“Despite the meteoric growth of the esports industry in recent years, it unfortunately remains plagued by team-entities that fail to pay their players agreed upon salaries, fail to distribute earned prize money, and deceive their players for their own gains. Defendant Naventic is one such team entity.”

This is the plaintiffs' opening argument in a legally significant setting matter in California state court (*Superior Court of the State of California – Riverside County, Case No: MCC1800976*), where gamers collectively sued their owner for back pay...and actually won.

In August of 2018, gamers known as Zuna, Kenma, Bkid, Tomster and BigEmpact (collectively the ‘Plaintiffs’),

filed an action in the Superior Court of California for breach of contract and fraudulent misrepresentation, to name a few claims, against their Team entity, Naventic, LLC, and owner, James Ross Elliott II (collectively the ‘Defendants’).

The complaint focused on winnings earned by the Plaintiffs while competing in the ‘Heroes of the Storm’. The gamers took 5th and 6th place, earned prize money, but none of the money was received by the players. This was despite the fact that the Defendants allegedly received the prize money from the competition organizers.

At the time of competition win, the gamers performed under independent contractor agreements, executed in early

See **PLAYERS** on Page 6

INSIDE THIS ISSUE

Study Looks at Whether Video Game Addiction Is Real?	2
Martino Brings Long-Simmering Passion to His Role as Esports Lawyer	3
Lupu Guides UTA's Gaming Practice to New Heights	5
Court Orders Fortnite Developer Case to Arbitration	6
Military Depictions in Video Games: Trademark Infringement or First Amendment Protection?	7
Litigation Festers Between Turner ‘Tfue’ Tenney and Former Employer	8
Steve Jackson Games, Inc. v. inXile Entertainment, Inc.	9
News Briefs	11

Court Grants Summary Judgment for Video Game Publisher in Tattoo Copyright Case

By Hannah M. Marek, of Skadden, Arps, Slate, Meagher & Flom LLP

On March 26, 2020, the U.S. District Court for the Southern District of New York drew clear limits on the scope of copyright protection available for tattoos inked on public figures. In *Solid Oak Sketches, LLC v. 2K Games, Inc.*, Judge Laura Swain dismissed tattoo art licensee Solid Oak’s copyright infringement lawsuit against video game



Hannah Marek

publisher Take Two Interactive, finding that Take Two’s use of images of certain NBA stars’ copyrighted tattoos in its basketball simulation video games, published by Take Two’s 2K Games studio, was de minimis, authorized by implied license, and fair use.

publisher Take Two Interactive, finding that Take Two’s use of images of certain NBA stars’ copyrighted tattoos in its basketball simulation video games, published by Take Two’s 2K Games

Take Two’s NBA 2K video game franchise features realistic renderings of NBA basketball games, with lifelike depictions of the players, including their tattoos. Solid Oak, the exclusive licensee to certain tattoos inked on three NBA players, sued Take Two for infringing its copyrights in those tattoos. Take Two moved for summary judgment dismissing Solid Oak’s copyright claim and entering a declaratory judgment in Take Two’s favor.

See **SUMMARY** Page 10

Esports and the Law

HOLT HACKNEY

Managing Editor and Publisher

Hackney Publications

THE ROBERTS GROUP

Design Editor

ELLEN M. ZAVIAN, ESQUIRE

Adjunct Professor at George Washington University,
Professorial Lecturer in Sports Law at George Washington Law School
Editor In Chief

COURTNEY SEAMS

Researcher

BRIANA NARDONE

Marketing

Please direct editorial or subscription inquiries to Hackney Publications at: info@hackneypublications.com.

Esports and the Law is published quarterly by Hackney Publications.

Postmaster send changes to: Hackney Publications, P.O. Box 684611, Austin, TX 78768.

Copyright © 2020 Hackney Publications

Skadden

Skadden is the advertiser and sponsor and the views expressed here are not the firm's views.

Study Looks at Whether Video Game Addiction Is Real?

For most adolescents, playing video games is an enjoyable and often social form of entertainment. However, there is a growing concern that spending too much time playing video games is related to negative developmental outcomes and can become an addiction.

A recent six-year study, the longest study ever done on video game addiction, found that about 90 percent of gamers do not play in a way that is harmful or causes negative long-term consequences. A minority, though, can become truly addicted to video games and as a result can suffer mentally, socially and behaviorally, according to the study.

“The aim of this particular study is to look at the longer-term impact of having a particular relationship with video games and what it does to a person over time,” said Sarah Coyne, a professor of family life at BYU and lead author of the research. “To see the impact, we examined the trajectories of pathological video gameplay across six years, from early adolescence to emerging adulthood.”

In addition to finding long-term consequences for addicted gamers, this study, published in *Developmental Psychology*, also breaks down gamer stereotypes and found that pathological gaming is not a one size fits all disorder.

Pathological video gameplay is characterized by excessive time spent playing video games, difficulty disengaging from them and disruption to healthy functioning due to gaming.

Only about 10 percent of gamers fall into the pathological video gameplay category. When compared to the non-pathological group, those in the study displayed higher levels of depression, aggression, shyness, problematic cell phone use and anxiety by emerging adulthood. This was despite the groups being the same in all these variables at the initial time point, suggesting that

video games may have been important in developing these negative outcomes.

To measure predictors and outcomes to video game addiction, Coyne studied 385 adolescents as they transitioned into adulthood. Each individual completed multiple questionnaires once a year over a six-year period. These questionnaires measured depression, anxiety, aggression, delinquency, empathy, prosocial behavior, shyness, sensory reactivity, financial stress and problematic cell phone use.

“Pathological video gameplay is characterized by excessive time spent playing video games, difficulty disengaging from them and disruption to healthy functioning due to gaming.”

Two main predictors for video game addiction were found: being male and having low levels of prosocial behavior. Having higher levels of prosocial behavior, or voluntary behavior meant to benefit another person, tended to be a protective factor against the addiction symptoms.

Aside from the predictors, Coyne also found three distinct trajectories of video game use. Seventy-two percent of adolescents were relatively low in addiction symptoms across the six years of data collection. Another 18 percent of adolescents started with moderate symptoms that did not change over time,

See **STUDY** on Page 8

Martino Brings Long-Simmering Passion to His Role as Esports Lawyer

By Ellen M. Zavian, Esq.

As a partner at Skadden Arps Slate Meagher & Flom LLP, Matthew M. Martino represents a wide variety of clients in antitrust litigation and advisory matters.

Beyond his antitrust expertise, he has handled disputes on behalf of sports leagues and their teams involving labor and employment, torts, bankruptcy, gambling, team relocation, intellectual property rights, contractual issues, and other legal matters. He also has counseled sports clients with respect to a variety of business practices, including league governance, licensing, sponsorships, merchandising, events, new media, broadcast rights, and ticketing.

Martino graduated from the University of Pennsylvania *summa cum laude* with a B.A. degree in Psychology. Following undergraduate school, he attended Yale Law School. He was President of the *Yale Entertainment & Sports Law Association* and an editor of the *Yale Law & Policy Review* and the *Yale Journal on Regulation*.

What follows is an interview with Martino.

Question: *Did you play sports growing up and if yes, what sports?*

Answer: Yes. I played baseball and wrestled, but alas I was not good enough at either to participate beyond high school. Playing sports as a child and teen, however, taught me the value of hard work, dedication, perseverance, and teamwork, lessons that I utilize every day in my legal practice. And it was a lot of fun. I also was a huge sports fan and watched all of the major professional sports, rooting for all of the Philadelphia teams (Eagles, Flyers, Sixers, Phillies) as I grew up in southern New Jersey, not far from the stadium complex in Philadelphia. It was one of



.....

"When I was a kid, we had an Atari in our house, and I have many fond memories of playing games on it with my family. One particularly memorable game was Activision's Decathlon."

— Matthew Martino

the major ways I bonded and connected with family and friends.

Q: *What was your first experience with video games?*

A: When I was a kid, we had an Atari in our house, and I have many fond memories of playing games on it with my family. One particularly memorable game was Activision's Decathlon, in which you competed in Olympic-style decathlon events. I recall that if you surpassed certain score levels, you could take a photo of the television screen with a Polaroid camera and mail the photo to Activision, and in return, the company would mail you back a bronze, silver, or gold patch depending on the score you achieved. I spent many, many hours playing Decathlon with my father and brother trying to win those patches, and we did win some.

Q: *How does your bachelor's degree impact your legal profession?*

A: I majored in psychology because it was remarkably interesting to me, but it hasn't had a great impact on my legal practice. However, I do at times harken back to some of my social psychology classes when dealing with adversaries, witnesses, and the like. And jury consultants often have backgrounds in psychology, so on

the rare occasion when we are preparing for a jury trial (which does not happen too often in my practice), it is nice to share that background and have a bit of insight into that process. Probably the most relevant takeaways from my undergraduate work that I have applied to my career have come from my classes in sleep studies and my time working in a research lab studying sleep deprivation. As you can imagine, especially as a young associate, having some background in and understanding of sleep deprivation comes in handy from time to time!

Q: *With many of the same owners from the NHL and NBA getting involved at the ownership level in esports, have you seen a change in the understanding of how antitrust applies to esports over the past 2-3 years?*

A: Certainly, for those owners, I would expect a greater understanding of the antitrust laws and how they apply to their esports businesses because they have been dealing with those legal issues with their traditional sports teams for many years. As esports leagues continue to mature, I would expect an even greater understanding of the antitrust laws to emerge among all stakeholders as the legal issues

See MARTINO on Page 4

Martino Brings Long-Simmering Passion to His Role as Esports Lawyer

Continued From Page 3

inevitably arise. Our group is uniquely positioned in that we are able to draw from the resources of Skadden's worldwide Antitrust/Competition capabilities and apply them to developing issues in the esports realm.

Q: *Antitrust was not originally written to apply to the unique business structure found in sports, where teams do not want other teams to fail (except on the field maybe), how might you rewrite the antitrust laws to better apply to traditional sport structures?*

A: I am not sure whether it requires rewriting the antitrust laws, but I would like to see a better understanding and appreciation in the law of how competition and cooperation work in professional sports. For example, do teams within a particular league really compete with *each other* for the sale of tickets, concessions, merchandise, broadcasts, etc., or is it more likely that a team competes more with the local teams of other sports leagues and with the other entertainment options available within the team's specific geographic locale? And with respect to the cooperation among teams that is often necessary for a league to function and thrive as a business in the competitive world of sports and entertainment, I would like to see a better recognition in the law and among courts of the realities of sports league operations and how they may differ from other industries. Many of the agreements among teams and joint efforts within a particular league are procompetitive in that they, among other things, foster competitive balance, prevent free-riding, ensure economic efficiencies, and otherwise better enable the league to compete with other sports and entertainment offerings. Unfortunately, however, the leagues often need to endure very expensive litigation in order to demonstrate this, and perhaps some

bright-line rules with respect to some of these issues and business practices—for example, recognizing that some established and well-considered practices are actually presumed *lawful*—would allow for more efficient and less costly determinations when the conduct of a league

fronted with claims of monopolization. Because of the parallels to traditional sports, esports leagues and teams may be able to look to the history, experience, and legal precedents of traditional sports properties in handling such disputes.

Q: *Where do you see the esports industry*

“The esports industry continues to thrive and grow, and in many, metrics has begun to outpace the traditional sports industry.”

and its teams is challenged.

Q: *What are the parallels between esports and traditional sports when it comes to antitrust?*

A: As esports businesses continue to evolve, they likely will face many of the same legal issues as traditional sports leagues and teams. Like in traditional sports, esports teams within particular leagues often will need to cooperate with respect to a variety of business practices, including league governance, labor and other player issues, licensing of intellectual property, sponsorships, merchandising, broadcasting, and ticketing. As revenues increase, the leagues and teams may become the targets of antitrust challenges to some of these practices under the antitrust laws. Leagues may also face assertions of dominance with respect to particular market segments and be con-

in 10 years?

A: The esports industry continues to thrive and grow, and in many, metrics has begun to outpace the traditional sports industry. I expect this growth trajectory to continue with the explosion of additional digital and social media platforms and the appetite of young fans for new sources of content. The global pandemic in which we now find ourselves, and the attendant restrictions on our daily lives, has only served to further highlight this phenomenon, as even traditional sports have moved to esports content to satisfy their fans. If anything, I think our current situation may accelerate the already explosive rate of growth of the esports industry. It would not surprise me if in 10 years the esports industry is a fixture in our homes and a major player for our entertainment and leisure spending. ●

Lupu Guides UTA's Gaming Practice to Unprecedented Heights

When United Talent Agency (UTA) hired away Ophir Lupu from Creative Artists Agency (CAA) nine years ago and asked him to lead its then-nascent gaming practice, the agency knew it was getting a rising star.

Lupu has not disappointed, building out what has become one of the gaming industry's leading pools of talent.

His productivity aside, Lupu has also proven to be one of those rare executives that can adapt to the marketplace with creative solutions. Witness how he has used the pandemic to build a robust community at UTA, a phenomenon that was profiled in April in the Hollywood Reporter: <https://www.hollywoodreporter.com/news/quarantine-uta-turns-gaming-stay-connected-1289602>.

Industry observers like Michael Folger, a senior associate at Skadden, believe Lupu and UTA will emerge from the current crisis stronger than ever. His track record and the influence he will undoubtedly have on the industry make him a great candidate for a brief interview, which follows:

Question: *Ophir, how did you personally get involved with UTA's eSports and gaming initiatives?*

Answer: I have been running UTA's Gaming Division since I joined the company in 2011. Our department represents best-in-class game developers by sourcing and negotiating publishing deals as well as advising on investments and acquisitions. A few years ago, my good friend Sam Wick (Head of UTA Ventures) and I spearheaded UTA's investment in Cloud9, a leading global esports organization that manages championship teams across League of Legends, Overwatch,



Counter-Strike, and many others. That investment gave us a better understanding of the broader esports and game streaming landscape. With that knowledge, it became obvious to us that UTA needed to build a much deeper connection to the esports business. After several months of meeting as many people as we could, we acquired management company Everyday Influencers and its sister company, digital esports agency Press X, which provided us with an incredible roster of agents and clients. I am very proud of our division's continued expansion, and I would argue that it is among the most well-respected groups across the gaming industry.

Q: *What led UTA to take such significant steps into eSports and video gaming?*

A: UTA has always challenged itself to be forward-thinking and entrepreneurial in its growth strategy. Gaming is one of the largest and most rapidly expanding segments of media. UTA had identified this

"The business has hyper-matured in the past few years as investors have poured a lot of money into the ecosystem. As a result, the expectations surrounding gamers' responsibilities and professional services have led to some significant, but very necessary, challenges."

— Ophir Lupu

as a growth area nearly a decade ago, and we have remained committed to expanding the landscape ever since.

Q: *What legal issues arising in the eSports industry are UTA's clients facing?*

A: Like most young and fast-growing business areas, esports is experiencing a very natural set of growing pains. The business has hyper-matured in the past few years as investors have poured a lot of money into the ecosystem. As a result, the expectations surrounding gamers' responsibilities and professional services have led to some significant, but very necessary, challenges. There have been questions about the differing roles of agents vs. managers, standard commission rates, whether a team has the authority to manage its players, and the role of the Players' Association in any of the franchised leagues. These rules are all being written in real-time. ●

Court Orders Fortnite Developer Case to Arbitration

By Lauryn Robinson, GWLaw 2L

Michael Heidbreder, a Missouri resident, filed suit alleging Epic Games' "vulnerable" security allowed hackers to charge fraudulent in-game purchases to his debit card between November 2018 and January 2019.

Heidbreder filed both statutory and common law claims including negligence, breach of implied contract and violation of state consumer-protection and data-breach statutes with the U.S. District Court of the Eastern Division of North Carolina. However, assigned Judge Terrence W. Boyle decided the matter must be moved to arbitration since the End User License Agreement ("EULA") with Fornite developer, Epic Games, mandated such.

That decision was made in response to Epic Games' Motion to Compel, filed in October 2019, which argued that the terms and conditions of the EULA should prevail. Pursuant to the EULA, the arbitration provision included: "(1) an agreement

to arbitrate on an individual basis only; (2) delegation clause granting the arbitrator the power to determine whether a specific dispute is governed by the arbitration clause; (3) a venue selection clause giving user the choice of venue between their home state or North Carolina; (4) Epic Games' agreement to pay arbitration fees under \$10,000, share costs after \$10,000 and not seek attorney fee's against users and (5) a 30 -day opt-out provision, giving users a 30 day window after agreeing to the End User License Agreement to opt out of arbitration provision." *Compl.*

Heidbreder presented three compelling, yet unsuccessful, arguments.

First, he asserted his minor son lacked contractual capacity to agree to the EULA. Judge Boyle rejected this argument noting "under the basic principles of principal-agent law" his son acted as Heidbreder's agent, giving him both actual and apparent authority to agree.

Second, Heidbreder argued that privacy

related matters are outside the scope of arbitration. According to common law, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Therefore, the arbitrator, rather than the court, determines the scope of these provisions.

Lastly, Heidbreder claimed the class action waiver, arbitration clause and class action clause are unconscionable because Epic Games is applying the agreement retroactively. Judge Boyle acknowledges yet quibbles with Heidbreder's last argument noting the terms at issue "are common terms in modern contracts that have been recently sanctioned by the courts and can hardly be considered substantively unconscionable." ●

Heidbreder v. Epic Games, Inc. No. 5:19-cv-348, 2020 WL 548408 (E.D.N.C. Feb. 3, 2020)

Players Take a Stand and Secure a Legal Victory in Esports Case

Continued From Page 1

2016, which called for the team to be paid a percentage first (5%), before issuing the balance due (95%) to the gamers in a timely manner, from prize winnings.

A second contract was entered into by the Plaintiffs in November of 2016, keeping the gamers as independent contracts. The terms called for the gamers to continue to receive monthly stipends in addition to their prize winnings. Even though the gamers still had not received their prize money from the Heroes' event, in good faith, they entered into this second agreement ... hoping for the best.

However, 'best' never came and the

gamers were not receiving their prize winnings owed or their monthly stipends.

Although the team owner continued to promise the overdue prize money and missed monthly payments, none were received by the gamers. After many failed promises, the Defendant ceased all communications with the Plaintiffs. Despite such, the gamers continued to perform until the end of August 2017, when the Plaintiffs terminated the November 2016 agreements.

Following a settlement in the gamers' favor, the players requested a public statement from the team owner:

Statement of Jimmy Ross Elliott, II

My involvement with Naventic, LLC, both as a Member and as an unpaid CEO, was challenging. Regardless of my efforts to assist Naventic, LLC, become a successful esports organization, desired results were not obtained. Such resulted in a negative impact on people's lives, including Christopher 'Zuna' Buechter, Ken "Kenma" Buechter, Josh 'Bkid' Choi, Sammuell 'Bigempct' Hua, and Thomas 'Tomster' Maguire. I am truly sorry. ●

Military Depictions in Video Games: Trademark Infringement or First Amendment Protection?

By Laura Saini, GWLaw 3L

Video game publishers may be able to breathe a sigh of relief when using trademarked military equipment in their video games without an agreement. AM General lost its trademark infringement claim against Activision, Inc., publisher of the popular Call of Duty games, for its depiction of trademarked military vehicles.

Call of Duty 4: Modern Warfare is a first-person shooting game, simulating realistic military storylines, weapons, and equipment. Call of Duty Modern Warfare is one of the most popular games, generating over \$1.13 billion as of 2019.

To make players feel like they are in a virtual military reality, publisher Activision featured official military High Mobility Multipurpose Wheeled Vehicles (“Humvee”) in its game without a licensing deal. AM General, the manufacture of Humvee, sued in the Southern District of NY, claiming trademark infringement because Activision features its Humvee without authorization.

The Supreme Court found in *Brown v. Entertainment Merchants Ass’n* (2011) that video games are considered a form of expression that is subject to first amendment protection. Activision used a first amendment defense when filing for summary judgment, stating that it has a right to use the Humvee because the goal of Call of Duty is to create a realistic military scene for its players. The court used a test developed in *Rogers v. Grimaldi*, a case about trademark infringement in movie titles, to weigh trademark infringement concerns against first amendment protections. The court looks to whether the trademarked use has any artistic relevance to the work, and whether the use is misleading.

The court found that the use of Humvee is related to a game that simulates warfare with a lifelikeness reality. The whole purpose of using Humvee was because the U.S. mili-



tary uses it in war efforts. For determining whether the use was misleading, the court looked at several *Polaroid* factors. The court found that there was no misleading use because both parties have different purposes in using the mark. AM General used the mark to sell Humvee, whereas Activision used the mark to replicate military warfare in its game. Although there was some consumer confusion about AM’s association with Call of Duty, the court found the likelihood of confusion was not compelling enough to outweigh the first amendment interests.

The court ruled for Activision and dismissed the suit on summary judgment. While first amendment defenses are often successful when video games are trying to depict reality, there are cases where courts have found that the use is misleading. In another military video game, *Battlefield 3*, the Northern District of California found that the use was misleading because there was a strong likelihood of confusion under the *Rogers v. Grimaldi* test.

Battlefield 3 depicts the Bell-manufactured helicopters that are used in the U.S. military. In *Electronic Arts v. Textron, Inc.*, the court found that players could believe

that Textron, the owner of the helicopters’ trademark, provided Electronic Arts with knowledge and expertise to recreate the workings of the Bell-manufactured helicopters. Textron argued that its helicopters are prominent in *Battlefield 3* because consumers factor flying the helicopters when they buy the game, and the game prominently displayed the trademarked name of the helicopters. The court agreed in summary judgment that there could be confusion as to Textron’s sponsorship of *Battlefield 3*. After Electronic Arts lost on summary judgment, both parties settled out of court.

The main difference between Humvee and Bell-manufactured Helicopters is that Humvee was incidental to Call of Duty’s depiction of warfare, whereas Bell Helicopters’ were more centerpiece in *Battlefield 3*. The implications of video game publishers frequently losing on first amendment defenses would be problematic for publishers trying to show a realistic scene. Still, video game developers will have to weigh the risks of using trademarked images in their video games without a licensing agreement because there is no guarantee a court will find a first amendment defense. ●

Litigation Festers Between Turner ‘Tfue’ Tenney and Former Employer, FaZe Across Three Venues, Two Jurisdictions

By Ellen M. Zavian, Esq.

It took a great deal of guts for Turner “Tfue” Tenney to sue his former employer, FaZe, over breach of contract and violation of the California Talent Agency Act, to name just a few of the claims asserted [see issue Q2 of esportsandthelaw.com for more details], and now all parties will need to deal with three venues and two jurisdictions; two in California (one in the Los Angeles Superior Court and the other with the California Labor Commissioner’s Office) as well as the third venue, the Southern New York District Court.

This multi-state decision was handed down by the NY Judge Jed S. Rakoff when he denied Tenney’s motion to dismiss or stay the court proceedings while he dealt with the matters in California.

While Tenney filed his actions in California, it was FaZe’s maneuver to file a countersuit in NY in order to enforce the venue and jurisdiction clause in the employment agreement which named NY as its “mandatory and exclusive forum selection”. In the decision, Judge Rakoff found Tenney’s arguments “...unpersuasive” and viewed Tenney’s actions as merely an attempt to

“...avoid a binding and enforceable forum selection clause”.

Judge Rakoff is also not wasting anytime. He ordered a pretrial conference in March and according to filed documents (dated October 31, 2019), the parties should prepare for a jury trial to begin on March 4, 2020 [the virus has delayed all matters in the New York court docket].

In the Motion to Dismiss, Tenney’s defense heavily relied upon the *Colorado River abstention doctrine* (Colorado River Water Conservation Dist. V. United States, 424 U.S. 800 (1976)). The doctrine requires the court to consider six factors: (1) whether the controversy involves a res (res???) over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less inconvenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed, and whether proceedings have advanced more in one forum than in the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff’s federal rights.

In defense, FaZe strongly argued that

the Gamer Agreement (employment agreement) contains a “mandatory and exclusive forum selection clause and choice of law clause in New York, as well as consents by both parties to personal jurisdiction in the state and federal courts of New York”.

In the end, Judge Rakoff ruled in favor of FaZe’s, denying the Motion to Dismiss, stating that it viewed Tenney’s argument was an ‘obvious attempt’ to escape the terms and conditions of his executed agreement with FaZe. Furthermore, the Court determined that only factor 3 of the *Colorado River Doctrine* really needed to be analyzed (the desire to avoid piecemeal litigation). In its review, the Court ultimately decided that the inconvenience of multiple forums did not rise to the level of an ‘exceptional’ circumstance that would justify abstention. In addition, should the California Labor Commissioner have exclusive jurisdiction over the TAA claim, then the risk of piecemeal litigation might even be lowered.

While we have not even gotten to the merits of the matter in any venue/forum, what we do know is that neither party will be walking away from this fight anytime soon. ●

Study Looks at Whether Video Game Addiction Is Real?

Continued From Page 2

and only 10 percent of adolescents showed increasing levels of pathological gaming symptoms throughout the study.

The results suggest that while about 90 percent of gamers are not playing in a way that is dysfunctional or detrimental to the individual’s life, there is still a sizable minority who are truly addicted to video games and suffer addiction symptoms over time.

These findings also go against the stereotype of gamers living in their parent’s

basement, unable to support themselves financially or get a job because of their fixation on video games. At least in their early twenties, pathological users of video games appear to be just as financially stable and forward-moving as gamers who are not addicted.

“I really do think that there are some wonderful things about video games,” Coyne said. “The important thing is to use them in healthy ways and to not get sucked into

the pathological levels.”

Journal Reference:

Sarah M. Coyne, Laura A. Stockdale, Wayne Warburton, Douglas A. Gentile, Chongming Yang, Brett M. Merrill. Pathological video game symptoms from adolescence to emerging adulthood: A 6-year longitudinal study of trajectories, predictors, and outcomes. *Developmental Psychology*, 2020; DOI: 10.1037/dev0000939 ●

Steve Jackson Games, Inc. v. inXile Entertainment, Inc. (T.T.A.B 2019)

By Stephen Sharbaugh, GWLaw 2L

Trademarks serve as effective tools of communication. In the gaming industry, many gamers are strongly drawn to certain marks because of association with previous games that they have enjoyed. inXile Entertainment (inXile) attempted to take advantage of this phenomenon in filing for registration of the mark AUTODUEL for computer games. AUTODUEL had been first used by Steven Jackson Games, Inc (SJG) in 1982 for digital publications that supplemented SJG’s table-top combat game, “Car Wars.” To inXile’s disappointment, on January 22, 2019, the Trademark Trial and Appeal Board (TTAB) denied inXile’s registration on the basis that consumers were likely to be confused about the source of their computer games.

In defending its registration, inXile argued that SJG had abandoned its registration of the mark, AUTODUEL, because it had no longer licensed the mark for use on computer games, which SJG had done previously in 1985 with Origin Systems, Inc. In rebutting that claim, SJG expressed to the TTAB that they had made continuous use of the mark in selling their AUTODUEL QUARTERLY publications (since 2005), GURPS AUTODUEL world books, and AUTODUEL AMERICA maps. The TTAB found that these products, which served as supplements to SJG’s table-top games, constituted sufficient use of the mark and thus precluding inXile from registration of that mark.

In SJG’s opposition, they believed that inXile’s use of the mark AUTODUEL would cause confusion in the marketplace. Consumers may believe that computer games created by inXile, under the AUTODUEL mark, were in fact

licensed or created by SJG, a confusion of source. In analyzing the trademark’s confusion of source, the TTAB first examined the strength of the mark and its distinctiveness. If a mark was found to be merely descriptive of the games,

also pointed out that both SJG’s games and inXile’s proposed games were vehicular combat games in a post-apocalyptic setting. Furthermore, because it is common within the industry for trademarks to be licensed from makers of video games

“In analyzing the trademark’s confusion of source, the TTAB first examined the strength of the mark and its distinctiveness.”

then SJG would have a lower threshold of trademark protection, but the TTAB concluded that the mark was suggestive, a form of inherent distinctiveness, as it was attached to a game in which cars “duel” each other.

The TTAB also examined the similarities in the marks and concluded that the marks, as used by the companies, were practically identical. inXile attempted to argue that there was a lack of similarity as SJG used the mark within combination with other words such as “quarterly” and “gurps.” Unconvincing to the TTAB, the Board expressed its view that the “focus” of the mark was still AUTODUEL. Words such as “quarterly” and “gurps” served merely as description. The TTAB further concluded that the parties used similar channels in selling the goods and sold the goods to similar consumers. The TTAB

to makers of tabletop games, and vice versa, their markets seem intertwined to consumers in the market. Additionally, SJG made a showing of confusion by demonstrating actual confusion among market consumers shown in a twitter feed. These facts all supported the notion that there was a strong likelihood that consumers would confuse the source of inXile’s AUTODUEL game with SJG and thus that the registration by inXile should be denied.

This holding serves as an important reminder to companies in the gaming industry that when deciding on a mark for a future video game, it is imperative that publishers and developers examine not only existing video games but also other related games, such as tabletop or card games to help ensure that they will be granted trademark protection. ●

Summary Judgment Granted to Game Publisher in Tattoo Copyright Case

Continued From Page 1

The court granted Take Two's motion, finding a lack of infringement based on several grounds.

First, the court held that Take Two's use of the tattoos was de minimis, precluding a finding of substantial similarity between the video game and the copyrighted work. The tattoos appeared only on the players upon whom they are actually inked—just three out of over 400 available players. Even when such players are selected in the game, the tattoos are small and indistinct, often blurred as the figures move rapidly across the virtual court. The video game renderings of the tattoos were also greatly reduced, ranging from 4.4% to 10.96% of the size of the tattoos in real life.

Second, the court found that Take Two was authorized to display the tattoos under an implied license. In doing so, the court found that (i) each of the three players with the tattoos at issue requested the creation of those tattoos; (ii) the tattoo artists accordingly created the tattoos and delivered them to the players by inking them onto their skin; and (iii) the tattooists intended the players to copy and distribute the tattoos as part of their likeness, knowing that the players were public figures likely to appear in the public in various forms of media.

Third, the court agreed that Take Two's use of the tattoo images constituted fair use. Despite the game's commercial nature, the court found that the purpose and character of Take Two's use was transformative and therefore weighed in favor of fair use. Each of the tattoos has a meaning personal to the players, and

“This decision has substantial implications for the scope of possible copyright protection for ‘identifying’ works of art as used in video games.”

was created for the players to express themselves. Take Two, by contrast, used the tattoos to identify the video game figures as the players.

Analyzing the remaining fair use factors, the court found that the tattoos were not particularly creative or expressive because they comprised predominantly common motifs and factual elements, weighing against fair use. Although the tattoos were copied in their entirety, the court found that this did not weigh against fair use because such wholesale copying was necessary “to effectuate the transformative purpose of creating a realistic game experience.” *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-cv-00724-LTS-SDA, at 21 (S.D.N.Y. filed Mar. 26, 2020). Finally, due to the transformativeness of the work, Take Two's use did not serve as a substitute for the actual tattoos. Nor did the court find evidence of a market for licensing tattoos for use in video games, let alone one that was impaired by the

game's use of the tattoos.

This decision has substantial implications for the scope of possible copyright protection for “identifying” works of art as used in video games, even beyond tattoos on athletes. Indeed, as games continue to become more realistic, and as the line between the virtual and real world blurs with the rise of augmented and virtual reality games, it is likely that more real world works of art will begin to appear in video games. The court's fair use analysis, and in particular its transformative use discussion, suggests that when such works are replicated in a game to identify a person or locality, the copyright owner may face challenges in establishing infringement. Further, the suggestion that an implied license may be found where an artist working on commission knew (or potentially should have known) that their art may be publicly reproduced could limit the scope of protection for such “public” works. ●

News Briefs

Midwest Esports Expands National Gaming Footprint with Upsurge Acquisition

Midwest Esports, a Wichita, Kansas-based leader in esports experiences for collegiate, youth, hobbyists and amateur video game players, has acquired Upsurge Esports. The acquisition supports the company's "ongoing efforts of streamlining national awareness, participation, advancement and opportunities for players, sponsors and spectators within the immersive online gaming arena."

Ramsey Jamoul, founder and CEO of Midwest Esports, added that he has appointed a new Chief Operating Officer, Benjamin Redington, to his executive team. "The position was created in response to the organization's continuing growth and expansion, with Redington now having a greater focus on overarching business operations, organization, and employee resources. Transitioning from the Chief Marketing Officer role, he will now be responsible for operations management and will identify new areas of employee services, resources and benefits."

L AFC Teams Up With Allied Esports To Produce L AFC Gaming Charity Challenge Series

The Los Angeles Football Club (L AFC) and Allied Esports, a leading esports entertainment and production company, announced today an agreement to produce the L AFC Gaming Charity Challenge Series – a 10-game FIFA20 series streamed live on twitch.tv/lafc to support Los Angeles-based charities in their fight against COVID-19.

Launched on March 29, the L AFC Gaming Charity Challenge Series has raised over \$6,500 through fan donations during two broadcasts. Fans are encouraged to continue to tune in and donate to help support the L AFC Foundation and its work with numerous charities fighting COVID-19. For more information on how to donate during the coronavirus outbreak, please visit L AFC.com/Foundation.

"Producing L AFC's online FIFA broadcasts allows us to support the team and the important push to raise money for the people on the front line of this pandemic," said Jud Hannigan, CEO of Allied Esports. "Our transition to online production and events has opened the doors to a number of new relationships, and we're thrilled to serve L AFC's loyal fanbase during a time when positive spirit and community is crucial for us all."

Northeastern Elevates Esports to Varsity Program

Northeastern University will become the first New England area

Division I institution to add Esports as a varsity program. In the first year of competition, the Huskies will add four teams in Overwatch, League of Legends, Rocket League and Hearthstone.

"We felt the timing was right to add Esports as an intercollegiate sport at Northeastern University," said Jeff Konya, director of athletics and recreation. "The interest in competitive gaming across the country is skyrocketing among teens and our Esports club teams have proven to be some of the best in the country. This addition to our athletics brand will expand our engagement opportunities and utilize an emerging market for strategic recruitment."

Konya singled out his administrators as well as Director of the Esports platform Nick Avery "for helping to bring this excellent opportunity to fruition."

Northeastern already has a successful history in esports. Its club teams captured the Rocket League national championship in 2017, placed in the top four in the Collegiate Rocket League Eastern Division in 2018, and continued to be one of the top teams in the northeast in 2019-20. The Huskies tallied a second-place finish in Hearthstone at the National Varsity Division this past spring.

"We have seen this program grow rapidly over the last few years at Northeastern and from there they have succeeded on a national level," said Avery. "We were blown away when we saw that the national championship for League of Legends had a larger viewership than the Super Bowl."

University of Utah's Top-Ranked Games Program Held Virtual Graduation in Online Videogame

The University of Utah's nationally ranked video game development program, Entertainment Arts & Engineering, held its 2020 graduation ceremony on May 1 in an online video game students created. The game, similar to a massively multiplayer online game, allowed students to log in and control a 3D avatar of themselves marching through the ceremony.

"We needed to have something special for the students because this may be the end of their academic careers, and we wanted them to leave on a high note," said University of Utah School of Computing professor Robert Kessler, who is also EAE's co-founder and executive producer of the virtual event. "And we're games people, so we said, 'Let's make a game.'"

Torque Esports, Frankly, And WinView Enter Into Business Combination Agreement

Torque Esports Corp. (TSX-V: GAME) (OTCQB: MLLLF)

See NEWS BRIEFS. Page 12

News Briefs

Continued From Page 11

(“Torque”, formerly Millennial Esports Corp.), Frankly Inc. (TSX-V: TLK) (OTCQX: FRNKF) (“Frankly”), and WinView, Inc. (“WinView”) have entered into a business combination agreement (the “Business Combination Agreement”), pursuant to which Torque will acquire each of Frankly and WinView (the “Transaction”), which will create an integrated platform dedicated to live esports, news and gaming.

The combined company, to be called Engine Media Holdings, Inc. (“ENGINE”) [Esports, News, Gaming, Interactive Network, Engagement], will be co-led by Torque Esports CEO Darren Cox and Frankly CEO Lou Schwartz. WinView Executive Chairman Tom Rogers, who also serves as Chairman of Frankly, will serve as Executive Chairman of ENGINE.

ENGINE “will be the first public entity devoted to driving new sources of revenue for sports, esports and news content, with a set of businesses covering various elements of the esports sector, gaming related to live sports events, content management and streaming services, data-driven advertising sales, and intellectual property covering mobile cash games of skill and sports gambling,” according to a press release. “The three companies bring together an established set of technologies to address the burgeoning esports and lifestyle gaming markets to capitalize on the growing competitor and spectator audiences that are engaging in skills-based competitions across a wide range of games.”

Cornell Expands Esports Program with League of Legends

Mount Vernon, Iowa-based Cornell College’s esports program is expanding into a new sport, following a successful first semester competing in Overwatch.

Head Esports Coach Mayson Sheehan held tryouts and has built a varsity team for League of Legends. The team will battle against other colleges in the Riot Scholastic Association of America (RSAA), which is organized by Riot Games—the developer of League of Legends.

While League of Legends is new to Cornell, it’s not new to Sheehan. He was ranked in the top 0.5 percent of players in America for League of Legends by the age of 21.

“It feels like a return home for me,” Sheehan said. “While I dearly love Overwatch and coaching it, League of Legends is my true love in esports. So, I am very excited to have another good run in a different title. League of Legends is a much more established collegiate sport, however. So, the competition will be much fiercer. We began competition on Jan. 26 and play every Saturday until March 1, then playoffs will start.”

With the two Cornell College esports, the varsity rosters consist of 25 students, but many more students participate in the program. The student involvement per block ranges from 50–80 students.

Sheehan is actively recruiting team members for the future of the program with the possibility of earning scholarships to play with the Cornell Esports Team.

Simplicity Esports and Gaming Company Announces Partnership with University of North Carolina Charlotte’s Niner Esports to Host Online Tournaments

Simplicity Esports and Gaming Company (OTCQB: WINR) (“Simplicity Esports”), a brand within the esports industry, as well as owner and manager of multiple esports teams, an operator of Esports Gaming Centers, and online tournaments, has announced today that it is partnering with University of North Carolina Charlotte’s Niner Esports to present multiple esports tournaments online.

Simplicity Esports is “partnering with Niner Esports to convert its previously scheduled on campus in-person flagship esports event to a series of multigame online tournaments,” said Roman Franklin, President of Simplicity Esports. “Online tournaments exemplify Simplicity Esports’ strategy of reaching and engaging with our customer base during a time of necessary social distancing.”

St. Mary’s University Launches Varsity Esports Program in San Antonio

St. Mary’s Athletics will launch an esports program this fall, Director of Athletics Robert Coleman announced earlier this year. As such, St. Mary’s will be the first university in San Antonio to sponsor a varsity Esports program.

The program will compete in the newly created Rattler Esports Arena in the heart of campus. The University is renovating space with amphitheater-style seating on the second floor of the University Center to become the team’s home.

In addition to housing the varsity Esports team, the venue will provide opportunities for students to participate in competitive gaming through the intramurals program or to convene for casual gaming.

The St. Mary’s Esports program will join two esports organizations, the National Association of Collegiate Esports and Tespa. Through these organizations, student-athletes will compete online against students from other universities and colleges of all sizes in games that could include Rocket League, League of Legends, Super Smash Brothers Ultimate and Overwatch, among others.