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**LEGAL AND BUSINESS ISSUES IN THE VIDEO
GAME INDUSTRY: RIGHTS DEALS**

**CO-SPONSORED BY LOYOLA LAW SCHOOL &
SOUTHWESTERN LAW SCHOOL**

SATURDAY, OCTOBER 21, 2006

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Ronni Coulter, Panelist^{**}

Patrick J. O'Brien, Panelist^{***}

David S. Rosenbaum, Panelist^{****}

Brian Hupp, Panelist^{*****}

MR. SOBEL: Let me do some quick introductions so you can see names. To my immediate left is Ronni Coulter, who's the Senior Vice President of Business Affairs at Sony Pictures Entertainment, working in the video game area. Then Brian Hupp who is a Director of Licensing for Electronic Arts, Inc. ("EA"). And then David Rosenbaum who has his own law firm in Woodland Hills, California. And then, last but not least, Patrick O'Brien, who's a Vice President of Business Affairs, also from Electronic Arts, Inc. The topic of our panel is Rights Deals and the way in which we're going to approach this is we're going to begin with some comments about the business decision. By the way, the Rights Deals that we're referring to are the kinds of deals that involve licenses from movie companies to game companies authorizing game companies to do games based on movies. And then the reverse: licenses that movie companies

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acquire from game companies authorizing movie companies to make movies of games. For example, games like *Halo* being licensed to movie companies for making into movies. And then, last but certainly not least, the issue of sports licenses. Licenses from players and teams and leagues running in favor of game manufacturers authorizing game manufacturers to do games based on those. So what we want to start with is the discussion of the business decision, the business decision to do a license like this or not. And then after we've just talked about the business decision, a decision that though business lawyers are sometimes brought into it for their business acumen. Also, the question of whether to do the deal as a business matter will have an influence later on if the decision is to go ahead with respect to the amount of the license fees and the other license firms that would be relevant. But we'll start with business then we'll go to the legal issues. What rights have to be acquired? And we're going to talk about that first—the panelists will—in terms of the actual underlying rights disconnected from the deals that are made. The underlying rights, what they are, from whom they need to be acquired, and then, finally, we're going to talk about the deals themselves, the actual deal points. And it's there where you'll want to have your pen nimble in order to make a couple of notes about the kinds of things that our panelists will reveal. So let us do start with the business decision and, maybe, for this I'll start all the way over with Patrick O'Brien and ask Patrick, why would a game company choose to acquire a license from a movie company authorizing the game company to make a game based on a movie? What would be the positive reason for doing it?

MR. O'BRIEN: The number one reason is just a sheer awareness. You are, in most cynical terms, buying an audience and, frankly, you can even be buying an audience regardless of whether you have a perfect 90 plus Metacritic¹ rated game, which is quite rare for a movie-based game because of the timetables you work under, but the number one reason is really awareness in audience. And by the way, I would go beyond movies. To me, it's any kind of license. So whether it's movies, we have a *Simpson's* license, we've got a *Godfather* license which was a movie, we had *James Bond* which is films, but there's also an underlying IP (intellectual property). There's *Transformers* licenses. So the reason you do any license is because of the awareness underlying it. Typically, movies spend \$30, \$40, \$50 million dollars on their U.S. marketing budgets alone,

1. See Jason Dietz, et al., About Us, Metacritic.com, <http://www.metacritic.com/about/> (last visited Feb. 11, 2007) (Metacritic compiles film, television, DVD, book, music and game reviews and assigns a weighted average score from 0 to 100, called a "Metascore," based on all the scores given by individual critics).

and when you look at a typical game company's marketing budget, which is about \$4 or \$5 million dollars, you really are buying that awareness, you're buying the launch, and then you're also buying the underlying character. I mean, we have *Harry Potter*, we have *Superman*. Those are phenomenal characters, they translate phenomenally into games, and so why wouldn't you start with, again, with a thing that's known? Another reason you might do it is—even us with our new push into trying to own as much of our own IP as we can—because you want to control that whole pie, not just your little slice you'd get in the videogame category for five or seven years. Certain genres really lend themselves to licenses. Children's games are a notable example. It's very hard to break into the kids business—unless you're Nintendo—without a licensed property. And so, as you look at your portfolio when you're trying to go really broad and make sure you're hitting different categories, some, just by nature, you want to license.

MR. SOBEL: Ronni, Dave, Brian, did he cover the waterfront or . . . ?

MR. ROSENBAUM: Well, I mean, the games business is like the music business and like the film business. It's a hits driven business and the demands at retail are such that the retailers want recognizable brands. So they're more inclined when you make your trip to Arkansas to pitch Wal-Mart they want to see what licenses you have and what recognizable brands because that's what's going to fly off the shelf quicker than an original IP. So there's a retail pressure there as well.

MS. COULTER: Right. It's the name recognition that the studio wants, the title. I mean, there's millions of kids playing these games, presumably, millions of adults I've learned today as well, and you have a built-in audience. And there are so many entertainment choices out there that the studios are desperate to get an edge on anything that has a recognizable title. I mean, you've seen recently every old television show from *Bewitched* to *Dukes of Hazzard* and you name it. They'll buy up anything that has a recognizable name. So it's the same thing with the videogames.

MR. HUPP: I agree. It's the same in the sports category and on top of everything that's been mentioned so far, you have a real strong consumer demand for authenticity. They want not only American football, but they want every player that they know, they want every team that they know. They want everything. They want all the mascots. They want . . .

MR. O'BRIEN: Stadiums.

MR. HUPP: Stadiums. And everything on down to the smallest trademark on a jersey that you would only see if you zoom in on the character. So authenticity is a real driving force and one that really complicates matters for a lot of reasons. It really drives you to increase the

number of licenses you have to do for any one particular product.

MR. SOBEL: So we'll talk about why it increases the number of licenses, particularly, in the sports field when we get down to what rights have to be acquired. But, really, what you just referred to was the reason that a game company would elect to license rights from teams and leagues rather than to do just a generic version of the game.

MR. HUPP: Exactly.

MR. SOBEL: I'm trying to remember—actually, I have sitting on my shelf one of the original—I think it's one of the original *Madden*² games. I mean, in the beginning did EA do generic sports games? A generic football or a generic baseball game?

MR. HUPP: Well, EA started pretty quickly with the leagues. There were some generic games. Certainly, if you look at the *Madden* clip, which I think is in the loop that we've been watching, there's a real evolution you see from the small pixelated characters from the past that had no defining characteristics. So no name personal rights, the publicity involved, not even team logos or numbers, and so forth, on the uniforms, to today's world where the consoles are so sophisticated and technology is so advanced these days that you can see all of that minutia and, consequentially, you have to provide it.

MR. SOBEL: I'm looking out at the audience and not everybody in the room can represent EA. If people in the room are representing three folks working out of a bedroom to do, maybe, a football or a baseball game for the iPod, it's still open to them to do a generic version.

MR. HUPP: Certainly.

MR. SOBEL: Okay. And in a couple of minutes we'll talk about what it would mean to do a generic version of a sports game. There has been some recent litigation over how similar to a team's uniform the generic game can get without needing a license, but those are legal rights. We'll get to that in a second. Ronni, what about a movie company's decision, a movie studio's decision to acquire a license from a game company, as Universal and Fox did when they acquired movie rights to the game *Halo*.³ Why would a studio elect to do that rather than just make movies based on novels, plays, or original scripts that are submitted to it?

MS. COULTER: Well, you're also buying this great world that's been

2. See generally EA Sports, *Madden NFL 07*, <http://www.easports.com/madden07/> (last visited Feb. 11, 2007) (*Madden NFL* is a videogame series named after color commentator and former NFL coach John Madden).

3. See Cesar A. Berardini, *Halo Movie Rights Acquired by Fox and Universal*, TEAMXBOX.COM, June 10, 2005, <http://news.teamxbox.com/xbox/8493/Halo-Movie-Rights-Acquired-by-Fox-and-Universal/>.

created. The game elements are often very innovative, very cutting edge and, again, have a huge audience. And when I worked at DreamWorks, Steven Spielberg was a huge game fan. I mean, they loved all of the characters. You get a great *Lara Croft*⁴ character five, six years ago—female empowerment—and you try to build on that. The problem that differentiates the games from book rights is that there's no story and that's what leads to a lot of the problems in trying to turn the games into great movies because the challenge is the script. You've got to get a good script to differentiate your material from all of the other material out there. I mean, most of the games that we buy have a science fiction [basis], but you can't just have a lot of explosions and bad guys getting killed. I mean, there has to be something to differentiate your film. For example, in *Harry Potter* and in *Lord of the Rings* you have the great characters, you have the great world, the great film elements, but you also have the great story, and that's what's missing with the games and that's what often leads to the problem.

MR. ROSENBAUM: Well, I think the challenge is not only that you don't have a story, but also, you may have too much of a story because a game has multiple outcomes. And, therefore, how do you turn a great game experience that has multiple outcomes every time you play from an interactive experience into a linear experience with one plot line carried through? So that's a challenge as well—turning an immersible experience into a linear one.

MR. SOBEL: Brian, Patrick, are you ever in a situation, or your executives ever in a situation, where they're affirmatively trying to sell, pitch a game to a movie company and, if so, what are your pitching points? Why do you tell a movie company it should pay lots of money for a license?

MR. O'BRIEN: I love this question. The most recent thing we did was affirmatively buy back our rights from a TV company.

MR. SOBEL: But before you explain why you did that, which I guess would fall into the category of why not do these deals, what would you tell the movie company, back at the beginning, the reasons were the movie company should buy those rights? Because at some point one of your executives, actually, sold the rights. Was it a push sale or did the movie studio come to you and . . . ?

MR. O'BRIEN: They came to us.

4. See *Tomb Raider Chronicles*, <http://www.tombraiderchronicles.com/lara/info.html> (Lara Croft is the main character in the *Tomb Raider* games. Two *Tomb Raider* films, starring Angelina Jolie as Lara Croft, have been made based on the game series).

MR. SOBEL: Oh, they did.

MR. O'BRIEN: And, well, so the reasons you'd do it, instead of starting with the negative, are the awareness. I mean, I mentioned that film marketing budget that we love if we do a *Harry Potter* game or a *Superman* game. The fact that a movie is out there doing all that, the forecast for a game if you come out with the movie versus a year later is tremendously different. So if you flip that around and think of it from your perspective. It's like, I've got this great franchise, two million people are playing it, or three million people. That's a huge audience in our world but that's a fraction of a film audience when you think about how many people go to the theater, how many people buy it on DVD, etc. And then when you think about the size of those movie marketing budgets you're, like, "Wow, this could be a great way to truly go mass market with my franchise that has heretofore only been, kind of, a cultural phenomenon known by four million people." So the reason you would do it is to spread that footprint and really grow the IP. It's great to start owning your own IP. You don't have the margin erosion when you're paying out the royalties to the other party, but if you own it and don't do anything with it then you haven't really, kind of, widened the pie to where you should. So that's why you would do it.

MR. SOBEL: Brian, Dave, anything to add? Or did that cover the waterfront?

MR. ROSENBAUM: Yes.

MR. SOBEL: Well, okay. So now let's talk about the flipside which is: are there reasons not to do these kinds of deals? Meaning, reasons why game companies would elect simply to develop their own IP, their own characters, their own storylines. Why movie companies would elect to pass on games and instead rely upon their traditional, meaning pre-videogame sources of movie ideas. Ronni, you want to start with why not to do it?

MS. COULTER: Well, the biggest reason would be the cost. I mean, some of the more popular games carry incredible price tags. If you've been reading about the *Halo* game that was bought with great fanfare over a year ago by Universal and Fox—it was a huge bidding war engendered by the agents at CAA. I remember it was the summer, I guess, about a year and a half ago when they sent out a very tall guy. I remember I was standing at the front of Amblin⁵ and I saw this guy walk up in the Master Chief⁶ outfit,

5. See generally IMDB.com, Amblin Entertainment, <http://www.imdb.com/company/co0009119/> (Amblin Entertainment is a production company, founded in part by Steven Spielberg. The company logo features the silhouette of the flying bike from E.T. the Extra-Terrestrial).

6. See Chris Bryan, HaloBungie.org, http://halo.bungie.org/misc/cb_mcsuit.html.

I guess, very tall guy. I didn't know what it was. I mean, I thought maybe he was an actor in a movie on the Universal lot, but he was carrying a bag, which said, "CAA" on it full of scripts and he was delivering the scripts. The agents get very creative in trying to sell these projects. One aside, I remember a few years ago when they were selling the project *Willard*, the remake rights to the movie about the rats. The agents at Endeavor actually got a cage with a live rat in it and put the script in the cage, and sent one to each of the major studios, but it sold. The movie bombed but the script got a lot of money. Anyways, they sent the Master Chief out. There was a big bidding war and it was a very expensive deal, so expensive that two studios, Universal and Fox, combined to do the deal together and it was a first dollar gross deal to the rights holders, Microsoft and the writers. I think it was 10% of first dollar, and "first dollar" means that the participants get paid based on every dollar that goes into the studio. The studio's not allowed to deduct its production costs or its marketing costs. So a film like *Halo*, I would have to guess without knowing the particulars because I have no involvement in it, but I would have to guess the studios would have to take in a minimum of \$400 million dollars to break even on that picture because there's, probably, with Peter Jackson involved, in addition to the 10% to the rights holders, there was, probably, 25 points out which is usually the cap. I know at Sony, my studio, we won't ever pay more than 25 points out on a project. So that means if the studio takes in \$400 million dollars of gross, \$100 million off the top is to the participants.

MR. SOBEL: We'll talk about lots of deal points, but really I'm wondering whether the essential point that you're making is that one of the reasons the studios are sometimes reluctant to do game deals is because the game companies want more money even than, for example, Neil Simon's agent wants for movie rights to a Neil Simon play or John Grisham's agent wants for a movie rights to a John Grisham book. That's what the situation is?

MR. ROSENBAUM: Yeah. Of course.

MS. COULTER: It can be very expensive and then also on the other side is the fact that box office results, to be honest, haven't been that great the last few years.

MR. ROSENBAUM: Right.

MR. SOBEL: Dave, you're nodding your head as though you were somehow responsible for the disappointing box office results. What is it that you're thinking of?

MR. ROSENBAUM: No, I just think that in terms of the game companies' expectations, the gaming business started as a licensing business being the licensee and having to negotiate licenses with studios

and having to go through some of the most onerous terms in the licensing business in terms of what studios expect in return for the licenses of their properties, and here they're on the flipside of, you know, with what they think is a very lucrative franchise and the studios are not saying, "Okay, we did this deal, as on the other side of the table, we can expect the same kind of limited term licenses, absolute approvals, and all sorts of things," which just don't work from the production side. So it's an unusual dynamic.

MR. SOBEL: Brian?

MR. HUPP: On the sports side, if you decide to do games without taking a license and you decide to do generic games and you can get past the issues of not having a ready-made audience of not needing that authenticity, you might decide to either do it or do it in part by creating a game which is only partially licensed where you're depending on one main license from a league to use the trademarks, for example. So instead of doing *NBA Live* with players, actual NBA players, you're doing an *NBA Street*, which is a free forum game on courts that exist in the real world. You don't have to license. So you're paying the NBA still for the principal license and the use of the NBA name, but you're not paying out on players' rights. You can add other content. You have a lot more freedom. That's, I think, probably the other main reason to do it. But every license you do your licensor has some kind of approval rights that you have to then work into your world, and other responsibilities to your licensors and their sponsors, etc., etc.

MR. SOBEL: So all of those obligations go onto the tally sheet of, "Let's not do it," or "Reasons not to do it."

MR. HUPP: Yes. Well, there are at least things you have to think through thoroughly whenever you enter into a league license. You're also taking on a lot of other relationships that you don't control. All of the leagues have their principal sponsor lists. One company, generally, in each business category, one mobile phone provider, one shoe provider, Nike or Adidas, and so on and so forth, that then put restrictions on what you can do within the game and how much control you have over the creative development.

MR. SOBEL: I wonder, which really, after yesterday's *Daily Variety* article about *Halo*⁷ and the *L.A. Times* article this morning about *Halo*,⁸ whether any of you suppose that the discussions within a studio are now

7. Michael Fleming, 'Halo' Pic Loses Its Studios, DAILY VARIETY, <http://www.variety.com/article/VR1117952317.html?categoryid=13&cs=1&query=Halo>.

8. Lorenza Munoz & Dawn C. Chmielewski, *Game Not Over for "Halo" Movie*, L.A. TIMES, Oct. 21, 2006, at C1.

more likely to result in a decision not to bother with a game license. What I'm thinking about is that the *L.A. Times* this morning reported what the box office gross was for *Lara Croft* which was a movie that I went to see and I thought that if somebody of my generation went to see a *Lara Croft* movie everybody in America must have, and yet the box office gross, while terrific for a movie had it not been expensive to produce, was not something to get it onto *Hollywood Reporter's* year end best grosses of all time.

MS. COULTER: *Lara Croft* was \$131 million domestic. I pulled up Fox . . .

MR. SOBEL: Oh, it was that much? Oh, I thought the *L.A. Times* report was . . .

MS. COULTER: But that was the only game to ever crack the \$100 million domestic box office and there's only five that have made greater than \$50 million domestic.

MR. SOBEL: So is that kind of a statistic a very significant one within a movie studio? I mean, when movie studios are looking to hit a homerun and they see that only five games have done better than fifty million dollars box office in the United States? Does that cause executives to say, "We're not terribly interested in games as a source of material?"

MR. O'BRIEN: I think it causes them to say, "We're really cautious," and then when you look at *Halo* they would look at that sheet Ronni's got and then they're going to compare the \$145 to rumored \$185 million production cost against all that backend and against the kind of controls that a company like Microsoft or EA would want, and it's not surprising when you read this stuff that they pulled the plug. And there is a huge tension. I'm going to refer to those rights we bought back.

MR. SOBEL: So, again, why don't you explain all of that.

MR. O'BRIEN: Okay. So in the year 2000, I think, right when the *Sims*—right when we were launching it—Will Wright, who's the game designer, had some notoriety from *Sims City*, but the game was launching. We had no idea what we had on our hands and somebody in the company did a very classic, what I'll call an off-the-shelf author-type option deal for the *Sims*. And it was very little money, very little control, multi-multi-year reversion. Meaning they've got an 18-month option period for negligible money, another 18 months and then if they bought it for also, a very negligible price, they could sit on it for seven years or whatever the classic reversion period is. And we had what's called, "meaningful consultation." I like to call it "meaningful meaningless consultation." And we looked at this and the company didn't know what they wanted to do. It was a television production company but all your other rights get tied up. It's not

like, “Well, there’s the TV now I can go do the movie deal.” It’s understandable if I’m going to pour all this money into linear entertainment I don’t want all these other categories out there. But anyway, they bought it for this nominal fee and we worked with them to buy it back because they didn’t have great ideas. They didn’t really know what to do with it and our IP, which we otherwise own and could go exploit wherever we wanted, aspects of that were tied up and frozen. And it just, kind of, highlighted us. If you combined that with, kind of, this *Halo* deal, it’s quite hard for two big sophisticated companies to meet in the middle because you guys have your development timelines that you said that you talked about cracking the script especially on game related movies.

MS. COULTER: It can take years.

MR. O’BRIEN: It can take years and we’re sitting there going, “Well, we got \$100 million dollar annual franchise here. It’s not worth my time. If you need to work on it for years and that is your business model, and I understand that, why would I do it?” Because it’s fantastic if a wonderful such and such movie comes out in the year 2012 but my franchise is dead by then.

MS. COULTER: Right. The games have a short shelf life.

MR. O’BRIEN: Yeah. The game in itself has a really short shelf life, and you’re right, even the franchise often has a relatively short shelf life. So there’s this tension where ideally you’d want to be—we’re developing a lot of original IPs right now. We’d want to be in discussions with the film companies not to try to launch “day and date,”⁹ because that’s just impossible because of your budgets and stuff, but to at least have a film be moving along in the development process so that maybe it comes out between your first and second game or second and third. But the flipside, of course, is you have a very non-valuable IP at the point in which you haven’t even launched it yet into this crowded world. So you can have discussions now when you won’t get anything for the rights or you can wait until it’s really mature and you still have very little ability to control when the movie comes out. Microsoft tried to do it and it was going to be Fox and Universal spending \$200, \$300 million bucks when you combine marketing and production, and they said, “Well, you know, sorry.” So it’s tough.

MR. SOBEL: I want to move ahead into legal rights. This is a continuing legal education course. So let’s talk pure law for a while and

9. “Day and date” in the video game context refers to releasing the game on the same date as the film. *See, e.g.,* Southway Theatres, Inc. v. Georgia Theater Co., 672 F.2d 485, 490 (1982) (“‘day and date’ (that is concurrently)”).

then we'll talk about how these legal doctrines, as a separate part of the discussion, get translated into deal points. So let's see if we can break it down this way. Imagine that the folks that have come this morning to listen to us are representing a game company and the game company wants to acquire the rights to do a game based on an existing movie. What actual legal rights have to be acquired and from whom must they be acquired? Dave, you want to start off?

MR. ROSENBAUM: Well, the movie studios will license, the owner of the film or the television production will license, the rights to the game company. They'll license the rights to use the storylines, the characters, the characterizations, the visuals of the film, the name of the film and the plot lines and whatnot, where they will draw the line will be in use of film footage and use of music. Things that might trigger reuse of fees obligations under a collective bargaining . . .

MR. SOBEL: Okay. So in terms of what rights have to be acquired you're saying that the game company will not ask for permission to use . . . ?

MR. ROSENBAUM: No, they will ask for it but the studios won't give it to them unless they pony up or assume the risk of clearances and reuse fees.

MR. SOBEL: Because there are more rights that have to be acquired.

MR. ROSENBAUM: That's correct.

MR. SOBEL: All of the game rights to a movie are not captured within the copyright to the movie.

MR. ROSENBAUM: Right. Otherwise, it's one-stop-shopping. Although, an interesting dynamic occasionally—and this was true in the early stages of *Lord of the Rings*—Electronic Arts originally licensed the rights to the *Lord of the Rings* from New Line, but they only got the rights to the films themselves because the Tolkien Enterprises Company maintained the rights to the literary works and had a separate license of game rights based on the books but not based on the film.

MR. SOBEL: Okay. So if you're the game company lawyer you've got to get copyright licenses and, maybe, trademark licenses from the film company.

MR. ROSENBAUM: Correct.

MR. SOBEL: Then if the film itself was based on an underlying book it's likely you'd have to get game rights from the author of the book. And David or one of the others of you, one of my former students in the audience is a lawyer for the Screen Actors Guild. So let's be a little bit more particular in getting out to the group what the rights are of actors that

might also have to be cleared separate from clearances from the studio.

MR. ROSENBAUM: Well, the Screen Actors Guild agreement, along with the WGA (Writers Guild of America) and the DGA (Directors Guild of America) have provisions that require their members who worked on that production to be paid fees for the reuse of footage, reuse of dialogue, reuse of footage. Most, and it's been a while since I've checked this but I believe that actors who are above the day-player who get more than just the day-player rate grant merchandising rights as part of their grant of rights when they sign a deal to act in a film. Day-players have a separate clearance issue but generally speaking characters and action figures aren't made of the day-players so you're only looking at the principal cast. But the use of film footage triggers payments to any recognizable actor, any recognizable stunt. So if it's an action film and you want to use film footage that's become—the studios don't want to assume that burden.

MR. SOBEL: Okay. So any of you, suppose that the game is not going to use film footage but the animated characters within the game are going to have facial features and body builds that make them immediately recognizable as the real actors, the actual actors who portrayed those roles, then is a license necessary for the use of the actual facial features of an actual actor and from whom are those rights acquired by a game company?

MR. O'BRIEN: Well, quickly, it's absolutely necessary and with the modern day, kind of, action film or comic book film or whatever, almost invariably the merchandising rights have been pulled in by the film company because that is, you know, we're just one category of merchandise. So there's so many things they're going to do that it's, pretty much, fundamental of your deal with the actor portraying whoever. They'll get those rights. Sometimes they don't. A completely different version was we did our *Godfather* game. That movie was made in 1972. All the actor deals were done by Francis Ford Coppola's production company. Merchandise wasn't anticipated. So we went out and got rights to four or five of them including a voiceover service which is a whole different thing. And Paramount went out and got rights to, I think, 25 of them. So it was after the fact, 30 years later, dealing with the people and, in some cases, their estates and it was quite an endeavor but it worked out.

MR. SOBEL: Did I read that, not too long ago, I mean, it might be a couple of years now, that EA actually acquired rights to the likeness of Marilyn Monroe for its *Sims* game?

MR. O'BRIEN: Yes, we did. Yeah.

MR. SOBEL: And now there's a Marilyn Monroe animated character that's available to be played.

MR. O'BRIEN: Yeah. It was for one of our expansion packs called, I

think, *Sims Superstar* and she's, kind of, the iconic superstar. So we cut a deal with you and we're able to use her likeness in the game, and then some . . . there it is. And in some marketing of it, and so on.

MR. SOBEL: So actually one of the things that you just said surprised me. I understood you to say that with respect to newly made movies the likelihood is that the actors have, in their own contracts with the movie studios, conveyed to the movie studios merchandising rights broadly enough to authorize the studios to license the manufacturer of a game. When Angelina Jolie appears in her next film, the likelihood is that the studio has acquired the right to license her likeness to a game company?

MR. O'BRIEN: I don't want to use her as the particular example. The likelihood is still that they have a . . .

MR. SOBEL: I could've used Harrison Ford, but that's another generational thing.

MR. O'BRIEN: You could use Christian Bale and *Batman* as an example.

MR. SOBEL: Okay, good.

MR. O'BRIEN: Again, they're trying to re-launch a franchise and what is the point, you know, "You can't star in this unless I'm going to be able to merchandise you." So it depends on the nature of the film. They're pushing to not to hold . . . their agents for the top stars are pushing to carve back videogame rights so that we have to go directly to them, and then that changes the entire attractiveness to the package. If you don't know what you're getting when you sign up to it you're less prone to take that license.

MR. ROSENBAUM: I think the other issue is if there may be a grant of rights but it may be encumbered with all sorts of approvals provisions. So that, therefore, you have to go back to the talent and show them an animated depiction of the character and the likeness and they have at various approval levels, and that is something game companies are very sensitive to.

MR. O'BRIEN: And you might be well advised to do a fairly lucrative voiceover deal with them with the actual actor that makes him or her feel better about the very small piece of merchandising trickled down that he or she is getting from the studio on the likeness side.

MR. SOBEL: So if their clients are game companies that are doing movie-based games is it likely as a business matter that the game creators will want to include, say, the theme music from the movie? And, if so, is that another license that has to be acquired from somebody else, or the music license, this is a license to the game company to use the movie's music, does that come from the studio, too?

MR. HUPP: Sometimes it does come along with the studio license to the game if the studio feels they have sufficient rights to use that music and merchandising for the movie too, and sometimes it doesn't. Sometimes it comes with a price tag that would be an additional cost for the studio. So they'll push that back to the game company and the game company will take a separate master and synch license to the music.

MR. O'BRIEN: Or the game company will decide not to use the music.

MR. HUPP: Or decide not to use the music.

MR. O'BRIEN: Because *Bond* music is incredibly important to the *Bond* experience. *Godfather* music as well. But with *Potter*, as an example, John Williams is a huge famous composer but it was a brand new movie. So the score didn't have this intrinsic marketing value and we ended up, in that case, opting not to use it rather than have incremental royalty because it didn't have that 20 years of imprint in people's memory.

MR. SOBEL: And there was an incremental royalty or would've been for the *Potter* movie because you would've gotten a license from the publisher, John Williams's publisher, or was that license, in fact, available from . . . ?

MR. O'BRIEN: To be honest, I can't remember if it was built-in with an increment or whatever, but we just didn't see the value of it because it was new.

MR. SOBEL: Okay. Ronni, were you going to add something about rights that have to be acquired?

MS. COULTER: Well, the studios view this as a marketing tool, for the most part, so I would think that they would want the games to include their art, their title, their look, their music to the extent possible because I don't think the studios expect to make . . . well, on some games they don't expect to make that much money, but it's a great marketing tool to have that out there at the time their movie's released especially if it's a franchise.

MR. O'BRIEN: Yeah. Which comes back to some of our deals have these day and date requirements which are very tough because a film is not truly green lit until a certain point in time, and then your game you can sometimes have a hard requirement that you come out within this four week window, and it's very hard to meet that.

MS. COULTER: Yeah. You need that long lead time.

MR. O'BRIEN: But you're right. This very much helps the movie company market the film. So sometimes you'll have a marketing commitment in there, etc.

MS. COULTER: Right.

MR. SOBEL: Okay. Let's take a minute to talk about the flipside. I actually want to save some time to talk about sports rights because, as a sports fan, those are actually very interesting and in some ways most complicated. But before we do sports, let's flip it around and, maybe, I'll start with Ronni. Now, I want you to imagine that their clients are movie producers and they are going to make a movie based on a game. Is it simply a matter of going to the game publisher and getting movie rights or are there more licenses, too?

MS. COULTER: Well, we'd need to know that we're getting all audio/visual rights exclusively and in perpetuity we'd have to do a very careful chain of title review and there would be a few issues that would be important, and the first would be the contracting party, and we'd need to know that we're getting all of the rights from the right people. There is often more than one individual or entity involved in creating a game.

MR. SOBEL: So it might be multiple rights. And these would all be copyright rights, wouldn't they?

MS. COULTER: Yeah. We'd have to make sure we get a 100% of the pie as it were.

MR. SOBEL: So how does it happen that a game company doesn't wind up being the central repository of 100% of the copyrights in the game so that it's just a single license?

MS. COULTER: It generally would be, but there can be situations where companies have split off—entities have split off and you just have to be careful just like you have to see who all the attachments are in each game. A lot of times there are producers, directors, writers that the game companies have talked to, and even if they haven't entered into formal written agreements, promises have been made or, more likely, they've gotten an idea about a great storyline for their game that they come to us and they say, "This is a great science fiction game and this is what you can do with it," and everybody loves it and it turns out that some assistant at the company came up with the idea. We have to make sure that we have the rights to that assistant's take if that's what happened, and you have to make sure you get all the clearances taken care of if it's based on some obscure Japanese comic book, which they never tell us about, but that will certainly come out later. So that's another issue. And then encumbrances, you know prior uses. Were the games ever exploited elsewhere in a Saturday morning TV series or in comic books?

MR. SOBEL: And does that raise a legal rights issue or just a business concern?

MS. COULTER: It may be more of a business concern because if the merchandising rights are already all gone, we may not want that franchise.

MR. HUPP: Suddenly you find your scope of the license suddenly narrowing and pieces of the pie disappearing that you're counting on.

MS. COULTER: That's exactly right. Because you can do picture-based merchandising versus game-based merchandising. I mean, it gets a little complicated but it's done all the time. You just have to be clear on what rights are available to you.

MR. SOBEL: Another question. I've noticed that some of the most recent videogames have begun to advertise that they include original music and recordings made originally for the game. So what has been your experience, any of you, with respect to who turns out to be the owner of the copyrights to the music and the recordings in a game? Is it the game company, so the license from the game company includes music or now are the music game deals being made such that the music copyrights stay with the composers and the recording artists so that a movie company has to go separately to composers and recording artists?

MR. O'BRIEN: When we hire composers we own the score. It's an identical type of a contract for a film composer.

MR. SOBEL: Okay, so now let me go to Brian with respect to sports. What I'm imagining now is two different kinds of sports games. One may be easier in terms of the number of rights than the other, but I'm imagining, for example, a golf sports game. So that what we're talking about is not a team athlete, not a league athlete, but an individual athlete. And then, if you would, talk separately about the number of rights, the kinds and number of rights that have to be acquired by a game company like EA, when what the game company is doing is a game based on a league, a team in a league sport.

MR. HUPP: Okay. Well, certainly the sport will dictate how complicated your licensing arrangements will be. For golf, for example, we do *Tiger Woods PGA Tour Golf*. So right there, in the name of the game you'll have two principal licensors that you'll have relationships with, Tiger Woods and then PGA Tour. So from Tiger we're getting principally name and likeness rights, and then a host of publicity services, voiceover services, and so forth. From PGA Tour we're getting the PGA Tour trademarks, we're getting a host of courses that we can use within our games.

MR. SOBEL: Who do you get rights to the golf courses from?

MR. HUPP: Well, some come through PGA Tour which controls a certain number of courses. Other courses we go out and license individually.

MR. SOBEL: Right from the owner of the golf course?

MR. HUPP: Right from the owner of the golf course.

MR. SOBEL: What exactly is the right that you're licensing from the golf course? It's not a copyright. Do golf courses have a right of publicity?

MR. HUPP: It's really a trademark right that you're licensing from them.

MR. SOBEL: So you can use the name of the course?

MR. HUPP: There are also certain design rights that you're getting. The design of the course is actually protectable. So you've got the layout.

MR. SOBEL: Look at all the wrinkled foreheads. The design of the course is protectable by what legal doctrine? Actually I'm not hiding the ball. This is a serious legal question.

MR. HUPP: So the design rights that attach to courses come from the creators of those. So that you've got certain layouts that you're using, you've got reference materials that you're gathering from the courses themselves. So you've got a lot of materials you're using for reference purposes, essentially, for your artists. That's what I'm referring to there.

MR. SOBEL: On the team and league side, which is easier or worse?

MR. HUPP: On the team and league side it's just as complicated but depending on the sport. For a *Madden Football*, for example, you've got the NFL, your main league. You've got a Players' Association. So from the main league you're getting your trademark rights, your team uniforms, your team logos. Sometimes stadia and arenas. And then from the Players' Association you're getting collective use rights across the board, generally, to use all players' names and likenesses with whom that Players' Association has entered into a collective use agreement. Then you need to go out and license separate rights to whoever is going to be your cover athlete and, perhaps, provide publicity services for you on the side. You've got separate stadia, arenas, other sponsor trademarks that you've got to go out and license. You've got referees, you've got mascots, you've got the Nikes and the Adidas marks which may appear in the game. So it's sponsor rights to the extent that you don't get them through the leagues. You've got compellations of statistics that you've got to license.

MR. SOBEL: Who do you get those rights from, the statistics rights?

MR. HUPP: It depends. Sometimes they flow through the leagues and sometimes they flow through an entity like Stats, Inc.¹⁰, which makes a business out of building those compilations and licensing. Obviously, individual statistics aren't protectable, so if you want to go out and gather your own, you can do that, but that takes a lot of time and manpower, what

10. Stats, Inc., <http://biz.stats.com/history.asp> (last visited Mar. 4, 2007).

you're saving by licensing the already done compilation. You've got footage, you've got other content, photographs, whatnot, that you've got to be licensing. You've got all the music, and so on and so forth. The rights issues for a game like *Madden* are actually a lot more straightforward because you've got a clear authority in the NFL, the NFL Players, Inc., that control the majority of those rights and exert pressures within their own worlds to round those rights up and so you can get most them in one or two, stop shopping kind of deals. With games like *FIFA*,¹¹ for example, [things are] much, much more complicated because you get out . . . a lot of your licensing has to happen in Europe with European entities to begin with. You've got all kinds of complications in publicity rights issues. Probably, your most contentious area are, certainly, players, names and likenesses, and so you end up in situations where you're licensed from a FIFPro,¹² for example, as well as from FIFA, the main authority. FIFPro purports to have rights to players' names and likenesses for most of the European teams.

MR. SOBEL: But it's a private licensing organization.

MR. HUPP: It's a private licensing organization.

MR. SOBEL: It's not European soccer or Players Association.

MR. HUPP: It's not. And you'll find that over in Europe you have a number of authorities who claim to have the rights to names and likenesses to give to you but, for example, Konami¹³ went out and did a deal with FIFPro to use players' names and likeness rights but then used German player rights from the German national team which the Bundesliga, the German soccer league, claims to control entirely. So now there's a suit going on between the two of them. And you end up with all kinds of complications on the question of venue and forum shopping when you're dealing with players' rights as well. Another good example is a David Beckham, who is a U.K. citizen playing now for Real Madrid in Spain.¹⁴ There are no personal rights of publicity under U.K. law but there are under Spanish law, German law, and French law, for example. So what are you licensing when you're getting name and likeness rights from either one of

11. See generally EA Sports, <http://www.easports2006fifaworldcup.com/> (last visited Mar. 4, 2007); see also FIFA, <http://www.fifa.com/en/history/history/0,1283,4,00.html> (The Federation Internationale de Football Association (FIFA) is the largest "soccer" organization in the world).

12. FIFPro, <http://www.fifpro.org/> ("FIFPro is the worldwide representative organization for all professional [soccer] players").

13. Konami, <http://www.konami-digital-entertainment.com/> (last visited Mar. 4, 2007) (Konami is a developer, publisher and manufacturer of video games).

14. At the time of the symposium, David Beckham was playing for Real Madrid, but he has now signed a deal to play for the Los Angeles Galaxy of Major League Soccer in the United States. See MSNBC, <http://www.msnbc.msn.com/id/16453485/> (last visited Mar. 4, 2007).

the leagues or directly from a player when the underlying law doesn't provide for this? Interesting question.

MR. SOBEL: They're promising not to sue you in those countries where the underlying rights aren't recognized. It sounds like it's a lot of separate contracts.

MR. HUPP: It is. For our *NASCAR* game, for example, we've got about 250 to 300 individual licenses.

MR. SOBEL: For the one *NASCAR* game?

MR. HUPP: For one *NASCAR* game.

MR. SOBEL: Because there is no players association for *NASCAR* drivers so you had to go to each of the drivers individually?

MR. HUPP: There were 35 drivers in the Nextel Series.¹⁵ There are about the same number in the Busch Series,¹⁶ and so on and so forth. Then you've got all the tracks and sponsors as well as the main authority.

MR. SOBEL: And we have case authority.

MR. HUPP: And the car manufacturers, to a large extent, you're not getting those through the drivers. Although we pushed to get driver team, car, and sponsor rights through individual deals, obviously, but [it is] not always possible.

MR. SOBEL: So we have case authority, I think, here in the Ninth Circuit for the proposition that if you don't use . . . even if you don't use a driver's facial likeness but do feature the kind of car the driver drives with the number the driver typically uses, the number and the car will be sufficient by itself to identify the driver and the driver's right of publicity has to be licensed.¹⁷ For those of you that might wind up representing game makers that don't use player likenesses but you do use player names and performance stats, your client would be, for example, a fantasy sports league. There's very recent case authority, maybe, just a few weeks ago, a month ago, for the proposition that the use simply of a player's name and performance statistics where those statistics are gathered independently by the game publisher, not acquired in bulk from somebody whose business it is to sell them, does not constitute a violation of the athlete's rights of publicity and even if it did under the state law of some state that had a very broad right of publicity, that right of publicity law would be unconstitutional of First Amendment infringement of the game maker's

15. See generally *NASCAR.com*, <http://www.nascar.com/series/cup/> (last visited Mar. 4, 2007) (The Nextel Cup Series is NASCAR's top tier stock car racing series).

16. See generally *NASCAR.com*, <http://www.nascar.com/series/bg/> (last visited Mar. 4, 2007) (The Busch Series is NASCAR's second tier stock car racing series).

17. See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974).

rights.¹⁸ I called it the fantasy baseball game. It's something like CWC or CBC versus Major League Baseball. A recent federal district court opinion and that'll, probably, be going up on appeal but it's a very, very interesting opinion limited on its face to those kinds of games that do not use the likeness of the players and don't, in fact, even use the players' names in the marketing of the game. The marketing of the game was then under the title of *Fantasy Baseball*, and it was just baseball players' actual names and likenesses.

MR. ROSENBAUM: I think over time it was the Players Associations of the leagues that got very aggressive with game publishers who were not—in the early days of the game business—not all that sophisticated and they wouldn't get players' names but they'd have the team. They'd either use the cities where teams were located and they'd use the actual jersey numbers of the players and therefore if you're playing a San Francisco team without using the name 49ers but your wide receiver is number 80,¹⁹ the Players' Association and the NFL started that trend of saying, "You're violating our players' rights of publicity."

MR. SOBEL: Right. Exactly. And, David, the case to which you allude is a currently pending case. In other words, there have been since the beginning of games, game companies that have done what I'll call and have been calling "generic games" not identifying by name any particular teams or leagues, and this latest, newly-filed lawsuit is one in which the game company did consider itself to be a generic football game publishing company identifying teams only by city, the San Francisco team, the Los Angeles team, but then have these players whose facial features did not represent any actual player but the players' uniforms were, in fact, the color of the uniforms of either professional or college teams from that city. So the case that's pending is a trademark lawsuit in which the plaintiffs allege that this is another in a not-very-long line of cases that have held, but under certain circumstances a mere color can be a trademark of the company that uses the color and that is what the claim is here in this case. Yes?

AUDIENCE: Along those lines, NCAA college sports games specifically don't use the names of the players or their likenesses, but they do use the colors of the uniforms of the school and they do usually have the correct number for each player, and I wanted to know what the difficulties are in acquiring rights to the players' names and likenesses.

18. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball*, 443 F. Supp. 2d 1077, 1100 (E.D. Mn. 2006).

19. See generally, Geocities.com, <http://geocities.com/ricecollector80/bio.html> (last visited Mar. 4, 2007) (Jerry Rice wore number 80 on the San Francisco 49ers from 1985 to 2000 and is considered by many to be the best wide receiver to ever play in the NFL).

MR. SOBEL: Well, the NCAA doesn't allow it because that would turn the athletes into professionals. So that's why, for example, Reggie Bush²⁰ didn't show up on the NCAA videogame until after he had graduated or finished his collegiate eligibility at USC and was actually a pro. The first use of Reggie Bush's name and likeness in a videogame in a way that featured him was actually a use in which Reggie Bush, already a professional, was featured in an NCAA game, *NCAA 2007*, which is really based on the 2006 season.

AUDIENCE: So that's usually the case with the athlete on the cover, but in the game itself they're using the current players' numbers and we were saying that the use of the team colors and the specific numbers of current players is sufficient by itself to implicate the right of publicity. Does that create a problem?

MR. SOBEL: You have to understand the issue. The issue is that the individual college athletes can't be paid even if the game companies were willing to because as NCAA athletes they are not allowed to accept compensation for the exploitation of their athletic abilities. Nevertheless, the game companies have acquired a license, I'll say, from the NCAA and the colleges. There's actually a licensing organization that now represents most, if not all of the colleges and their athletic departments, but the game maker has acquired a license from the colleges and is now using, not random numbers on the players in the game, but the actual numbers of players who play for those licensed teams, and you're wondering whether that violates an athlete's right of publicity. The difficulty is, is that by asserting a violation of his right of publicity the player would be violating an NCAA rule that said that he can't, or if it's a woman's sport she can't, exploit for her own benefit, his own financial benefit, athletic prowess while still an NCAA player.

AUDIENCE: What if an athlete were to wait to assert the right? Like, if they're a senior and they wait until their college career is over, but their likeness is still being used in the game?

MR. SOBEL: What I would recommend is that as each college athlete joins the team through the agreement that's signed, including a waiver of liability for injuries that inevitably will occur to a certain number of team members. There is a paragraph in which the athlete acknowledges that the number and design of the uniform is the property of the college, not the athlete, and in which the athlete promises to assert no proprietary interests in the number so that when the college then issues a license to game

20. See <http://www.neworleanssaints.com/playerbio.cfm?playerid=363> (Reggie Bush is now a professional football player on the New Orleans Saints).

manufacturers authoring game manufacturers to use the design of the uniform and particular numbers, the player has signed away whatever rights the player otherwise might have had. But I actually haven't—I regret to tell you I never was asked to sign a college athlete deal. So I don't know what used to be in them and I haven't seen one, so I don't know what's in them now. Well, now we want to talk about deal points. Now, those are the underlying rights. Should we break it down by type of deal? So let's start with deal points in a movie company's license to a game company. This is a game that's going to be made by a game company based on an existing movie. What are the major deal points? Ronni, do you want to talk from the studio's point of view? What would you want from the game company in the deal points?

MS. COULTER: Well, I am more involved in buying.

MR. SOBEL: So, David, you're a seller?

MR. ROSENBAUM: Sure. Well, the format of a license from a studio to a game company tracks similarly to other sorts of merchandise, shirts, apparel, toys, and whatnot. So you've got advances against guarantees and negotiated royalty rate. From the studio's point of view, they want to make the licenses as narrow as possible so they're going to limit the license by platform. So a company such as Electronic Arts, which manufacturers games across all spectrums of the gaming business, will want all gaming platforms, console rights, handheld rights, wireless mobile rights, online gaming, and so forth. And the studios will try and limit that if their licensee is not a publisher that's, for instance, in the mobile business. They'll say, "Okay, we won't give you wireless rights." They'll be marketing dates and commitments so that you'll have to have at least a first game out by a certain date or the contract would provide that the publisher could lose its rights if it fails to meet its marketing obligations.

MR. SOBEL: I'm guessing that the computer game people are going to say that's brutal. If the rights explode on a certain date. If the game isn't finished.

MR. ROSENBAUM: Right. And there are, as I said, so you've got your advance and your guarantee, and your royalty rate, and platform restrictions. Then there are approvals, control over the game-play itself. The studio will want to approve the game concept. They'll want to approve game-play and game-play mechanics as the game is going along. They'll want to approve the final version of the game. They'll want approval over all packaging and advertising, anything that uses the film's trademarks, images, and whatnot, some of which is a function of the obligations they have to actors. If the actor has approvals rights then they want to make sure they comply with those obligations, and the publisher

will want assurances and will want to rely on the fact that the studios have gotten approvals of cast members and whatnot.

MR. SOBEL: And so, Ronni, now as a buyer, what are the deal points that you're looking for or which of the deal points that David has mentioned do you find just too stiff to swallow?

MS. COULTER: Well, when we're buying the rights to a game we would want to get as much time as we can to develop it. So we try to do these games as option deals where we get a 12 to 18-month option with an option extension for another 12 to 18 months, which already we're fighting because the game companies want the movies out right away, but that's how most of the deals are structured. It's generally a small option price and \$50,000 is a general number you'll see against a purchase price of, maybe, a half million dollars, more or less, depending on the leverage of the game maker, but in general it's in that area with, perhaps, bonuses and then a backend that's not a real strong backend generally. You don't see first dollar gross deals unless you are dealing with a *Halo* or something of that nature, but that's more rare. The big issues are the approval and the progress to production and reversion issues. On the approval, we understand that the game makers treat these games as their babies. They've created the characters and they want to make sure that the story unfolds in a way that's true to the characters they've created. But, generally, in the film business we're dealing with directors and producers who feel that they want all of the approval. At the end of the day they're going to have the say on how the script is written and how the characters are portrayed. So there's a built-in conflict that takes a while to overcome and, generally, the gamers have to be comfortable with the producers and the directors that we're working with. If they're not comfortable with the studio they shouldn't make the deal. They have to feel they share the same vision of where the game is going. They try to build in progress to production provisions where certain things have to happen within certain periods of time. You have to have a script written within this period of time. You then have to get a budget done. You're going to have to get a director attached. You have to get your locations to keep the project moving forward and if there's any long period of non-activity the rights would revert. We, of course, try to object to that and maybe we build in some very general non-activity provision where if nothing's happened within a year you can have the rights back or if the movie doesn't get made within seven years the rights revert.

MR. SOBEL: So let me do this. That's some of the points, game to movie and we can come back to that, especially if you have questions that you'd like to ask. Patrick, more to add from the game company's point of

view on game to movie?

MR. O'BRIEN: A little bit on both of those. So, I mean, another key term for the movie company licensing rights into somebody like J.K. Rowling,²¹ we want to participate. If they've got a franchise that's going to go on forever because there's seven books . . .

MR. SOBEL: So you're talking now movie to game?

MR. O'BRIEN: Yes. So the term is a fundamental issue. You want to participate in success. Most of the game companies, in particular EA and Activision, we're only about building franchises. We're not about one-offs. So you want it very, very long-term and the film company will resist that, but they'll often understand that if you're successful in putting out the games, you should remain their partner. Exclusivity, you mentioned *Lord of the Rings*. You don't want a situation where there's two competing games out there.²² It's one thing to have competing sports games, it's another thing to have two different *Harry Potter* games by two completely unrelated entities on the shelves.

MR. SOBEL: But you can say that because your company makes games for all platforms. If your company . . .

MR. O'BRIEN: Well, I mean just general exclusivity so that there's not . . . you don't want our Xbox game and somebody else's Xbox game.

MR. SOBEL: What would you say to any of those in the audience whose clients do games just for the PC or, coming up, just for the iPod? Would you tell them, "Don't take a license from a movie company if your rights are going to be limited just to the platform for which your company is developing now?"

MR. O'BRIEN: No. I'd tell me them to take one if that's their sole focus. [Those are] the only rights they're going to want to pay for or they can't recoup. But to your point that they've typically tried to hold on to mobile rights or hold on to MMO²³ or online rights, they have and it's somewhat justified. If we don't really have a mobile strategy or a solid mobile business, it's completely understandable that someone says, "I can't understand why I should give you the mobile rights." So in some deals—we're now, with the acquisition of Jamdat,²⁴ kind of . . . not only can we

21. J.K. Rowling—Biography, <http://www.jkrowling.com/textonly/en/biography.cfm>. (J.K. Rowling is the author of the Harry Potter book series).

22. John Gaudiosi, *Best of Both Worlds for EA's 'Rings'*, THE HOLLYWOOD REPORTER, Nov. 11, 2005 (Competing Lord of the Rings games were released by EA and Vivendi Universal during the time period in which the three films were released).

23. MMOGlossary.com, <http://www.mmoglossary.com/term/267,1,xhtml> (last visited Feb. 11, 2007) (MMO refers to Massively-Multiplayer Online games).

24. See, e.g., Olga Kharif, *Wireless Gaming is Getting Serious*, BUSINESSWEEK ONLINE,

very readily obtain mobile rights because of our position, but a lot of our licenses, where they've been frozen or where they hadn't granted it to us, we're now in a strong position. We're actually negotiating a number of our licenses to acquire mobile. And then one other point I would just make is that the relationship is really, really important and that's not a contractual term but with, literally, thousands of approvals on all of this stuff on the games, etc., you've got to develop a good relationship with your partners at the film company or at the sports league or whatever because, let's face it, with thousands of approvals you can't always be looking back to the ten-day approval timeline, failure to approve is deemed an approval. I mean, you just got to get in there, have people you can work with who will do you a favor, who will forgive a little of this or that. You'll forgive a little something on their end and that's really the only way to get these games made in time is to have a strong relationship.

MR. SOBEL: David, anything to add on movies and games in either direction? Then I'm going to go to Brian on sports.

MR. ROSENBAUM: I would just say there's a couple of things that are, kind of, stress points—at least for publishers. The licenses from studios often have restrictions on the definition of what the royalty is defined as a function of net sales, studios will put limits or caps on discounts and allowances that publishers will have to give to retailers in order to get the games into the stores. There's a game concept called "price protection" which is agreeing to price reductions in lieu of returns because games, in theory, are fully returnable, and that is often a tension between the publishers and the studios who don't want their royalty diluted by virtue of deals that publishers have to make to keep games in retail as opposed to taking returns.

MR. O'BRIEN: Yeah. I'd love to add something to that. When you look at the distinction between a game to movie or movie to game, our definition is called "net sales" and if you heard that in the context of a film deal you'd say, "Oh great, this is an illusory backend." But net sales are actually, for the most part, true gross revenue. The game companies pay, essentially, on gross revenue received. Price protection is, "Well, I had to give back some of your money in order to . . ."

MR. SOBEL: It's not even net of the \$7 you pay to the console manufacturers? Not to studios.

MR. O'BRIEN: It would vary, but not to the studios. Right. The \$7

or \$8 dollars paid to the console companies, production costs, nothing. So it's almost . . . when we are doing deals, we have to really explain to people what net sales means. That it's incredibly, frankly, an incredibly attractive definition. It's really on gross. Then you're trying to do a flipside deal to take your highly-valued IP to a film company, and what I'm finding on something I'm working on is, even if you're in that rarified air of distributor's gross, distributor's gross is not nearly as good a definition as the videogame company's net sales because they try to only drop in, say, 20% of home video revenue into this gross pot. So it's a whole wild and wooly world that we're learning as we try to understand the . . .

MR. ROSENBAUM: The game publishers finances don't take fees. There's no distribution fee system built-in to game publishing deals.

MR. SOBEL: Okay. Brian, what are the major deal points in a sports-to-game company deal?

MR. HUPP: Well, a lot of them are the same. You have to approach it looking at the scope of your license. Are you getting it for one game title only? Are you getting a license for multiple years and multiple products, or multiple products within the same year? You look at the scope of the platform rights, obviously, as noted, as a game company you want as many as possible and, certainly, everything that you're planning on exploiting. You've also got to get pretty substantial marketing and promotion use rights included in your license. You have to set up, and this also goes to the complications of net sales definitions and the royalty calculations rights to do additional premium content which would be distributed through an Xbox Live,²⁵ extra levels to a game, additional, you know, three more arenas, so on and so forth. You have, sort of, online revenue that will have a different model that you have to build in a way to calculate, you've got merchandising from the game and "OEM licenses" granting licenses out to use the game in bundles with hardware and software. So lots of different kinds of revenue streams that all have to be accounted for and for which you have to get the rights upfront. Obviously, distribution channels are important, as we heard earlier for PC games. In particular, right now, that's probably more and more so for console games. Digitally distributing games is getting a lot of attention right now, transmitting games either over the Internet as downloads or through-the-game consoles. And so distribution rights, distribution channels, obviously, again, as a game company as broad as possible. And then the same issues with exclusivity,

25. Xbox Live, <http://www.xbox.com/en-US/live/gold/goodasgold.htm> (last visited Mar. 4, 2007) (Xbox Live is a service provided by Microsoft for its Xbox consoles which allows players to play the console games against other players online).

exclusive, non-exclusive licenses have gotten a lot of attention of late. The term of your license is certainly tied to the scope of it. You not only need the exploitation period to develop your game but you have to remember the backend and the shelf life of a game or the IPs that are wrapped up in that game is getting longer and longer and longer. In the time when I came to EA seven years ago we were more concerned about getting a couple of years of rights to cover the immediate exploitation of the game. Now, you have to look at reuse issues where you've got older games being republished or PSP for handhelds, so on and so forth. So we want to try to anticipate that.

MR. SOBEL: Tell me how you handle that. For example, with iPod games, it occurred to me that there could be no such thing as an iPod game as recently as a year ago because there was no video iPod. And so the game companies, if they can get it now, insert a clause in their acquisition of rights agreement that says, "We have the right to do a game on all platforms now known or hereafter invented?"

MR. HUPP: Yeah, exactly. That's exactly the breadth of language you at least start with and then you, obviously, negotiate from there.

MR. O'BRIEN: It depends on what you're getting. If it's a license, again, when there was no mobile . . . a strong licensor will not give you that, I don't think, because you still have to develop specifically for that as opposed to the film model where, for example, if I made *Gone with the Wind* and now I want to exploit it on DVD or on whatever 90 years later. It still was the same movie. We're starting over developing again, so they'll say no. If you're doing something like . . .

MR. SOBEL: Is it because you're developing all over for different platforms because the technology has to be different or because even the techniques of game play have to change?

MR. O'BRIEN: Both. But whereas if you were, say, acquiring like book rights or something, if we were doing that then the language you would see, the "All media now known hereafter devised . . ." would be identical to what a film company's getting. If I'm going to go make this game based on this book, I will make it for whatever I want whenever I want. And that is where you come back to, well, that was an author, an individual, who at some point is relinquishing his rights as opposed to a big company that really needs to maximize the revenue streams.

MR. SOBEL: Well, we have ten minutes left and I don't want to burn it all up myself if you have questions. So why don't we take questions from the audience for a while on any of these issues.

AUDIENCE: This is, I guess, mostly directed to Patrick. For the most part, most day and date release schemes have been terrible either because

the license . . . a store had to pay too much money to the movie companies and so they had no money left to perfect the game or there was not enough time left to do so, or in the case of the LucasArts²⁶ games, whenever we tied it to a movie they were just bad games. Probably just more of a time constraint. It can actually affect . . . I would think it would affect publisher's reputation in the marketplace. I mean, there's Activision,²⁷ which has come out with one bad licensed game after another. Why would you continue to do it just to get on the Wal-Mart shelves?

MR. O'BRIEN: Well, agreeing to day and date works for us because of that massive marketing spending that the film company's doing. I mean, the short answer is you do it to make a lot of money. I think one reason the games aren't that great has been, mainly, the timing. Trying to get out day and date can just be very hard to do. Our *Superman* game that we're doing with Warner Brothers, we did have to delay it. We missed the launch of the movie. It's very unfortunate. We'll make less money, but we're going to have a much better game, and the issue was we were dealing with flying in an open world environment and sometimes when you add up all the variables you go, "Golly, flying in an open world environment and meeting a day and date is going to be very hard." So now we work with them, we're going to be with the DVD it's not as an ideal window because you just don't have that buzz out there. Frankly, the same thing happened with *Godfather*. There was no day and date movie but we were shooting for a certain holiday time period. It was our first truly open world grand theft auto type game. We bit off a lot to chew on. Those are very, very difficult games to make. But you say to yourself, "We've got a partner here and we're trying to build a franchise over many years." And you can be more opportunistic with a film. To come out with a 62 rated *Godfather* game at Christmas, we were not going to build a *Godfather* franchise. It was in our interest and Paramount's interest to wait until March. We ended up with an 81 rated game, which is incredibly good for a movie license and now we're building franchises.

MR. O'BRIEN: The games business just gets very obsessive about the ratings of the game. There are Metacritic.com aggregate ratings²⁸ for games, for movies, for TV shows. When you talk to people in the film and

26. See Lucas Arts, <http://www.lucasarts.com/about/> (last visited Mar. 4, 2007) (LucasArts is a publishing and development company founded by George Lucas and has released many *Star Wars* games).

27. Activision, http://www.activision.com/en_US/corporate/home.jsp (last visited Mar. 4, 2007) (Activision is a major videogame publishing company).

28. See Jason Dietz, et al., About Us, Metacritic.com, <http://www.metacritic.com/about/> (last visited Feb. 11, 2007).

TV business they go, “Meta what-ic?” But with us we really, kind of, trust that aggregated rating. It really does say a lot about the quality of the game because you’ve got very hardcore people from the game world and these gaming magazines who are reviewing the game and they’re judging it on everything from game play to audio to all these different categories.

AUDIENCE: So it’s like getting a “B” on a law school exam.

MR. O’BRIEN: Yes, it is. An 81 is a solid “B” I guess.

AUDIENCE: Tell us, what is a range of ratings that is considered good?

MR. O’BRIEN: Well, anywhere from . . . games rated in the seventies and eighties are good. If you’re into the nineties it’s just a phenomenal game, and if you’re in the forties, fifties, and sixties, back to your point, you are not looking good to the rest of the game-publisher world.

AUDIENCE: And what are the criteria that would get someone into the nineties?

MR. O’BRIEN: Originality, incredibly immersive and fun game to play, great graphics, great audio.

MR. HUPP: Feature sets. Features of games.

MR. ROSENBAUM: One of the things I would say about day and date, and some of that’s a function of the license agreement, which studios want games out by a certain day and date. It may or may not be timed with the release of the movie but the agreement will also say that the studio makes no guarantee as to how well the movie’s going to do or any obligation to continue to distribute the movie if it fails. So I’ve had publishing clients who’ve had movie licenses in the game. Because of the amount of time it takes to make, a game did not come out in time for the theatrical release of the film. The film tanked and as a result the game suffered and studios aren’t quick to run to you and say, “Oh, I’ll give you your guarantee back.”

AUDIENCE: One of the things I would like to hear the panel discuss more about is economics.

MR. SOBEL: Oh, the actual money.

MR. SOBEL: Okay. So what categories would you like to hear some numbers on? Because we could talk about a *Godfather* to a game or a *Lara Croft* to a game.

AUDIENCE: High, low, middle. What’s a guarantee? I haven’t heard anything. Brian gave me a little bit.

MR. SOBEL: You want to just pluck some, because you don’t have to identify the particular properties but it matters whether it’s an old Disney children’s book becoming a PC game or . . .

AUDIENCE: What are the royalties? What is the range?

MR. O'BRIEN: Well, I'll tell you the range and I won't tell you . . . I won't attach any particular IP to it, but royalties and advances and guarantees have been going up a lot, especially in the sports world with these exclusive licenses. The NFL is starting to do to people like us what they've been doing to broadcasters for ages. You could be up into the hundreds of millions of dollars on something like an NFL, the guarantees. In the movie world there's very, very few attractive IPs out there, frankly, to do games on. And so the most attractive ones like a *Spiderman* or a DreamWorks one, they're really starting to command these huge advances and guarantees almost to the point where, depending on what somebody's paying for them, the royalty rate becomes less important and you're, actually, you're looking at your forecasts compared against the guarantee you had to pay them, for that movie-based game, and you move into an effective royalty rate type scenario rather than the actual one because the guarantee you're never going to earn it out.

MR. O'BRIEN: We'll just start back at the beginning. So a typical deal for a good, say intellectual property rights license, would be a few million dollar advance against a royalty rate that can be anywhere from . . . I mean, they really range, and I'm talking not necessarily just about EA, but about what I've heard others have had to pay recently, anywhere from like, 7% to 15% or 16%.

MR. SOBEL: Of net sales.

MR. O'BRIEN: Yes. Of net gross sales.

MR. SOBEL: "Net sales" meaning sales less returns of product, but in the movie world it would be called "gross."

MR. O'BRIEN: It's gross. It's gross revenue.

MR. ROSENBAUM: Of the wholesale price.

MR. O'BRIEN: So and then you often have . . .

AUDIENCE: You said two different things because he said off the wholesale price and you said off of the . . .

MR. O'BRIEN: Revenue. Exactly.

MR. SOBEL: A publisher's revenue is wholesale.

MR. O'BRIEN: Well, to David's point, you can actually be in a situation where, if they've stopped you at wholesale price, so if I sold a million units at \$42 wholesale, if I'm not allowed, if the thing's not selling and I have to start dropping the price in the channel, and so on, if the studio has restricted or put caps on the deductions, I can actually be paying you on more than my own revenue. So I sold a million units at \$42 theoretically that's \$42 million, I pay you 10%. But if I've had to price protect deeply in the channel and my ultimate revenue was \$30 million dollars but the

deductions I was allowed to take were only \$5 million, I'm paying you your 10% royalty on more money than I actually ended up with. It's not pretty. That's why you don't want to bomb. But one other point on royalty rates is often they will escalate with success so that you might start at, I'm going to make this up, 8% for the first 500,000 units sold across all the titles escalating to 9% for the next 500,000 units, and it's 11% for that title, that version of the game but across the different platforms, and it's 11% for units 101 million and into the stratosphere. And the guarantee, historically, we made it a function of our forecast. You look at the royalty rate, you look at what your forecast is, and you would want to guarantee them, call it 60% of what you think you're going to sell. So if we thought we were going to do \$100 million dollars worth of revenue on a game and somebody was at a 10% royalty, ultimately, they're going to get \$10 million. You'd be comfortable guaranteeing them \$6 million dollars, 60% of your base case forecast. And, again, though, for the top, top IPs people try to dictate the guarantee and you move into this world where the guarantee is 100% of your forecast, and then if you fail or it doesn't do as well as you thought, you paid out much more than, say, a 10% royalty because the guarantee was so high.

AUDIENCE: And when you're selling your very impressive (inaudible) . . . to the movie companies . . .

MR. ROSENBAUM: Not the same.

MR. O'BRIEN: I'll let Ronni comment on that.

MS. COULTER: I heard that *Halo* was the top of the line and they were getting 10% of first dollar gross, but generally you'd be getting 5% of the studio's net profits.

MR. O'BRIEN: And even *Halo* it was 7.5% because Peter Jackson took 2½ from that 10, 7.5% but when you then move into the home video piece, my understanding is they were only having 30% or 20% of all that home video revenue drop into the distributors' gross pot. So once you multiply 7.5 times 30, you're down to them getting 2.2% of the home video pot. Our feeling is that's the business we understand. We're selling to Wal-Mart just like you are. We're selling to Target. And we're paying you for one of your properties 10% or 12%, you're paying us 2% in the best rights deal in the history of, like, the world. So it's totally different.

MS. COULTER: That's another panel. But the history of the movie business is that video is accounted for in a 20% royalty. Those with leverage get more. It would take me a long time to explain why that's the case, but it is the case. And even when you're a first dollar gross player you, generally, don't get more than 30% of video unless you're Tom Cruise who had 100%. There's very few that do.

MR. O'BRIEN: And they treated the rest of us like Tom Arnold when we tried to go do a rights deal.

MR. ROSENBAUM: If you want to get a sense of what the value of some of these film IPs are, purportedly Activision now has the rights to the Bond franchise, which, when EA's rights lapsed, and according to Published Reports,²⁹ their guarantee is upwards of \$50 million dollars.

AUDIENCE: Fifty million dollars? For what contract?

MR. ROSENBAUM: Probably for the right to do multiple titles over a five-to-eight year period. But it's going to take them two years to get their first game out, and it'll take them another year to 18 months to get each subsequent game out. So you've got a large burden then. Activision is heavily into the licensing business. They have a fairly lucrative deal with Marvel to produce *Spiderman* and various other *X-Men* titles. So the games business grew out of the licensing business and licensing content. So they're used to paying large guarantees in a limited period of time to exploit those rights.

MR. SOBEL: Is anybody but me interested . . . that's the high end, anybody but me interested in the low end? In other words, if we are talking about a game based on an illustrated children's book, a game to be played by children on the PC or on a handheld, what would the deal points be at the low end? So this is a game based on a children's book, a game to be played by children.

AUDIENCE: Other than *Harry Potter*?

MR. SOBEL: Yeah. Other than *Harry Potter*. An illustrated children's book. So that one of the things the game maker is getting is a visual representation of what the characters look like. Anybody have any experience with that?

MR. ROSENBAUM: Well, I would say that if it's a game company that's getting the rights to an unpublished children's work . . .

MR. SOBEL: No, no, not unpublished. No, it's a published children's book but, you know, the kind of books that are displayed at the UCLA book fair in the spring in the quad that's devoted to children's books.

MR. ROSENBAUM: If I'm making that deal I'm not offering a lot of money in terms of a guarantee. Maybe a few thousand dollars and I'm not . . .

MR. SOBEL: A few thousand dollars from the game company to the publisher and . . .

MR. ROSENBAUM: And a small royalty of some sort. The range of

29. See generally Ben Fritz, *Bond, Superman Games on the Move*, DAILY VARIETY, May 4, 2006.

royalties in the licensing business is anywhere from 5% to 15% of the wholesale revenue of some sort of retail revenue. But, by and large, so I'm paying low money and it's a risk that a publisher might be worth taking but if I'm in the children's market I'm more often than not knocking on the door of Nickelodeon and children's companies getting rights to television shows.

MR. SOBEL: That's true if your client is Activision or EA. What I was really thinking about were the three people that graduated from college with degrees in computer science and they're artistic, and they are potential clients out there. We saw that there are over a thousand publishers . . .

MR. ROSENBAUM: Developers.

MR. SOBEL: Developers. So not all thousand developers are looking for Nickelodeon properties because they can't afford them.

MR. ROSENBAUM: They can't compete.

MR. SOBEL: More questions?

AUDIENCE: I have a question. You touched on (inaudible) . . . licensing but how big of a deal point is asset sharing (inaudible) . . .?

MR. O'BRIEN: Big deal point and getting even bigger with the accuracy and authenticity that you can now have with NextGen³⁰ and, for example, Activision's deal with DreamWorks. As publicly stated, DreamWorks has actually set up shop for them in their animation studio and they're serious about it. It's not just hot air. And they've got them there constantly. They've got an asset pipeline so they can share assets with each other, etc. It makes the most sense in CGI-type properties. But, yeah, we always want as many assets as we can get. With *Harry Potter* we've got very close relationships with the production staff over in England, and are constantly sharing photo reference, all that stuff.

AUDIENCE: And, for Ronni, are you seeing the same thing from the studio? Do want that sharing going on or is that something that you're concerned about keeping your IP control?

MS. COULTER: Generally, the studio wants all of the rights. They're not interested in sharing.

MR. SOBEL: I think he meant if you were the studio and we were doing the game based on yours, are you interested in giving us the assets to help us with authenticity or whatever?

30. See, e.g., Nintendo, <http://nintendo.wordpress.com/2006/10/09/is-wii-next-gen-part-2/>. (The term "NextGen" refers to the next generation of upcoming videogame consoles in which games can expect "a bump in graphics, a push in processing, some new system features, a slightly modified controller, and the continuation of familiar franchises").

MS. COULTER: Yeah, because it's all about the marketing and it's about getting the brand out there. But the studios like to keep control over their assets and, especially with the marketing chiefs at the studios. There's a fear that if they put too much out there they lose control over the look of the film, over how the film is perceived in the marketplace, and that's something that they'll never allow. So they like to keep as much control as possible.

MR. SOBEL: Okay. If you'll join me in thanking our panelists. Thank you so much.