

## **NEW CASTLES WITH FAMILIAR BRICKS – BALANCING COPYRIGHTS, SPIRITUAL SUCCESSOR VIDEO GAMES, AND COMPETITION**

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*This paper reviews intellectual property and non-competition implications that arise from the recent trend within the video game industry of veteran game developers leaving their longtime publishers and creating new IP. This paper provides examples of this trend with the departures of game developers from well-known video game franchises like Mega Man, Castlevania, and Banjo-Kazooie, who go on to make so-called “spiritual successor video games” that are not explicitly sequels but have some notable similarities to their prior work. These departures are reminiscent of the departures of four high profile programmers from Atari in the 1970’s to form Activision.*

*In the Atari-Activision situation, Atari used intellectual property-based causes of action to hinder these departed programmers from competing in the software market. This paper examines the possibilities and implications if such tactics would be used against game developers today by performing copyright analyses on several of these “spiritual successor video games” in comparison to their respective predecessors. By allowing other video game companies to produce work that has some similarities allowable within copyright law but hinder a former employee from also doing so by merely threatening legal action resembles the specter of a non-compete agreement, but without its traditional limitations. The paper then goes on to discuss why abusing intellectual property law to effectively enforce a covenant not to compete when*

*one did not exist or would not be valid would weaken intellectual property rights and lead to market failures.*

*To address these potential abuses and promote fair competition in the video game industry, this paper suggests a statutory solution inspired by anti-SLAPP (Strategic Lawsuit Against Public Participation) laws. Former employees sued by their publishers for alleged intellectual property infringement may utilize a special motion to strike if the purpose of the lawsuit is to merely restrict their employment. This paper also addresses potential criticisms of this proposed statute and suggests other areas where a statute like this would be applicable.*

I.	Introduction.....	340
A.	The Developer Leaves. ....	342
B.	The Developer Creates a New Game.....	343
C.	Publisher Threatens Developer With Legal Action Over Spiritual Successor Video Game. ....	345
D.	Unfairly Preventing Competition is Harmful to Developers and the Market. ....	346
II.	The Video Game Industry, Departing Developers, and Potential Problems in Spiritual Successor Games .....	347
A.	The Trend of Well-Known Video Game Developers Departing and Creating Familiar Works.....	348
B.	Spiritual Successors .....	355
C.	Examples of What Becomes of the Created Intellectual Property Upon Developer’s Departure ....	358
D.	Developers More Free to Leave.....	361
E.	Potential Problems for Departing Developers Arising from Their Spiritual Successor Video Games	364

III. Mighty No. 9 and Mega Man – A Copyright Analysis of a Spiritual Successor Game ..... 367

- A. Gameplay Mechanics..... 372
- B. Characters ..... 375
- C. Story and Setting..... 380

IV. The Effects of Non-Competition and Restraint of Trade ..... 382

- A. General Harms of Non-Competition and Restraint of Trade..... 382
- B. Specific Harms of a Mutant Non-Compete Based on Intellectual Property Rights ..... 387
  - 1. Uncertainty as to Duration and Scope ..... 389
  - 2. Potential Damage to Reputation & Hireability.....389
  - 3. Failure to Meet Market Needs ..... 390

V. A Proposed Statutory Solution to Prevent Mutant Non-Competes in the Video Game Industry..... 391

- A. The Proposed Statute ..... 391
- B. Purpose of the Statute ..... 393
- C. Origins of the Statute ..... 393
- D. Application..... 394

VI. Criticisms to the Proposed Statutory Solution ..... 395

- A. Potential Objection #1: Disincentives to IP rights 395
- B. Potential Objection #2: The proposed legislation is too narrowly aimed at video games ..... 397

VII. CONCLUSION..... 399

“What do you do when you find yourself without a castle? You build another.”<sup>1</sup> – Koji Igarashi

## I. INTRODUCTION

In 1979, four programmers – David Crane, Alan Miller, Larry Kaplan, and Bob Whitehead – left Atari.<sup>2</sup> This departure from what was at the time the premiere video game hardware and software manufacturer had long-lasting effects on the history of the video game industry. These four programmers formed their own software company, Activision, which would make games that were playable on Atari’s hardware.<sup>3</sup> Atari, unhappy with the exodus of its former employees and presumably concerned about potential competition over software sales, spent two years engaged in a lawsuit with the upstart Activision.<sup>4</sup> According to the gaming history website Gamasutra, Atari attempted to sue Activision out of existence, with its causes of action against Activision being patent and copyright infringement<sup>5</sup>,

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<sup>1</sup> Sheridan, Connor. *Teaser Site May Hint at Ex-Castlevania producer Koji Igarashi’s next project*, GAMES RADAR, <https://www.gamesradar.com/sword-whip-igarashi-teaser/> (last visited May 4, 2018) [<https://perma.cc/2UKA-BHPY>].

<sup>2</sup> Jeffrey Fleming, *The History of Activision*, GAMASUTRA, [http://www.gamasutra.com/view/feature/1537/the\\_history\\_of\\_activision.php?print=1](http://www.gamasutra.com/view/feature/1537/the_history_of_activision.php?print=1) (last visited Aug. 9, 2017) [<https://perma.cc/PWN4-AC34>].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

rather than a breach of a covenant not to compete. Atari also voiced its displeasure outside of the court room - “Atari bought full-page magazine ads to try to paint us as criminals, when all we were doing was pursuing our chosen craft,”<sup>6</sup> David Crane said. Atari also attempted to pressure retailers into not carrying Activision software.<sup>7</sup>

Eventually, the courts threw the complaint out and Activision could continue developing games for Atari hardware, making Activision the first ever third-party software developer in video games.<sup>8</sup> Assuming that Atari was trying to “sue Activision out of existence,”<sup>9</sup> this case represents a company utilizing intellectual property-based causes of action to stifle potential competition in the video game industry, where perhaps avenues based on contract law or employment law had been exhausted. Fortunately for Crane and his colleagues, Activision had the resources to hold out<sup>10</sup> until the courts threw the complaint out and then went on to make its own proverbial “new castle”. However, not every game developer in a situation like that would have the resources to hold out for that long. It is possible that a game developer could be “sued out of existence”, no matter how serious the intellectual property-based claims may be. Even the mere threat of a lawsuit with some nebulous IP claim might be enough to dissuade competition unfairly and chill a game developer from creating new intellectual property.

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<sup>6</sup> *Id.*

<sup>7</sup> Ben Reeves, *Activisionaries: How Four Programmers Changed the Game Industry*, GAMEINFORMER, <http://www.gameinformer.com/b/features/archive/2013/02/26/activisionaries-how-four-programmers-changed-the-game-industry-forever.aspx?PostPageIndex=3> (Feb. 26, 2013) [<https://perma.cc/8JV7-TDEG>].

<sup>8</sup> Fleming, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

Crane and his colleagues, in building their own proverbial new castle, changed the video game industry by becoming the first ever third-party game developer. Up to this point in the video game industry, hardware makers tended to also make the accompanying software. Today, Activision is known as the software giant Activision-Blizzard, and many third-party software makers exist, now far outnumbering hardware makers. But in this era of video games, could something similar to the Atari-Activision situation happen now?

### A. *The Developer Leaves.*

Imagine a modern-day scenario where Hideo Kojima, a well-known video game director and designer, departs from his long-time video game publisher home of Konami, where he was most well-known for his work from 1987 to 2015 on Konami's video game franchise, *Metal Gear*.<sup>11</sup> His two and a half decades of work on the franchise seemingly innovated a new genre in action-adventure video games – military stealth. At some point after his departure from Konami, his non-compete agreement expires,<sup>12</sup> and Kojima forms his own video game studio independent of Konami, called Kojima Productions. The artists and producers that worked with Kojima on *Metal Gear* at Konami, like Yoji Shinkawa, Kenichiro Imaizumi, and Jackie Tan, as well as former Konami president Shinji Hirano, also went with him to Kojima Productions.<sup>13</sup>

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<sup>11</sup> Hideo Kojima, WIKIPEDIA, [https://en.wikipedia.org/wiki/Hideo\\_Kojima](https://en.wikipedia.org/wiki/Hideo_Kojima) (last visited Aug. 9, 2017) [<https://perma.cc/X4HX-CAQF>].

<sup>12</sup> Sam Prell, *Report: Kojima's Last Konami Day Was Oct. 9, Non-Compete Active Until Dec.*, GAMESRADAR, <http://www.gamesradar.com/kojima-konami-october-december-non-compete-clause/> (Oct. 19, 2015) [<https://perma.cc/8ZEL-4HPU>].

<sup>13</sup> Shabana Arif, *Former Konami President Shinji Hirano Appointed President of Kojima Productions*, VG24/7,

### **B. The Developer Creates a New Game.**

In this hypothetical scenario, Kojima announces a new video game to be developed at Kojima Productions. The genre of this new IP is military stealth, much like *Splinter Cell*, *Spec Ops*, *Sniper*, *Ghost Recon*, and Konami's own *Metal Gear Solid*. As of the writing of this paper, Kojima has not announced a new video game that is within the military stealth genre. This hypothetical new Kojima-helmed game features a third person perspective, military setting, and a protagonist that is a hardened soldier on a secret mission, which are all elements that are also a part of *Metal Gear*. Many of the aforementioned team members that went from Konami to Kojima Productions are working on the game, under the direction of Kojima himself. Kojima Productions advertises the game as "from the creator of *Metal Gear Solid*". Fans look forward to a new military stealth game by the master of the genre because, although other non-*Metal Gear* military stealth games have been published over the years, *Metal Gear* and even the genre itself have become synonymous with Kojima, and vice versa. Perhaps this new non-Konami video game would be "Kojima Unleashed!", and players can finally see how Kojima's vision would evolve the genre outside of the confines of Konami. In this scenario, the Kojima brand carries much weight among fans – disproportionate in comparison to what Konami had spent previously in marketing new entries in the *Metal Gear* franchise. It becomes quite obvious that Kojima's new game is a "spiritual successor" to his work on the *Metal Gear* franchise, echoing a trend within the gaming industry of game developers leaving their long-time homes and developing spiritual successor games elsewhere. For the

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<https://www.vg247.com/2016/12/19/former-konami-president-shinji-hirano-appointed-president-of-kojima-productions/> (Dec. 19, 2016) [<https://perma.cc/2DFA-VAGY>].

purposes for this paper, we will define “spiritual successor” video game as one in which a developer attempts to make a connection with a predecessor video game by evoking similar elements such as character archetypes, gameplay, setting, etc. The level of the connection can range from merely using the same game engine to making an “unofficial sequel.”

Kojima’s new military stealth game would be published at relatively the same time as Konami’s new Kojima-less *Metal Gear Solid* entry, *Metal Gear Survive*.<sup>14</sup> While video game fans express their enthusiasm and support for the new Kojima Productions project, the initial response to *Metal Gear Survive* previews is very negative.<sup>15</sup> Meanwhile, all signs indicate that Kojima’s new game would be a commercial, and maybe even critical, success upon release. It is quite easy to imagine that Konami would be concerned that his new game is about to face some stiff competition in the form of his former employee’s new game. But maybe not quite as easy to imagine is how Konami would react, and what Kojima could do in response to that reaction. Because Kojima’s non-compete agreement has expired, Konami cannot prevent him from making video games in general.

What about *specific* types of video games? Kojima likely wants to capitalize on his previous success in making

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<sup>14</sup> *Metal Gear Survive*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Metal\\_Gear\\_Survive](https://en.wikipedia.org/wiki/Metal_Gear_Survive) (last visited Aug. 9, 2017) [<https://perma.cc/2P69-6XPX>].

<sup>15</sup> Ollie Barder, *Konami Announces ‘Metal Gear Survive’, Shows It Doesn’t Understand ‘Metal Gear’*, FORBES, <https://www.forbes.com/sites/olliebarder/2016/08/17/konami-announces-metal-gear-survive-shows-it-doesnt-understand-metal-gear/#645dc2f56c3f> (Aug. 17, 2016) [<https://perma.cc/9JNE-LRQ2>]; Chloi Rad, *E3 2017: Metal Gear Survive Doesn’t Understand the Series’ Strengths*, IGN, <http://www.ign.com/articles/2017/06/15/e3-2017-metal-gear-survive-doesnt-understand-the-series-strengths> (June 15, 2017) [<https://perma.cc/52TU-296L>].



games within the military stealth genre, and he understands that this is the type of game his audience expects from him. But the notion of Kojima making a military stealth game that is NOT published by Konami would raise a few eyebrows. There are similarities between Konami's previous *Metal Gear* entries (regardless of Kojima's prior involvement) with Kojima's hypothetical upcoming military stealth video game. At first blush, aspects of the two games are similar enough that a cause of action for intellectual property infringement would be worth it for Konami to at least consider.

**C. *Publisher Threatens Developer With Legal Action Over Spiritual Successor Video Game.***

At some point in this hypothetical scenario, someone at Konami might ask, "Should we prevent Kojima, a former employee, from making this type of video game?". Kojima's name and brand have so much caché that his new game could negatively impact sales of the new Kojima-less *Metal Gear*. After all, new triple-A games at launch are approximately \$60 each,<sup>16</sup> which is asking much of consumers when deciding what to buy in an already-crowded release schedule. Konami, in this hypothetical situation, could claim aspects of Kojima's new game are substantially similar to his own *Metal Gear* or the name or trade dress of the box art would cause confusion in the marketplace and threaten to sue Kojima over his new game, similar to what Atari did to Activision. Even the mere threat of legal action could be enough for a developer like Kojima to second guess his or her new venture.

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<sup>16</sup> Melissa Loomis, *Video Game Prices: Why Games Are \$60, Where Your Money Goes, & Who Benefits Most*, GAMERANT, <https://gamerant.com/video-game-prices-breakdown-514/> (2015) [<https://perma.cc/6ND7-HDME>].

**D. *Unfairly Preventing Competition is Harmful to Developers and the Market.***

In the Atari-Activision story, Atari appears to have brought the lawsuit against its former employees to prevent its new venture from getting off the ground. Crane and his colleagues worked with an attorney on start-up issues and had access to contacts in the venture capital world.<sup>17</sup> Had Atari succeeded, Activision may never have become the powerhouse in the gaming industry that we know; today, Activision-Blizzard is the publisher of world-renown video game franchises like *Call of Duty*, *Guitar Hero*, *Candy Crush*, and *World of Warcraft*.<sup>18</sup> Had Atari succeeded, the history of video games would likely look very different than it does now. However, not every new venture can hold out for two years of legal threats from a larger company and survive to see its first product launch. We assume that utilizing intellectual property law in this way to hamper competition does have a chilling effect on a departing developer, simply because it is likely one party has greater legal and financial resources, and thus has the apparent ability to prevent the other party from developing its new game. This type of burden on competition could deprive markets and consumers of the next big video game franchise, and should be prevented.

This scenario, although hypothetical, is entirely possible. It shows us a potential conflict – developers should be able to capitalize on their resumés after they leave; on the other hand, the owner of the original IP is the one that has spent the money in developing and marketing the brand and building a video game franchise., and gave these developers a stage to develop and show their skills. It also brings up

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<sup>17</sup> Fleming, *supra* note 2.

<sup>18</sup> *Activision Blizzard*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Activision\\_Blizzard](https://en.wikipedia.org/wiki/Activision_Blizzard) (last visited Aug. 9, 2017) [<https://perma.cc/8LYZ-CE7N>].

potential implications concerning copyright (and other intellectual property regimes), potential abuses of intellectual property law to deter competition, and how market needs might not be fulfilled within the video game industry. Part I of this paper will provide a general overview of the video game industry as well as this trend of well-known developers leaving to create spiritual successor video games. Part II will analyze copyright law with respect to video games and apply it to Inafune's *Mighty No. 9*, the poster child (or poster boy robot) of recent spiritual successor video games, and how copyright implications might start resembling non-competes. Part III discusses the general justifications and effects of non-competes, as well as the specific harms to developers and consumers of abusing intellectual property law to chill future prospects of former employees. Part IV proposes a statutory solution to the problem of a non-compete disguised as an IP claim within the video game industry. Part V addresses potential criticisms that such a statute may receive.

## **II. THE VIDEO GAME INDUSTRY, DEPARTING DEVELOPERS, AND POTENTIAL PROBLEMS IN SPIRITUAL SUCCESSOR GAMES**

Video games represent a fascinating nexus where technology, storytelling, user experiences, business, and the law all meet, meld, and constantly evolve together. Seemingly every year, video games become more ingrained into everyday lives, from new hardware launches and specialized PC gaming rigs to new releases from triple-A game franchises to multimedia tie-ins. Gamers can play on their own or with friends using online cooperative play. They can experience the most cutting-edge games on the newest home consoles, scratch a nostalgia itch on a retro console that they picked up at a local game store, or kill time casually with a simple smartphone app. The Entertainment

Software Association reported that consumers spent over \$23.5 billion combined in 2016 on video game hardware, software, and peripherals.<sup>19</sup> This astounding number indicates that video games are both cross-generational and global, with revenue numbers that rival the movie industry.<sup>20</sup>

Some of the most well-known video game franchises have been around seemingly since the beginning of the home console market. Many of these game franchises themselves are now household brands. Although more contemporary franchises like *Madden*, *Call of Duty*, and *Grand Theft Auto* often garner the most mainstream attention, classic franchises like *Super Mario*, *Final Fantasy*, *Resident Evil*, *Mega Man*, *Castlevania*, and *Metal Gear* still conjure up fond memories within hardcore fans and enjoy an awareness among even the most casual gamers. The successes of these franchises have made several video game developers into celebrities within the gaming industry, creating strong links in fans' minds between the franchise and the developer.

**A. *The Trend of Well-Known Video Game Developers Departing and Creating Familiar Works***

Celebrity video game developers are not a new phenomenon. Well-known video game developers have managed to raise their profiles within the gaming public to the point that they become brands of their own. Sid Meier is a prime example of someone who has status as a celebrity

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<sup>19</sup> 2016 *Essential Facts About the Computer and Gaming Industry*, ENTERTAINMENT SOFTWARE ASSOCIATION 1, 8 available at <http://www.thesa.com/about-esa/essential-facts-facts-computer-video-game-industry/> (last visited Aug. 2, 2017) [<https://perma.cc/64BU-LP25>].

<sup>20</sup> Brian Casillas, *Attack of the Clones: Copyright Protection for Video Game Developers*, 33 LOY. L.A. ENT. L. REV. 137,141 (2013).

game designer. Despite only having designed the first installment in the *Civilization* series released in 1991, his name is attached to every sequel and spin-off of that original game; for example, the sixth installment of the game is marketed as *Sid Meier's Civilization VI*. Will Wright's name is deeply associated with the *Sim* franchise of games, like *The Sims* and *SimCity*, despite Wright not having any involvement with the most recent *SimCity* installment in 2013. The names of these developers seem to be an important part of marketing the games. Going back to our hypothetical scenario above, Hideo Kojima has had a long association with Konami's *Metal Gear* franchise, to the point where Kojima's name is almost synonymous with the game series. This connection exists despite the fact that *Metal Gear* is the intellectual property of Konami.

A recent trend sees several high-profile game developers leaving their longtime homes and striking out on their own. Their reasons for leaving are varied but a notable number of these developers are creating new video game properties that have resemblances to these long, storied video game franchises with which they have long been associated.<sup>21</sup> When conversing with Iron Galaxy Games CEO Adam Boyes, he mentioned that the battle of “brand vs. creator”, (where publishers feel the creator can never eclipse the brand of the video game) can contribute to departures, or at the very least certain games not getting made.<sup>22</sup>

Well-known developers have been forming their own independent studios and have been creating new video games and associated intellectual property, like pitches for

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<sup>21</sup> *What Yooka-Laylee Learned From Banjo- IGN Plays*, YOUTUBE, <https://www.youtube.com/watch?v=Ui9ECJ6gTD8> (stating that games must support the platform they are on and that Banjo-Kazooie would have been relatively risky because a hardware console developer needs a big franchise to feature on their new platform) (June 5, 2015).

<sup>22</sup> Phone call interview, Adam Boyes (CEO, Iron Galaxy Games), July 7, 2017

animated television series.<sup>23</sup> Three notable recent examples include Keiji Inafune, Koji Igarashi, and Steve Mayles. Although their respective stated reasons for leaving their long-time publishers are varied, these three have at least two commonalities. The first is their respective new projects all share similarities with the respective games on which they had previously worked and have been dubbed “spiritual successors.” The second is these projects received at least partial funding through crowd-funded Kickstarter campaigns, allowing them to raise capital directly from end-users and players. The successes of their crowd-funding campaigns speak to the relationship between the creator and the player, and not between the publisher and the player.<sup>24</sup>

First on this list of recent examples is Keiji Inafune. Inafune spent over twenty years as a video game publisher Capcom in Japan, where he was instrumental in the creation of the 2-D platforming *Mega Man* series. He was producer and artist on the first ten installments of the original *Mega Man* series, as well as performing the same role on initial installments of the *Mega Man X* spin-off series.<sup>25</sup>

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<sup>23</sup> Alexa Ray Correia, *Mighty No. 9: The Animated Series Will Give Inafune’s Excitable Robot More Time to Shine*, POLYGON, <http://www.polygon.com/2014/7/21/5922717/mighty-no-9-the-animated-series-interview> (July 21, 2014) [<https://perma.cc/Y9G6-QFSN>].

<sup>24</sup> Allegra Frank, *Project Rap Rabbit Kickstarter Misses Campaign Goal*, POLYGON, <https://www.polygon.com/2017/6/20/15837756/project-rap-rabbit-kickstarter-canceled> (stating that not all of these “successor video games by established creators” crowdfunding campaigns are successful, as *PaRappa the Rapper* creator Masaya Matsuura’s successor video game called *Project Rap Rabbit* did not meet its Kickstarter goal and that both games were within the “music rhythm” genre) (June 20, 2017) [<https://perma.cc/W52U-UAL>].

<sup>25</sup> *Mega Man X*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mega\\_Man\\_X\\_\(video\\_game\)](https://en.wikipedia.org/wiki/Mega_Man_X_(video_game)) (stating that Inafune also did design work on *Mega Man X*, and to support technological capabilities of new hardware, Inafune worked on *Mega*

Eventually, Inafune left his full-time position at Capcom.<sup>26</sup> Although Inafune was no longer in-house at Capcom, he still offered to finish the *Mega Man* game that had been in development at the time, *Mega Man Legends 3*, because he desired to finish the project which he and his team had already committed to before starting any new non-Capcom work.<sup>27</sup> However, Capcom ended up canceling this game even though a working prototype was near completion.<sup>28</sup> In 2010, Inafune started his own studio, called Comcept (now known as Level-5 Comcept).<sup>29</sup> Through crowd-funding on Kickstarter, he created and eventually published a new video game called *Mighty No. 9*,<sup>30</sup> which shares similarities with *Mega Man*.<sup>31</sup> *Mighty No. 9* and its similarities to *Mega Man* is the main example used in this paper's copyright analysis of spiritual successor video games.

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*Man Legends*, a 3-D game that took Mega Man away for its traditional 2-D platforming roots) (last visited Aug. 9, 2017) [<https://perma.cc/BEH8-JE33>].

<sup>26</sup> Luke Plunkett, *Mega Man's Creator Quits Capcom*, KOTAKU, <http://kotaku.com/5676403/mega-mans-creator-quits-capcom> (Oct. 29, 2010) [<http://perma.cc/W3PT-2SEN>].

<sup>27</sup> C.J. Smillie, *Capcom Did Not Want Inafune to Help with "Mega Man Legends 3"*, GAMERANT, <https://gamerant.com/capcom-wanting-keiji-inafune-finish-mega-man-legends-3-cj-105556/> (2011) [<https://perma.cc/VC94-NTHS>].

<sup>28</sup> Owen Good, *Former Mega Man Producer Says He Offered to Finish Mega Man Legends 3 Under Contract but Capcom Said No Thanks*, KOTAKU, <http://kotaku.com/5841509/former-mega-man-producer-says-he-offered-to-finish-mega-man-legends-3-under-contract-but-capcom-said-no-thanks> (Sept. 18, 2011) [<https://perma.cc/T7F9-VPG7>].

<sup>29</sup> *Level-5 Comcept*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Level-5\\_Concept](https://en.wikipedia.org/wiki/Level-5_Concept) (last visited May 6, 2018) [<https://perma.cc/ZL7R-J2TG>].

<sup>30</sup> *Mighty No. 9*, KICKSTARTER, <https://www.kickstarter.com/projects/mightyno9/mighty-no-9> (last visited Aug. 9, 2017) [<https://perma.cc/9V34-L39V>].

<sup>31</sup> See chart comparing predecessor and spiritual successor games. *Mighty No. 9* and its similarities to *Mega Man* is the main example used in this paper's copyright analysis of spiritual successor video games.

Koji Igarashi is another developer who left a longtime publishing home. Igarashi spent over twenty years at video game publisher Konami in Japan, where he served as the director, producer, and writer on installments of the *Castlevania* series, including *Castlevania: Symphony of the Night*. This series of games are well-known for its gothic dark fantasy adventure setting and 2-D platforming mechanics. He left Konami in 2014.<sup>32</sup> After achieving much success at Konami with the *Castlevania* series, Igarashi had this to say about his departure: “I’ve decided to break out on my own to have the freedom to make the kind of games I really want to make – the same kind I think fans of my past games want as well.”<sup>33</sup> Not long after his departure from Konami, Igarashi crowd-funded a new video game on Kickstarter called *Bloodstained: Ritual of the Night*,<sup>34</sup> which has similarities to his work on the *Castlevania* series.<sup>35</sup>

A third recent example is Steve Mayles. Mayles worked as an artist on several installments of the *Banjo-Kazooie* series for Rare studios, starting in 1998.<sup>36</sup> *Banjo-Kazooie* is a “collect-athon” 3-D platforming game, in which one of the main goals in the game is to amass as many

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<sup>32</sup> Mitch Dyer, *Castlevania Producer Koji Igarashi Leaves Konami, Founding a New Studio to Make the Games his Fans Want*, IGN, <http://www.ign.com/articles/2014/03/17/castlevania-producer-koji-igarashi-leaves-konami> (Mar. 17, 2014) [<https://perma.cc/QRB4-768S>].

<sup>33</sup> *Id.*

<sup>34</sup> *Supra* note 1.

<sup>35</sup> Perhaps Igarashi used “of the Night” in *Bloodstained: Ritual of the Night* to form a connective tissue with *Castlevania: Symphony of the Night*, on which he previously worked at Konami. See chart comparing predecessor and spiritual successor games Chart on page 353-54 lists some of the similarities.

<sup>36</sup> *Steve Mayles*, YOOKAPEDIA, [http://yooka-laylee.wikia.com/wiki/Steve\\_Mayles](http://yooka-laylee.wikia.com/wiki/Steve_Mayles) (last visited May 6, 2018) [<https://perma.cc/J7UW-XPPM>].



collectable items as possible.<sup>37</sup> In 2014, Mayles and a few colleagues left Rare in 2014 and joined Playtonic Games, and developed a new game called *Yooka-Laylee*, which shared some similarities to *Banjo-Kazooie*.<sup>38</sup>

<u>Predecessor Video Game</u>	<u>Spiritual Successor Video Game</u>
<p><b><i>Mega Man (Capcom)</i></b></p> <ul style="list-style-type: none"> <li>- Designed by Keiji Inafune</li> <li>- 2-D side-scrolling platformer</li> <li>- Cast of characters include Rock and Roll, scientist Dr. Light</li> <li>- Fellow robots gone bad as antagonists, must defeat robots and take over their powers to advance</li> </ul>	<p><b><i>Mighty No. 9 (Concept)</i></b></p> <ul style="list-style-type: none"> <li>- Written by Keiji Inafune</li> <li>- 2-D side-scrolling platformer</li> <li>- Cast of characters include Beck and Call, scientist Dr. White</li> <li>- Fellow robots gone bad as antagonists, must defeat robots and take over their powers to advance</li> </ul>
<p><b><i>Castlevania: Symphony of the Night (Konami):</i></b></p> <ul style="list-style-type: none"> <li>- Produced by Koji Igarashi</li> <li>- 2-D side-scrolling platformer, action adventure game with role-playing elements,</li> </ul>	<p><b><i>Bloodstained: Ritual of the Night (Deep Silver):</i></b></p> <ul style="list-style-type: none"> <li>- Produced by Koji Igarashi</li> <li>- 2-D side-scrolling platformer, action adventure game with role-playing elements,</li> </ul>

<sup>37</sup> *The Nintendo Collectathon: A Genre of the Past*, THEARTIFACE, <http://the-artifice.com/nintendo-collectathon> (last visited Aug. 5, 2017) [<https://perma.cc/2TM3-4D6E>].

<sup>38</sup> Gary Sheppard, *Yooka-Laylee vs Banjo Kazooie*, GAMEGRIN, <https://www.gamegrin.com/articles/yooka-laylee-vs-banjo-kazooie/> (Apr. 18, 2017) [<https://perma.cc/W9BM-S4B4>]. See chart comparing predecessor and spiritual successor games.

supernatural dark fantasy gothic setting - Protagonist Maria	supernatural dark fantasy gothic setting - Protagonist Miriam
<b>Banjo-Kazooie (Rare):</b> - Designed by Steve Mayles and company - “collect-athon” 3-D platforming game, traverse different levels to solve puzzles to advance - Protagonists are Banjo the bear and Kazooie the bird who team up and combine abilities	<b>Yooka-Laylee (Playtonic):</b> - Designed by Steve Mayles and company - “collect-athon” 3-D platforming game, traverse different levels to solve puzzles to advance - Protagonists are Yooka the chameleon and Laylee the bat who team up and combine abilities

It is quite common for video game publishers to retain the intellectual property rights created by a video game developer in the course of a work-for-hire relationship.<sup>39</sup> These occurrences make sense for developers like Igarashi, who came in and created new games based on existing intellectual property that belongs to the publisher. The publisher (rather than the developer) is the owner of the intellectual property<sup>40</sup> despite the fact that gamers consider Keiji Inafune, Shinji Mikami, and Hironobu Sakaguchi to be the respective fathers of *Mega Man*, *Resident Evil*, and *Final Fantasy* due to their early and influential involvements.<sup>41</sup>

<sup>39</sup> Andy Ramos, *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO 1, 91 (July 29, 2013).

<sup>40</sup> David Greenspan, WIPO Magazine, *Video Games and IP: A Global Perspective*, stating IP rights typically vest with publisher, [http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html) [<https://perma.cc/TQ4F-YGG4>].

<sup>41</sup> *Keiji Inafune*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Keiji\\_Inafune](https://en.wikipedia.org/wiki/Keiji_Inafune) (last visited Aug. 9, 2017) [<https://perma.cc/4DNN-LLV3>]; *Shinji Mikami*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Shinji\\_Mikami](https://en.wikipedia.org/wiki/Shinji_Mikami) (last visited Aug. 9, 2017)

Additionally, these examples show that the developers mentioned here all went on to make games that fans (and perhaps they themselves) consider continuations of the work they did at their previous respective publishers. Previously mentioned examples are *Mighty No. 9*, *Bloodstained*, and *Yooka-Laylee* being spiritual successors to *Mega Man*, *Castlevania*, and *Banjo-Kazooie* respectively. The spiritual successor trend is additionally seen in both Shinji Mikami's *Evil Within* and Hironobu Sakaguchi's *Blue Dragon* as the spiritual successor to the *Resident Evil* franchise at Capcom and the *Final Fantasy* franchise at Square Enix, respectively. As seen here, this trend is not limited to just one video game genre or country, and is therefore not limited to just one jurisdiction or even one culture.

### B. *Spiritual Successors*

Spiritual successors to video games are not a new phenomenon. Within the video game industry, they tend to happen when a game developer is restricted from using certain intellectual property due to licensing issues.<sup>42</sup> For example, Rare Studios had the license to produce a James Bond video game based on the movie *GoldenEye*, and did so to critical acclaim.<sup>43</sup> *GoldenEye* was a “first person shooter” (FPS) game, and was a big hit in the 1990s.<sup>44</sup> When the opportunity arose to produce another James Bond game based on the *Tomorrow Never Dies* film, Rare ultimately did

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[<https://perma.cc/CK5M-LMJS>]; *Hironobu Sakaguchi*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Hironobu\\_Sakaguchi](https://en.wikipedia.org/wiki/Hironobu_Sakaguchi) (last visited Aug. 9, 2017) [<https://perma.cc/B69E-XFY7>].

<sup>42</sup> *Spiritual successor*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Spiritual\\_successor](https://en.wikipedia.org/wiki/Spiritual_successor) (last visited Aug. 5, 2017) [<https://perma.cc/7M8Q-PVFG>].

<sup>43</sup> *GoldenEye 007 (1997 video game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/GoldenEye\\_007\\_\(1997\\_video\\_game\)](https://en.wikipedia.org/wiki/GoldenEye_007_(1997_video_game)) (last visited Aug. 9, 2017) [<https://perma.cc/UXX4-M5K7>].

<sup>44</sup> *Id.*

not obtain the license from MGM Studios due to being outbid by another game publisher.<sup>45</sup> Rare used the game engine from *GoldenEye* in a new video game property, *Perfect Dark*.<sup>46</sup> Rather than a spy espionage setting for this first-person shooting game, it used a science fiction setting, devoid of any copyrightable or trademarkable James Bond elements.<sup>47</sup> Despite lacking any classic James Bond elements, it is considered a spiritual successor to Rare's *GoldenEye* game because the two games share a common development team, gaming engine, first-person perspective, and gameplay mechanics.<sup>48</sup>

The well-known *Bioshock* franchise is also a spiritual successor. *System Shock* was a well-regarded (if not well-selling) series of first-person shooter games that game designer Ken Levine had worked on at the Looking Glass Games company.<sup>49</sup> Although publisher Electronic Arts held the trademark for the game, Looking Glass held the development rights.<sup>50</sup> When Looking Glass went out of

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<sup>45</sup> Eddie Makuch, *Learn How Perfect Dark Came to Be in this Behind-The-Scenes Video*, GAMESPOT (Dec. 26, 2015, 3:11 PM), <http://www.gamespot.com/articles/learn-how-perfect-dark-came-to-be-in-this-behind-t/1100-6433378/> (discussing Rare Ltd., *Rare Revealed: The Making of Perfect Dark*, YOUTUBE (Dec. 24, 2015), <https://www.youtube.com/watch?v=7CxpdsOV5I>), Tom Batt, *Bond's Future in Video Games*, ROOBLA (April 10, 2015), <http://roobla.com/gaming/feature/44263/bonds-future-in-video-games/> [<https://perma.cc/U9AQ-NM6Y>] (“The bar had been set high, but Rare opted not to develop the next game to focus on original IP”).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Perfect Dark*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Perfect\\_Dark](https://en.wikipedia.org/wiki/Perfect_Dark) (last updated Jan. 21, 2018, 10:35 PM) [<https://perma.cc/X3ML-J9TD>].

<sup>49</sup> *System Shock*, WIKIPEDIA, [https://en.wikipedia.org/wiki/System\\_Shock](https://en.wikipedia.org/wiki/System_Shock) (last updated Dec. 22, 2017, 5:37 PM) [<https://perma.cc/J755-3LH5>].

<sup>50</sup> *The Lost History of System Shock*, G4TV, <https://web.archive.org/web/20160828214129/http://www.g4tv.com/the/feed/blog/post/713030/the-lost-history-of-system-shock/> [<https://perma.cc/53XH-FTYB>] (last visited July 21, 2016).

business, it made obtaining all rights to develop and publish the game difficult to unify.<sup>51</sup> Instead of trying to get all the rights together to make a new *System Shock* game, Ken Levine developed the *Bioshock* game series as a spiritual successor at 2K and Irrational Games.<sup>52</sup> *Bioshock* and *System Shock* are both science fiction-themed games that utilize a first-person perspective for gameplay, but differ in settings, with *Bioshock* taking place in the past and *System Shock* taking place in the future.<sup>53</sup>

Although spiritual successors share elements with their video game predecessors, they can be legally distinct intellectual property from each other because of differences in the expression of their ideas. In the *GoldenEye/Perfect Dark* example, both games feature different genres and protagonists, while in the *System Shock/Bioshock* example, both games feature different settings and time periods.<sup>54</sup> It

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; perhaps Levine used the “-shock” in *Bioshock* to form a connective tissue to *System Shock*.

<sup>53</sup> See *supra* note 49; *BioShock*, WIKIPEDIA, <https://en.wikipedia.org/wiki/BioShock>, (last updated Jan. 24, 2018, 9:01 PM) [<https://perma.cc/X62M-FW6R>]; Publisher Night Dive Studios eventually unified the *System Shock* rights and announced a remake of *System Shock*, with original developer Warren Spector, and crowdfunded by Kickstarter. Allegra Frank, *Warren Spector’s Sure System Shock 3 Will Stand Out from the Pack*, POLYGON (May 10, 2017, 1:27 PM), <https://www.polygon.com/2017/5/10/15611526/system-shock-3-concept-art-warren-spector-interview> [<https://perma.cc/Y3A5-HZKF>].

<sup>54</sup> *GoldenEye 007 (1997 Video Game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/GoldenEye\\_007\\_\(1997\\_video\\_game\)](https://en.wikipedia.org/wiki/GoldenEye_007_(1997_video_game)) [<https://perma.cc/Q8GZ-WN3U>] (“*GoldenEye 007* starts in Arkhangelsk in the Soviet Union in 1986 ... The remainder of the game takes place in 1995.”); *Perfect Dark*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Perfect\\_Dark](https://en.wikipedia.org/wiki/Perfect_Dark) [<https://perma.cc/3FZ2-C4M5>] (“*Perfect Dark* is set in 2023 against the backdrop of an interstellar war between two races.”); *System Shock*, WIKIPEDIA, [https://en.wikipedia.org/wiki/System\\_Shock](https://en.wikipedia.org/wiki/System_Shock) [<https://perma.cc/6FVY-GJAD>] (“Set in the year 2072, the protagonist—a nameless hacker—is

is these differences in expression that make them distinct IP, as we will see in this paper’s copyright analysis.

### C. *Examples of What Becomes of the Created Intellectual Property Upon Developer’s Departure*

Developers leaving publishers, and intellectual property changing ownership as a result of departures, are also not new phenomena. There are times when it can happen amicably and smoothly. Two examples include IO Interactive and its departure from publisher Square Enix, and Bungie’s departure from Microsoft. IO was the developer of the *Hitman* franchise of video games prior to IO’s acquisition by publisher Eidos, which in turn was acquired by Square Enix in 2009.<sup>55</sup> During its time under Eidos and Square Enix, IO continued to produce installments of the *Hitman* franchise.<sup>56</sup> In 2017, IO became independent of Square Enix, but retained ownership of the *Hitman* IP.<sup>57</sup>

Bungie’s relationship with Microsoft and the *Halo* franchise of sci-fi themed first-person shooter games represents the converse of the IO example, but also with an

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caught while attempting to access files concerning Citadel Station, a space station owned by the TriOptimum Corporation.”); *BioShock*, WIKIPEDIA, <https://en.wikipedia.org/wiki/BioShock> [<https://perma.cc/ZC3A-EXN6>], (“*BioShock* is set in 1960 in the underwater city of Rapture”)

<sup>55</sup> Matthew Handrahan, *IO Interactive is Now Independent*, GAMESINDUSTRY.BIZ, (Jun. 21, 2017), <http://www.gamesindustry.biz/articles/2017-06-16-io-interactive-is-now-independent> [<https://perma.cc/2N9S-TABJ>]; and *IO Interactive*, WIKIPEDIA, [https://en.wikipedia.org/wiki/IO\\_Interactive](https://en.wikipedia.org/wiki/IO_Interactive) (last visited May 6, 2018) [<https://perma.cc/SC45-S5HP>].

<sup>56</sup> *IO Interactive*, WIKIPEDIA, [https://en.wikipedia.org/wiki/IO\\_Interactive](https://en.wikipedia.org/wiki/IO_Interactive) (last visited May 6, 2018) [<https://perma.cc/SC45-S5HP>].

<sup>57</sup> *Id.*

amicable result. Bungie was acquired by Microsoft in 2000 when development on *Halo* was already underway.<sup>58</sup> In 2007, Bungie became independent of Microsoft, with Microsoft retaining the *Halo* IP.<sup>59</sup> Although now independent of Microsoft, Bungie continued to make *Halo* games until production moved in-house to Microsoft.<sup>60</sup> Eventually Bungie debuted its own sci-fi themed first-person shooter *Destiny*, which has similarities to *Halo*,<sup>61</sup> and is available on Microsoft's Xbox hardware consoles.<sup>62</sup>

The story of game developer Jeff Minter and his game *TxK* illustrates how not all splits are amicable. Minter made a career working on modernized sequels to old classic video games like *Defender* and *Space Invaders*.<sup>63</sup> He worked on two modernized remakes of the Atari tube shooter game *Tempest* (*Tempest 2000* in 1994 and *Tempest 3000* in 2000) for Atari.<sup>64</sup> In 2014, Minter made another installment in this series of tube shooters, called *TxK*.<sup>65</sup>

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<sup>58</sup> *Microsoft to Acquire Bungie Software*, MICROSOFT (Jun. 19, 2000), <https://news.microsoft.com/2000/06/19/microsoft-to-acquire-bungie-software/> [<https://perma.cc/QQY2-SVXW>].

<sup>59</sup> Benjamin Romano, *Microsoft, "Halo" Maker Bungie Split*, SEATTLE TIMES, <https://www.seattletimes.com/business/microsoft-halo-maker-bungie-split/> (last visited May 6, 2018).

<sup>60</sup> *343 Industries*, WIKIPEDIA, [https://en.wikipedia.org/wiki/343\\_Industries](https://en.wikipedia.org/wiki/343_Industries) (last visited May 6, 2018) [<https://perma.cc/GJT7-BPLH>].

<sup>61</sup> Timothy Torres, *5 Things Destiny Swiped from Halo*, PCMAG (Sept. 23, 2014, 9:20 AM), <https://www.pcmag.com/article2/0,2817,2468868,00.asp> [<https://perma.cc/N9MD-X864>].

<sup>62</sup> *Destiny (Video Game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Destiny\\_\(video\\_game\)](https://en.wikipedia.org/wiki/Destiny_(video_game)), (last updated Jan. 23, 2018, 4:10 AM) [<https://perma.cc/H6XY-YARK>].

<sup>63</sup> *Jeff Minter*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jeff\\_Minter](https://en.wikipedia.org/wiki/Jeff_Minter) (last updated Nov. 23, 2017, 9:54 PM) [<https://perma.cc/UWP4-S7DX>].

<sup>64</sup> *Id.*

<sup>65</sup> *TxK*, WIKIPEDIA, <https://en.wikipedia.org/wiki/TxK> (last updated Jul. 27, 2017, 1:29 AM) [<https://perma.cc/Q6DK-3RHU>].

When creating *TxK*, Minter had hoped Atari would commission him for an officially licensed new version of the *Tempest* series, but that did not happen.<sup>66</sup> *TxK* ended up being a spiritual successor, rather than a direct “official” sequel.<sup>67</sup> However, Atari issued cease and desist orders that hampered the release of the game on several gaming platforms.<sup>68</sup> Here, Atari asserted ownership of the *Tempest* IP and subsequent derivative works (including “spiritual successors”) in blocking Minter’s spiritual successor; Atari holds the rights to *Tempest*, and Minter was hired to merely develop sequels for Atari.<sup>69</sup> If Minter’s spiritual successor video game was not infringing under copyright law, then Atari may have over-reached in claiming its intellectual property rights against Minter.

Postulating on our hypothetical post-Konami Kojima military stealth game, there has been enough rumor and innuendo that the split between Konami and Kojima was anything but amicable, based on Konami’s actions upon

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<sup>66</sup> Keith Stuart, *Atari Threatens TxK Developer Jeff Minter with Copyright Claims*, GUARDIAN (Mar. 19, 2015, 5:37 AM), <https://www.theguardian.com/technology/2015/mar/19/atari-threatens-jeff-minter-copyright-claims-playstation-txk-tempest> [<https://perma.cc/Q36J-7QTB>].

<sup>67</sup> Wesley Yin-Poole, *Jeff Minter “Beyond Disgusted” with Atari Over TxK Block*, EUROGAMER (Mar. 18, 2015, 7:29 PM), <http://www.eurogamer.net/articles/2015-03-18-jeff-minter-beyond-disgusted-with-atari-over-txk-block> [<https://perma.cc/XG3H-R5RL>].

<sup>68</sup> *Supra* note 66; In terms of story or characters, there is not much there; the essence of the game is mostly its mechanics as a “tube shooter” game. In all three *Tempest* games, the player aims and shoots at enemies through a tube on a spaceship and gameplay mechanics are generally not copyrightable. See *Tempest (Video Game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tempest\\_\(video\\_game\)](https://en.wikipedia.org/wiki/Tempest_(video_game)) [<https://perma.cc/8ERE-JLX3>] (last updated Nov. 23, 2017, 11:45 PM); *infra* Part II.A.

<sup>69</sup> *Supra* note 66.



Kojima's departure.<sup>70</sup> Some rumors even suggest that Konami is attempting to stop Kojima and other colleagues that also departed from mentioning its previous work at Konami.<sup>71</sup> One can imagine even any superficial similarities between *Metal Gear* and Kojima's hypothetical new military stealth game (such as being within the same genre) would not be warmly received by Konami.

#### ***D. Developers More Free to Leave***

There are several concurrent possibilities that explain why developers are leaving their publishers. The first is the prominence of this wave of veteran game developers. As discussed earlier, the video game industry has coalesced around multi-billion-dollar video game franchises that are tied closely to developers with rock star-esque statuses.<sup>72</sup> The brands of these developers, like Will Wright and Sid Meier, carry their own significant *cachets* that could exist outside of a publisher's video game

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<sup>70</sup> Brian Ashcraft, *Report: The Hideo Kojima and Konami Saga Seems Endless*, KOTAKU (Jun. 12, 2017, 6:00 AM), <http://kotaku.com/report-the-hideo-kojima-and-konami-saga-seems-endless-1796012603> [<https://perma.cc/7F4V-ZUPB>]; Denny Connolly, *Konami Adds Hideo Kojima's Name Back to Metal Gear Branding*, GAME RANT (2015), <https://gamerant.com/konami-adds-kojima-name-metal-gear-solid-branding/> [<https://perma.cc/Z25X-HPLG>] (“After the announcement of Kojima's impending departure, Konami explained that the game creator would not be working on the upcoming *Silent Hill* and references to his work started to disappear from the website. His name was scrubbed off of the cover of older *Metal Gear* games on the website and the ‘from critically acclaim director, Hideo Kojima’ line was removed from the product descriptions for *Metal Gear Solid Legacy Collection*”).

<sup>71</sup> See *infra* note 79 (“The *Nikkei* article also states that Konami has allegedly told large game companies to be careful about hiring former Konami employees and Japanese TV stations to disregard them. What's more, it's even said that ex-employees are not supposed to refer to themselves as ‘Formerly of Konami’ in their new work when publicly discussing their career history.”).

<sup>72</sup> See *supra* Part I.

franchise. These developers enjoy good will that exists concurrently with the good will of the video game franchise and publisher with which they have long been associated, and the developers may realize that they can use that good will with fans and players to create their own franchises that they control.<sup>73</sup> Leaving to create something new potentially gives them more control while retaining their connection with their customer base.<sup>74</sup>

Another reason that may contribute to these departures is fewer restraints on trade. Within the video game industry, there is no shortage of non-compete agreements. Industry giants like Electronic Arts and Ubisoft have sued each other to obtain injunctions preventing employees from working at competitors.<sup>75</sup> Kojima himself was under a non-compete until the end of 2015.<sup>76</sup> But states have generally been unfavorable towards covenants not to compete because they restrict mobility of employees. As University of Michigan law professor Norman Bishara points out, “[Non-compete agreements] are clearly anti-competitive, so courts have always looked at them kind of askance because they are on their face designed to restrict

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<sup>73</sup> See *supra* notes 24, 30, 53, and accompanying text, for Kickstarter examples.

<sup>74</sup> Maxime, *Why I Quit My Dream Job at Ubisoft*, GINGEAR STUDIO (JAN. 21, 2016), <http://gingearstudio.com/why-i-quit-my-dream-job-at-ubisoft> [<https://perma.cc/Q5UF-2VPC>].

<sup>75</sup> Simon Carless, *Electronic Arts, Ubisoft Clash on Montreal Hiring*, GAMASUTRA (Jan. 31, 2006), [http://www.gamasutra.com/php-bin/news\\_index.php?story=7985](http://www.gamasutra.com/php-bin/news_index.php?story=7985) [<https://perma.cc/94S4-5UHX>].

<sup>76</sup> *Supra* note 12.

competition.”<sup>77</sup> In California, non-compete agreements are completely prohibited.<sup>78</sup>

The legislatures of Massachusetts, Hawaii, New Mexico, Oregon, and Utah have looked recently to reform their laws on non-compete agreements and to limit their effects to allow for more mobility of employees in certain job sectors.<sup>79</sup> Massachusetts state representative Lori Ehrlich reasons, “The strongest argument for reform is the damage it is doing to individuals. . . . It derails their careers, it damages them financially, and it creates a situation where they are told they cannot work.”<sup>80</sup> So the trend looks like the technology industry is moving towards fewer restrictions on employees leaving.

But what if these publishers start using these developers’ contributions to these large video game franchises to enforce a “mutant” non-compete via intellectual property rights when they leave and make a spiritual successor video game? As discussed previously, Atari tried something similar with Crane and his colleagues; it would not be a stretch to imagine that a publisher could try

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<sup>77</sup> Patrick Thibodeau, *As Noncompete Agreement Use Expands, Backlash Grows*, COMPUTERWORLD (Feb. 5, 2016, 1:12 PM), <http://www.computerworld.com/article/3030641/it-careers/as-noncompete-agreement-use-expands-backlash-grows.html> [<https://perma.cc/ZRF7-GT5Q>]. The harms of non-competes will be discussed in Part III.

<sup>78</sup> Robert B. Milligan & D. Joshua Salinas, *Non-Compete Agreements*, CAL. LAW. (May 17, 2017), <http://www.callawyer.com/2017/05/non-compete-agreements/> [<https://perma.cc/NQK7-YDTD>]; CAL. BUS. & PROF. CODE SEC. 16600 “Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”

<sup>79</sup> Steve Lohr, *States Take Steps to Loosen the Grip of Noncompete Pacts*, N.Y. TIMES, June 29, 2016, at B1, <https://www.nytimes.com/2016/06/29/technology/to-compete-better-states-are-trying-to-curb-noncompete-pacts.html>.

<sup>80</sup> *Supra* note 77.

similar tactics to at least chill a departing developer’s new venture.<sup>81</sup>

***E. Potential Problems for Departing Developers Arising from Their Spiritual Successor Video Games***

The success of game developers crowd-funding these spiritual successor games and similarities to other well-known video game properties has not gone unnoticed by both fans and other video game developers. Their reactions have been varied. One fan posted a video on YouTube entitled “Pay Attention, Gaming Industry!,” expressing his excitement for *Mighty No. 9*, *Bloodstained*, and *Yooka-Laylee*, sending a message to publishers like Capcom and Konami about what sort of games fans want to play.<sup>82</sup> He postulated that game developers, especially in the most recent cycle of hardware launches, are not willing to make games for the good will of the gaming public and are only looking for “home runs” to reach the biggest audiences.<sup>83</sup> In doing so, game publishers are missing out on producing content that consumers actually want.

Another gamer at the Project After forums commented on Igarashi and *Bloodstained* - “In case you haven’t heard of it yet, *Bloodstained* is another entry in the line of Kickstarter projects spearheaded by popular people in the games industry recreating franchises they have become recognized for and got as close as they could without causing copyright infringement. In that particular case, it’s Koji Igarashi making a not-*Castlevania* in the vein of

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<sup>81</sup> *Supra* note 4.

<sup>82</sup> Digital Boundaries, *Pay Attention Gaming Industry! Yooka-Laylee | BloodStained | Mighty No. 9*, YOUTUBE (May 12, 2015), <https://www.youtube.com/watch?v=3smWEyW31rg>.

<sup>83</sup> *Id.*

*Symphony of the Night* . . . .”<sup>84</sup> *Wired* magazine called *Bloodstained* “essentially a classic Igarashi-style *Castlevania* without all of Konami’s trademarks getting in the way.”<sup>85</sup> Other fans are wondering about the legal ramifications of these similarities between the spiritual successor video games and their predecessors. One fan posted a YouTube video entitled “*How is Mighty No. 9 not being sued by Capcom?*,” pointing out similarities between the two games, such as the antagonists and gameplay, saying “the gameplay looks just like *Mega Man*.”<sup>86</sup>

Some fans see these spiritual successor video games as essentially sequels to their predecessors. Regarding *Yooka-Laylee* and *Banjo-Kazooie*, Gamegrin noted, “Although *Yooka-Laylee* isn’t an official sequel, the fact that most of the team at Playtonic worked on *Banjo-Kazooie* is very much apparent. With playstyles, audio, and graphics all inspired by the titles that made those in the studio famous; it’s the closest thing that we will see to a true sequel at the moment.”<sup>87</sup> *Yooka-Laylee* publisher Playtonic leaned into the similarities when marketing the game - “It was very important for us, with the Kickstarter, to have a lot of the *Banjo-Kazooie*-isms front and center, because that’s what we were selling. . . . We’re the core *Banjo* team and we’re making a spiritual successor. When people went to that page, they saw a buddy duo in a colorful jungle world

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<sup>84</sup> Project After Forums, “Bloodstained: Ritual of the Night”, Project After Forums, <https://web.archive.org/web/20170705132830/http://www.projectafterforums.com/index.php?showtopic=5009>, (June 9, 2015)

<sup>85</sup> Chris Kohler, *Castlevania’s Producer Emerges From the Wreckage of Konami*, WIRED (May 11, 2015, 1:00 PM), <https://www.wired.com/2015/05/koji-igarashi-bloodstained-kickstarter/> [https://perma.cc/AN5A-HFVL].

<sup>86</sup> ProtoMario, *How Is Mighty No. 9 Not Being Sued By Capcom?*, YOUTUBE (Mar. 23, 2014), <https://www.youtube.com/watch?v=jabXQxRRAw8>.

<sup>87</sup> *Supra* note 38.

collecting things while a tune played that sounded like *Banjo-Kazooie*.”<sup>88</sup>

Fans and journalists are not the only ones that have noticed the similarities. Hideki Kamiya, like Keiji Inafune, is a former Capcom employee who worked on Capcom properties like *Resident Evil* and was a colleague of Inafune.<sup>89</sup> When asked about Inafune’s *Mighty No. 9*, Kamiya was critical of the similarities between Capcom’s *Mega Man* and Inafune’s *Mighty No. 9*, saying “[i]t’s like an insult to their old home... Similar? It’s a copy.”<sup>90</sup> He also went on to mention that it is not right to copy intellectual property, even if it has been dormant for years.<sup>91</sup>

Certainly “insult” is subjective; some have said imitation is the sincerest form of flattery. However, labeling *Mighty No. 9* as a “copy” of *Mega Man* brings it out from the realm of online banter, and into the realm of legal analysis. So, we examine these factors together – the developer leaving a publisher, the developer less likely

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<sup>88</sup> Colin Campbell, *Yooka-Laylee isn’t Going to be a Banjo-Kazooie Copy*, POLYGON (June 22, 2015, 9:00 AM), <https://www.polygon.com/2015/6/22/8817003/yooka-laylee-e3-preview> [<https://perma.cc/LNF7-V7JW>].

<sup>89</sup> Matt Leone, *Keiji Inafune Looks Back on Five Years of Comcept*, POLYGON (Feb 1, 2016, 12:00 PM), <https://www.polygon.com/features/2016/2/1/10863910/keiji-inafune-five-years-of-comcept> [<https://perma.cc/C567-NB5G>]; Hideki Kamiya, WIKIPEDIA, [https://en.wikipedia.org/wiki/Hideki\\_Kamiya](https://en.wikipedia.org/wiki/Hideki_Kamiya) [<https://perma.cc/7K9R-JCLP>].

<sup>90</sup> Ben Lamoreux, *Hideki Kamiya Says Mighty No. 9 is a Copy and an Insult to Capcom*, GAMENESIA (Jul. 7, 2015), <http://www.gamnesia.com/news/hideki-kamiya-says-mighty-no.-9-is-a-copy-and-an-insult-to-capcom> [<https://perma.cc/K9GV-NT3G>].

<sup>91</sup> *Id.* It is worth noting that Kamiya, after leaving Capcom, worked on a spiritual successor to Capcom’s *Resident Evil*, entitled *Evil Within*. Fans have also pointed out similarities between *Resident Evil* and *Evil Within*. Evan Narcisse, *This Evil Within Scene Will Look Familiar to Resident Evil Fans*, KOTAKU (Oct. 14, 2014, 7:15 PM), <http://kotaku.com/this-evil-within-scene-will-look-familiar-to-resident-e-1646327131> [<https://perma.cc/NCQ8-VJZJ>].

bound by a non-compete agreement, the general chilling effect of non-competes, the developer creating a spiritual successor video game, and the specter of a copyright infringement lawsuit. As Massachusetts Institute of Technology professor Matthew Marx said, “[i]t’s not about the lawsuit, but about the far larger chilling effect.”<sup>92</sup> Marx is referring to lawsuits over the enforcement of traditional non-competes; however, the mere threat of asserting intellectual property rights may chill developers from making a spiritual successor video game upon their departure from an employer, creating a mutant non-compete.

### III. MIGHTY NO. 9 AND MEGA MAN – A COPYRIGHT ANALYSIS OF A SPIRITUAL SUCCESSOR GAME

Going back to Kamiya’s accusatory quote, we must ask: Is Inafune’s *Mighty No. 9* a game that shares elements with *Mega Man* or is it just a copy?<sup>93</sup> It is understandable why a developer would want to use similar elements from his or her own previous works. The developers might want to serve a particular market by capitalizing on their brand being associated with a specific style of game with specific elements, for example, genre, setting, or gameplay. As Igarashi said about *Bloodstained* (which has similarities to its spiritual predecessor, the 2-D *Castlevania* series), “the core concept of *Bloodstained* is having that same gameplay experience as games from the past. The story and the characters and plot are quite different, but what we really did want to capture was having the same experience from the past and being able to play it now.”<sup>94</sup> But how far can

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<sup>92</sup> *Supra* note 79.

<sup>93</sup> *Supra* note 90.

<sup>94</sup> Heather Alexandra, *The Man Behind Bloodstained Talks Konami and Kickstarter Pressure*, KOTAKU, (June 20, 2017, 12:00 PM) [<https://perma.cc/X7RL-NSSC>].

spiritual successors go without running afoul of copyright law?

Copyright law as applied to video games is relatively new and still unfolding, in comparison to centuries of traditional, established copyright law, mostly because it is tied so closely to technology. Technology allows game makers to distribute games in new ways, and allows for greater experimentation with a complexity of stories, gameplay, graphics, and sound.<sup>95</sup> On the flipside, copyright law tends to lag behind these evolutions (and technology in general), but can still give us some direction when analyzing whether or not a spiritual successor game is copyright infringement.<sup>96</sup>

The Copyright Act grants copyright owners exclusive rights “to prepare derivative works based upon the copyrighted work,” which includes sequels to pre-existing works.<sup>97</sup> Courts have long held that video games are copyrightable as audiovisual works.<sup>98</sup> For the sake of this discussion, I will use Inafune’s *Mighty No. 9* as my primary example in my examination of copyright implications of a spiritual successor video game. Obviously, not all spiritual successor video games are automatically copyright infringements. Copyright law demands that each work be

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<sup>95</sup> David Greenspan, *Video Games and IP: A Global Perspective*, WIPO MAGAZINE, (April 2014)

[http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html) [<https://perma.cc/Y62J-8RPE>] (“Advances in technology have also dramatically changed the games themselves, spawning a wide range of new formats, stories, and genres. Games are in fact as varied as the imagination of the developers, featuring realistic graphics, voice-overs, use of motion capture technology giving characters fluid movements, music equal to film scores and original story lines.”)

<sup>96</sup> Vivek Wadhwa, *Law and Ethics Can’t Keep Pace with Technology*, TECHNOLOGY REVIEW, (April 15, 2014)

<https://www.technologyreview.com/s/526401/laws-and-ethics-cant-keep-pace-with-technology/> [<https://perma.cc/ZL9C-3GUA>].

<sup>97</sup> 17 U.S.C. § 106(2) (2016).

<sup>98</sup> Casillas, *supra* note 20, at 158.



looked at on a case-by-case basis.<sup>99</sup> “To prove a claim of video game copyright infringement in a court of law, the plaintiff must show ownership of a valid copyright and an unauthorized copying or usage of the copyright.”<sup>100</sup> In our numerous spiritual successor examples, the publisher as a plaintiff would have ownership of a valid copyright (typically because of a work-made-for-hire relationship); “unauthorized copying or usage of the copyright” by the departing developer (the defendant) brings with it some ambiguity without first some understanding of copyright as applied to video games.

Copyright law has its origins in the written word.<sup>101</sup> As a result, it becomes difficult to reconcile what copyright law says about written words with what it says about audiovisual works like video games, which arguably may have higher degrees of expression and variation. Rebecca Tushnet points out that a paradox of written words often receive higher levels of legal protection than images even though images can convey more information: “Law’s word-centrism is inconsistent with the real impetus for most copyright fights: audiovisual works now generate the most copyright fights . . . and anti-copying technology is mostly directed at protecting video and music rather than printed works.”<sup>102</sup> Video games combine text, story, code, music, imagery, hardware, software, and player interaction to create many variations of how to express an idea, beyond merely

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<sup>99</sup> For every example of a non-spiritual successor video game in this paper (including our hypothetical Kojima post-*Metal Gear* illustration), we assume that the game is work-made-for-hire and the copyright belongs to the publisher or precedent developer, and therefore the departing developer (or alleged infringer) has no claim on the protectable elements of the game.

<sup>100</sup> Casillas, *supra* note 20, at 146.

<sup>101</sup> Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 711-12 (2012).

<sup>102</sup> *Id.*

just words.<sup>103</sup> But these combinations and variations can make video game intellectual property ownership “tricky”, as Iron Galaxy CEO (and former Inafune colleague at Capcom) Adam Boyes describes it, because “you cannot own a move set, and you can get away with a lot in terms of character design.”<sup>104</sup>

Just based on what we know about copyright that stems from the written word, so-called “clone games” are relatively easy to determine whether or not they are copyright infringements.<sup>105</sup> Many smartphone users are likely familiar with the mobile game *Angry Birds*.<sup>106</sup> Perhaps they might not be as familiar with cloned games like *Angry Alien*, *Angry Pig*, and *Angry Rhino: RAMPAGE!*<sup>107</sup> Clone games are very common, and are potentially very

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<sup>103</sup> David Greenspan, *Video Games and IP: A Global Perspective*, WIPO MAGAZINE, (April 2014) [http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0002.html) [<https://perma.cc/RM25-Z6QE>] (“Advances in technology have also dramatically changed the games themselves, spawning a wide range of new formats, stories, and genres. Games are in fact as varied as the imagination of the developers, featuring realistic graphics, voice-overs, use of motion capture technology giving characters fluid movements, music equal to film scores and original story lines.”)

<sup>104</sup> Boyes, *supra* note 22.

<sup>105</sup> Porter, *The Difference Between a Blatant Clone and Building on a Proven Game*, TUTS PLUS (March 2, 2014) <https://gamedevelopment.tutsplus.com/articles/the-difference-between-a-blatant-clone-and-building-on-a-proven-game--gamedev-14363> [<https://perma.cc/Z69L-LT57>] (“When it comes to actual clones, they’re almost always quite obvious. Clones are usually so similar, that even the tiniest details will be copied over.”)

<sup>106</sup> THE TELEGRAPH (Dec. 9, 2011), <https://www.telegraph.co.uk/technology/mobile-phones/8944881/iPhone-Angry-Birds-most-popular-smartphone-app.html>.

<sup>107</sup> Casillas, *supra* note 20, at 143; Tom Curtis, *Apple removes several iOS copycat games from one offending developer*, GAMASUTRA (Feb. 3, 2012), [<https://perma.cc/7MFC-GSAQ>].

lucrative for the maker of the clone game.<sup>108</sup> *Tetris v. Xio* is a case concerning clone games that gives us some guidance into what is and is not protectable in video games.<sup>109</sup>

In *Tetris v. Xio*, the holders of the copyright and respective trademarks of the *Tetris* video game brought copyright and trade dress infringement claims against Xio, which made a smartphone game inspired by Tetris.<sup>110</sup> *Tetris* is one of the earliest “tile-matching” video games.<sup>111</sup> Xio’s game was called *Mino*, and Xio admitted that there were intentional similarities with *Tetris*, but those similarities were all unprotectable elements.<sup>112</sup> According to the court, “game mechanics and the rules are not entitled to protection, but courts have found expressive elements copyrightable, including game labels, design of game boards, playing cards, and graphical works.”<sup>113</sup> The court in this case found for Tetris Holding because “Xio has infringed a substantial amount of the overall copyrighted work” by replicating the movement of the tiles and the size of the playfield.<sup>114</sup>

However, a comparison of *Mega Man* and *Mighty No. 9* tells us that it is more than just replicating movement and aspects of a playfield, and that there are at least some differences in expressive elements worth examining to see what level of protection Capcom’s *Mega Man* should be given. Deborah Buckman, in *Intellectual Property Rights in Video, Electronic, and Computer Games*, posits, “When the idea of a game and its expression coincide or merge so that the expression provides nothing new or original, copyright law provides no protection except in cases of identical

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<sup>108</sup> See Casillas, *supra* note 20; See Curtis, *supra* note 107.

<sup>109</sup> See *Tetris v. Xio*, 863 F. Supp. 2d 394 (D.N.J. 2012).

<sup>110</sup> *Id.* at 397.

<sup>111</sup> Jesper Juul, *Swap Adjacent Gems to Make Sets of Three*, JESPER JUUL (2007), <https://www.jesperjuul.net/text/swapadjacent/> [<https://perma.cc/68NH-WWDJ>].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 404.

<sup>114</sup> *Id.* at 412, 413.

copying. The farther the expression gets from the initial idea of a game, the more protection the game will be afforded.”<sup>115</sup> We will need more developed guidance for a game that is not just a clone when examining Capcom’s *Mega Man* and spiritual successor Inafune’s *Mighty No. 9* for sufficient differences in expression to see whether the successor game is infringing upon any copyrightable elements. We look for differences in expression between *Mighty No. 9* and *Mega Man* in gameplay mechanics, characters, story, and setting.

To determine whether or not *Mighty No. 9* is merely a clone of *Mega Man*, we will look for differences in expression in gameplay mechanics, characters, story, and setting.

### A. *Gameplay Mechanics*

Gameplay mechanics includes how a player controls the action on the screen, how a character moves from one part of the game to another, and how progression is tracked in the game.<sup>116</sup> Both the classic *Mega Man* series (as seen in *Mega Man* 1-8) and *Mighty No. 9* are side-scrolling action platforming games, in which a player controls a character on a two-dimensional plane, that jumps between platforms to advance in the game while avoiding falls, all while combating enemies with an arm cannon.<sup>117</sup> Copyright law provides clear guidance when it comes to gameplay

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<sup>115</sup> Casillas, *supra* note 20, at 147 n.71 (quoting Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. Fed. 2d 269, 283 (2006)).

<sup>116</sup> Gameplay, WIKIPEDIA, <https://en.wikipedia.org/wiki/Gameplay> [https://perma.cc/XXL4-JRP9] (last visited Aug. 9, 2017).

<sup>117</sup> *Mega Buster*, MEGA MAN WIKIA, [http://megaman.wikia.com/wiki/Mega\\_Buster](http://megaman.wikia.com/wiki/Mega_Buster) [https://perma.cc/2643-AZH8] (“Mega Man’s main weapon used in the early *Mega Man* games”); *Mega Man (video game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mega\\_Man\\_\(video\\_game\)#Gameplay](https://en.wikipedia.org/wiki/Mega_Man_(video_game)#Gameplay) [https://perma.cc/92S4-UMGW].

mechanics; Gameplay, as a practical matter, “is not protectable expression.”<sup>118</sup> The simple mechanics of moving the player’s character around in the field of play, directions on a controller, or metrics that show a character’s health would therefore not be eligible for copyright protection (“Copyright does not protect game rules, procedures, or winning conditions that create the environment for the expressive elements of the game.”)<sup>119</sup>

*Capcom v Data East* gives us further guidance on gameplay mechanics. Capcom is the publisher of the well-known *Street Fighter* video game franchise that features an eclectic group of global martial artists competing in a fighting tournament, each match between the fighters being one-on-one on a 2-D plane.<sup>120</sup> Each fighter has a specific style and special (sometimes supernatural) moves unique to that fighter.<sup>121</sup> The first fighter to win two fights out of three (by depleting the opponent’s energy bar) advances in the tournament (i.e. the “winning condition”).<sup>122</sup> In 1991, Capcom released its latest installment of their franchise at the time, *Street Fighter II*.<sup>123</sup> In 1993, Data East released its fighting game, *Fighter’s History*.<sup>124</sup> *Fighter’s History*, also

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<sup>118</sup> *DaVinci Editrice S.R.L. v. ZiKo Games, LLC*, 183 F. Supp. 3d 820, 828 (D. Tex. 2017).

<sup>119</sup> *Id.* (citing *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846 (2nd Cir. 1997)); *See also* Bruce Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439 (2011) (parenthetical explaining its relevance).

<sup>120</sup> *Capcom U.S.A., Inc. v. Data East Corp*, No. C 93-3259 WHO, 1994 WL 1751482, at \*1-2 (N.D. Cal. Mar. 16, 1994); *Street Fighter II: The World Warrior*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Street\\_Fighter\\_II:\\_The\\_World\\_Warrior#Gameplay](https://en.wikipedia.org/wiki/Street_Fighter_II:_The_World_Warrior#Gameplay) [<https://perma.cc/6ZB7-ZJ3R>].

<sup>121</sup> *Capcom U.S.A., Inc.* at \*2; *Special Attacks*, STREET FIGHTER WIKIA, [http://streetfighter.wikia.com/wiki/Category:Special\\_Attacks](http://streetfighter.wikia.com/wiki/Category:Special_Attacks) [<https://perma.cc/FS4N-FRJR>].

<sup>122</sup> *Capcom U.S.A., Inc.* 1994 WL 1751482 at \*2.

<sup>123</sup> *Id.* at \*1.

<sup>124</sup> *Id.* at \*2.

a 2-D fighting game, featured a varied line-up of diverse global martial artists competing in a tournament.<sup>125</sup> The fighter advances by winning two out of three matches by depleting the opponent’s energy bar.<sup>126</sup> Capcom sued Data East, claiming that Data East’s *Fighter’s History* “copies the distinctive fighting styles, appearances, special moves and combination attacks of many of *Street Fighter II*’s characters, as well as the control sequences used to execute their moves,” specifically, “gameplay mechanics”.<sup>127</sup> The court ultimately found that the similar elements over which Capcom claimed copyright were common scenes à faire<sup>128</sup> and therefore unprotectable.<sup>129</sup>

Turning back to *Mega Man* and *Mighty No. 9*, there are many other video games completely unrelated to *Mega Man* that are side-scrolling action platforming games.<sup>130</sup> Among them are the *Super Mario* and *Sonic the Hedgehog*

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<sup>125</sup> *Fighter’s History*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fighter%27s\\_History#Fighter’s\\_History](https://en.wikipedia.org/wiki/Fighter%27s_History#Fighter’s_History) [<https://perma.cc/XMZ5-F7J6>]; *Fighter’s History*, GIANT BOMB, <https://www.giantbomb.com/fighters-history/3030-10486/>.

<sup>126</sup> *Fighter’s History*, WIKIPEDIA; *Fighter’s History*, GIANT BOMB.

<sup>127</sup> *Fighter’s History*, WIKIPEDIA; *Fighter’s History*, GIANT BOMB.

<sup>128</sup> *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978) (describing scenes a faire as “incidents, characters, or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic”).

<sup>129</sup> *Capcom U.S.A.*, 1994 WL 1751482 at \*13; *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (“Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain ‘stock’ or standard literary devices, we have held that scenes a faire are not copyrightable as a matter of law.”); *See also Ross Dannenberg, Case: Capcom v. Data East (N.D. Cal. 1994) [C]*, PATENT ARCADE, (Aug. 29, 2005, 10:00 AM), [<https://perma.cc/N5EM-VKW6>].

<sup>130</sup> *Side-Scrolling Video Game*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Side-scrolling\\_video\\_game#Scrolling\\_platformers](https://en.wikipedia.org/wiki/Side-scrolling_video_game#Scrolling_platformers) [<https://perma.cc/R8F9-JXZ3>].

series of 2-D platforming games.<sup>131</sup> Because gameplay and mechanics are not eligible for copyright protection in games, *Mighty No. 9*'s gameplay mechanics likely do not infringe upon those of the classic 2-D *Mega Man* series from Capcom.<sup>132</sup>

## B. Characters

Capcom's *Mega Man* and Inafune's *Mighty No. 9* both feature a boy robot as the protagonist that the player controls in the story.<sup>133</sup> This similarity between the two games brings up the concept of "stock characters." Stock characters are also part of scenes à faire.<sup>134</sup> As stated in the *Capcom USA v Data East* holding, "[t]he scenes à faire doctrine includes 'stock' characters and plots in dramatic works and now 'encompasses stereotyped expression, standard or common features in a wide variety of works, including audiovisual works generated by computers.'<sup>135</sup> Certain elements are essential, or at the very least expected, in a certain type of story or setting. To illustrate, courts cannot restrict the usage of a stereotypical cowboy character in a "wild west" story, because that is the type of character that would likely appear in that type of story.<sup>136</sup>

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<sup>131</sup> *Sonic the Hedgehog (1991 Video Game)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Sonic\\_the\\_Hedgehog\\_\(1991\\_video\\_game\)#Gameplay](https://en.wikipedia.org/wiki/Sonic_the_Hedgehog_(1991_video_game)#Gameplay) [<https://perma.cc/9XX2-M72E>].

<sup>132</sup> However, gameplay might be patentable subject matter. See *Top 5: Video Game Patents That Shape the Way You Play*, ARTICLE ONE PARTNERS BLOG, [<https://perma.cc/SZM6-8ZLT>] (last visited Aug. 9, 2017); See also Ernest Adams, *The Designer's Notebook: Damn All Gameplay Patents!*, GAMASTURA, [<https://perma.cc/T3JG-PVAQ>] (last visited Aug. 9, 2017).

<sup>133</sup> *MegaMan*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mega\\_Man](https://en.wikipedia.org/wiki/Mega_Man) [<https://perma.cc/BHM5-HSWW>] (last visited May 29, 2018).

<sup>134</sup> *Alexander*, 460 F. Supp. at 45.

<sup>135</sup> *Capcom U.S.A.*, 1994 WL 175482 at \*6.

<sup>136</sup> In a real life example, MGM (holders of the James Bond license) once sued Honda over a Superbowl commercial that featured a Bond-

As it relates to *Mighty No. 9* and its similarities to *Mega Man*, historically there have been boy robot characters within pop culture, most notably the Japanese comic book and cartoon character Astro Boy (known as “The Mighty Atom” in Japan).<sup>137</sup> At one point Capcom did have a license to create a video game based on Astro Boy but ultimately lost the license, and instead created *Mega Man*.<sup>138</sup> The main characters of *Mega Man* and *Mighty No. 9* are Rock and Beck, respectively, and are both boy robots.<sup>139</sup> Furthermore, both have an older male scientist-type as a father figure/mentor – Doctor Light and Doctor White,

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like spy protagonist in action scenes involving spy movie tropes. See *Metro-Golden-Mayer, Inc. v. American Honda Motor Co., Inc.* 900 F. Supp. 1287 (C.D. Cal. 1995).

<sup>137</sup> *Astro Boy*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Astro\\_Boy](https://en.wikipedia.org/wiki/Astro_Boy) [<https://perma.cc/UV5B-HHDW>] (last visited May 29, 2018).

<sup>138</sup> Additional design elements of the main *Mega Man* character came from a character in an animated series called *Tanpei*, although the *Tanpei* character is not a robot. See Luke Plunkett, *Mega Man Is Very Sad*, KOTAKU (Nov. 16, 2016, 6:30 PM), [<https://perma.cc/4KX4-RWY6>]; Angelo Dargenio, *11 Facts You Probably Didn't Know About Mega Man*, ARCADE SUSHI, (July 16, 2014) [<https://perma.cc/BF6M-6GDB>].

<sup>139</sup> *MegaMan*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mega\\_Man](https://en.wikipedia.org/wiki/Mega_Man) [<https://perma.cc/BHM5-HSWW>] (last visited May 29, 2018).



respectively.<sup>140</sup> Both have a female robot companion; Rock's is named Roll, while Beck's is named Call.<sup>141</sup>



Left: Beck from *Mighty No. 9*; Right: Rock from *Mega Man*<sup>142</sup>

The characters of Rock and Beck also share some visual similarities in their respective designs, namely in the costumes, arm cannons, and helmets. Earlier designs for Beck that Inafune's team had posted to the *Mighty No. 9* website showed a color scheme that originally featured more blue than the final design (which ended up as white).<sup>143</sup>

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<sup>140</sup> *Id.*; *Astro Boy/Mighty Atom* also had a male scientist-type as a father figure/mentor, named Doctor Tenma. *Dr. Tenma*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Dr.\\_Tenma](https://en.wikipedia.org/wiki/Dr._Tenma) [<https://perma.cc/4YR3-C8DD>], (last visited Aug. 9, 2017).

<sup>141</sup> *MegaMan*, WIKIPEDIA; One of the elements of copyright infringement is proof of access to the plaintiff's work. Not surprisingly, Inafune had access to *Mega Man*; after all, he did help very early on in the creation of *Mega Man*.

<sup>142</sup> Michael McWherter, *Mighty No. 9's Hero Looks a Little Less Like Mega Man Now*, POLYGON, (Nov. 11, 2014 8:41 PM) <https://www.polygon.com/2014/11/11/7200135/mighty-no-9-beck-design-change-mega-man> [<https://perma.cc/H7JS-T3ND>].

<sup>143</sup> *Id.*

*Mega Man*'s Rock is primarily known for his blue colored costume.<sup>144</sup>



Left: early Beck design from *Mighty No. 9*. Right: altered design for Beck.<sup>145</sup>

*Capcom* also provides guidance on copyright parameters for characters in video games.<sup>146</sup> Even though there were similarities between corresponding *Street Fighter II* and *Fighter's History* characters, the court found the similar elements to not be protectable, reasoning that “the physical appearances and fight moves of the few characters at issue are expressed in sufficiently different manners in the two games to preclude a finding of substantial similarity.”<sup>147</sup> Of particular interest is the comparison the court made between *Street Fighter II*'s Ryu and *Fighter's History*'s Mizoguchi.<sup>148</sup> Both are karate fighters—a stereotypical character in pop culture, across movies, television shows,

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *Capcom U.S.A., Inc. v. Data East Corp*, 1994 WL 1751482 (N.D. Cal. Mar. 16, 1994).

<sup>147</sup> *Id.* at \*14.

<sup>148</sup> *Id.* at \*16-7.

comic books, and video games.<sup>149</sup> Both throw magical projectiles, but the expression of those magical projectiles are different and other fighting video games (like *Mortal Kombat*) feature martial arts characters throwing magical projectiles, which is not a protectable element.<sup>150</sup> The court ultimately found that Ryu and Mizoguchi represent different expressions of the stereotypical karate fighter: “the actual expressive details of the stereotype, the part that is protectable, vary greatly.”<sup>151</sup>

Applying this guidance to *Mighty No. 9* and *Mega Man*, Rock and Beck are different expressions of the idea and stock character of “boy robot.” Other boy robots exist in pop culture, such as Rusty from the graphic novel and animated series *Big Guy and Rusty the Boy Robot*.<sup>152</sup> Arguably, all are variations of the “synthetic human-made boy” idea that go as far back as *The Adventures of Pinocchio*.<sup>153</sup> As the *Alexander* case pointed out, “where common sources exist for the alleged similarities, or the material that is similar is otherwise not original with the plaintiff, there is no infringement.”<sup>154</sup> Here, the aforementioned commonalities between Rock and Beck are not original to Capcom’s *Mega Man*, and therefore are likely

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<sup>149</sup> *Id.* at \*16.

<sup>150</sup> *Id.* at \*17.

<sup>151</sup> *Id.* at \*16.

<sup>152</sup> *The Big Guy and Rusty the Boy Robot*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Big\\_Guy\\_and\\_Rusty\\_the\\_Boy\\_Robot](https://en.wikipedia.org/wiki/The_Big_Guy_and_Rusty_the_Boy_Robot) [<https://perma.cc/54GH-G2HX>] (last visited on May 29, 2018); *The Big Guy and Rusty the Boy Robot (TV series)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Big\\_Guy\\_and\\_Rusty\\_the\\_Boy\\_Robot\\_\(TV\\_series\)](https://en.wikipedia.org/wiki/The_Big_Guy_and_Rusty_the_Boy_Robot_(TV_series)) [<https://perma.cc/5WTZ-KM9S>].

<sup>153</sup> *The Adventures of Pinocchio*, WIKIPEDIA, [https://en.wikipedia.org/wiki/The\\_Adventures\\_of\\_Pinocchio](https://en.wikipedia.org/wiki/The_Adventures_of_Pinocchio) [<https://perma.cc/C7M3-EJ2T>] (last visited on May 29, 2018).

<sup>154</sup> *Alexander*, 460 F. Supp. at 45 (citing *Fuld v. Nat’l Broad. Co.*, 390 F. Supp. 877, (S.D.N.Y. 1975); *Costello v. Loew’s Inc.*, 159 F. Supp. 782 (S.D.N.Y. 1958); *Greenbie v. Noble*, 151 F. Supp. 45, 65 (S.D.N.Y. 1957)).

not copyright infringement on their own, because “Capcom cannot claim a stereotype for its exclusive use.”<sup>155</sup>

### C. *Story and Setting*

Once again, the scene-a-faire doctrine helps us understand the copyright implications of the similarities in story and setting as presented in *Mega Man* and spiritual successor *Mighty No. 9*, and how they are different expressions of the same idea. “Scenes a faire, where events flow naturally from generic plot-lines or sequences of events necessarily resulting from the choice of a setting or situation constitute one type of unprotectable idea.”<sup>156</sup> So, a robot character in a futuristic setting is hardly surprising. Going back to our brief cowboy illustration, to prevent anyone else placing a character like that in such a setting like that is akin to preventing someone from placing a cowboy character in a wild west setting.

*Capcom v. MKR Group* illustrates this point, where MKR Group, holders of the copyright to the George Romero film *Dawn of the Dead*, sued Capcom for copyright infringement over Capcom’s video game, *Dead Rising*.<sup>157</sup> Romero’s 1979 film features survivors of a zombie plague outbreak (one of which is a traffic helicopter pilot) escaping via helicopter and finding shelter in a shopping mall and defending themselves against zombie attacks.<sup>158</sup> Capcom’s *Dead Rising* video game features a protagonist who is a photojournalist and, amidst a zombie plague outbreak arrives at a shopping mall via helicopter where the photojournalist

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<sup>155</sup> Capcom U.S.A., 1994 WL 175482 at \*16.

<sup>156</sup> *Capcom Co., LTD. v. MKR Group, Inc.*, No. C 08-0904 RS, 2008 WL 4661479, at \*6 (N.D. Cal. Oct. 20, 2008) (citing *Metcalfe v. Bochco*, 294 F.3d 1069, 1074 (9th Cir. 2002) (quotations omitted).

<sup>157</sup> *Id.* at 1.

<sup>158</sup> *Id.* at 2.

must battle zombies to survive.<sup>159</sup> The court here, determined the similarities between *Dawn of the Dead*'s traffic helicopter pilot and *Dead Rising*'s photojournalist were attributable to both being stock characters.<sup>160</sup> The court even found enough differences between the layouts of each respective work's shopping mall settings to not be "substantially similar."<sup>161</sup> The court went on to differentiate the respective plots of the two works, citing dissimilarities in the sequence of events as depicted in the video game versus the movie.<sup>162</sup>

Applying that to *Mighty No. 9* and *Mega Man*, each is a different expression of a similar idea with respect to story and setting. Admittedly, there are similarities between the stories and settings of *Mega Man* and *Mighty No. 9*. Both feature the (stereotype) boy robot character in a futuristic setting, battling other robots that have gone rogue. In both, the protagonist "levels up" by defeating the rogue robots and taking on their powers and abilities (which is part of both story and gameplay). They are each similar in idea (which, by itself, is not eligible for copyright protection), but are likely different enough in expression as to not be considered substantially similar.

It is worth noting there are other post-*Mega Man* video games that share commonalities with *Mega Man*, just as *Mighty No. 9* shares with its common predecessor. Among these games are *Azure Striker Gunvolt*, *Mighty*

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<sup>159</sup> *Id.* at 1, 2 (Prior to the release of *Dead Rising*, Capcom contacted MKR about licensing some elements of *Dawn of the Dead* for use in the game but ultimately did not obtain the license (similar to how Capcom attempted to get the Astro Boy / Mighty Atom license for a video game); the game was ultimately released with a disclaimer – "THIS GAME WAS NOT DEVELOPED, APPROVED, OR LICENSED BY THE OWNERS OR CREATORS OF GEORGE A. ROMERO'S DAWN OF THE DEAD").

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *Id.* at 10.

<sup>162</sup> *Id.* at 7.

*Gunvolt*, and *Android Hunter A*.<sup>163</sup> None of these games have the intimate involvement of Inafune, yet none of their developers have been called out specifically by former Capcom employees for copying from *Mega Man*, and therefore the specter of litigation (or even very many eyebrows) has not been raised. However, just because Inafune previously worked at Capcom, he seemingly is being targeted and accused of “copying.” Here, we begin to see the overtones of non-competition, as Inafune, according to copyright law, should have the same freedom as anyone else to make a new game that has unprotectable elements in common with *Mega Man*. These overtones begin to cross the line from intellectual property law into employment and contract law, which could have ramifications on our hypothetical Kojima / Konami scenario.

#### IV. THE EFFECTS OF NON-COMPETITION AND RESTRAINT OF TRADE

This section will go over general harms that are inherent in non-competes, and then will move on to specific harms that may arise from a de-facto non-compete that stems from intellectual property-based causes of action.

##### A. *General Harms of Non-Competition and Restraint of Trade*

Companies in many different fields justify using non-compete agreements to protect intangible assets like

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<sup>163</sup> Bonnie Burgette, *Android Hunter A – Revolutionary Action Platforming*, INDIE GAME MAGAZINE, <http://indiegamemag.com/android-hunter-a-revolutionary-action-platforming/> [https://perma.cc/P7XB-TM3T] (last visited August 9, 2017) (“*Android Hunter A* is a 3-D action platformer being developed by DigiPlox and hopes to build upon the success and nostalgia of games like *Mega Man* while bringing something new to the table.”).

trade secrets and customer relationships.<sup>164</sup> Other justifications include protecting the investment they have made into employees by way of training; non-compete agreements give companies an assurance that an employee is unlikely to leave shortly after they have spent time and money in training them.<sup>165</sup> One other justification can be seen in the recruiting and hiring process, namely screening.<sup>166</sup> Potential employees that are more likely to leave a company in a fairly short amount of time are less likely to find a non-compete agreement to be an acceptable condition of employment, and therefore more attractive to employers.<sup>167</sup>

Companies might desire to retain certain employees, such as those that are valuable to them or those that are expensive to train. Generally, non-competes do not deter workers who plan on staying at a particular company for a relatively long period of time, making them attractive hires.<sup>168</sup> This does not necessarily mean that the employees that companies are hiring are the most talented or potentially valuable; it could mean, however, that someone coming in that possesses specific talent or high value would be sought after by competitors, and more likely to leave. Therefore, a non-compete agreement and related restrictions would be an attractive tool for companies to use to retain employees of higher value.

The flipside to the justifications of non-competes is the general harms that they can cause, both to employees and entire industries. It is estimated that over one-third of

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<sup>164</sup> Off. of Econ. Policy U.S. Dep't of the Treasury, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 7 (2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> [<https://perma.cc/7RGL-5DHN>].

<sup>165</sup> *Id.* at 8.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 8-9.

<sup>168</sup> *Id.*

engineers and scientists in the technology sector are covered by non-compete agreements.<sup>169</sup> One obvious harm is the cost of litigation. Copyright litigation for video games is fact-intensive and potentially very costly. This type of litigation could involve expert witnesses and consumer surveys to determine substantial similarities.<sup>170</sup> But there are other harms; non-compete agreements affect employee mobility, employee wages, and, on an aggregate level, how talent and information are shared across an industry.<sup>171</sup>

Firstly, non-compete agreements restrict mobility of employees. A study by the U.S. Treasury in 1985 suggests that worker job mobility decreased by eight percent or more when states (such as Michigan) allowed for non-competes to be enforced.<sup>172</sup> These workers are more likely to leave their industry if they are restricted by non-competes and wish to leave their current jobs, which might result in “reduced compensation, atrophy of their skills, and estrangement from their professional networks.”<sup>173</sup> These restraints could cause workers “to detour from their original career paths.”<sup>174</sup>

Secondly, non-compete agreements can affect wages and earning potential of employees. The report from the U.S. Department of the Treasury on non-competes shows findings that suggests “stricter non-compete enforcement to be associated with both lower wage growth and lower initial wages.”<sup>175</sup> Sometimes, new employees will accept lower initial wages to, in effect, pay for their own training; otherwise, an employer who invested in training that

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<sup>169</sup> Lohr, *supra* note 79.

<sup>170</sup> Or likelihood of confusion, if the cause of action be trademark-based.

<sup>171</sup> Off. of Econ. Policy U.S. Dep’t of the Treasury, *supra* note 164 at 18-23.

<sup>172</sup> *Id.* at 18.

<sup>173</sup> *Id.*

<sup>174</sup> Lohr, *supra* note 79.

<sup>175</sup> Off. of Econ. Policy U.S. Dep’t of the Treasury, *supra* note 164, at 19.



employee would want that employee to be bound by a non-compete so that they do not leave for a competitor after being trained.<sup>176</sup> University of Maryland economist Evan Starr estimates, “Technical workers in Massachusetts would be paid about seven percent more if the State’s non-compete practices mirrored California’s.”<sup>177</sup> Additionally, “when workers are legally prevented from accepting competitors’ offers, those workers have less leverage in wage negotiations and fewer opportunities to develop their careers outside of their current firm.”<sup>178</sup>

The different non-compete policies of Massachusetts and California illustrate our third harm of non-competes—non-competes stifle innovation by restricting the sharing of talent and information. Because of differences in non-compete policies between Massachusetts and California, Route 128 and Silicon Valley have stark differences in their respective abilities to innovate. Various states across the U.S. have begun to recognize that California’s refusal to enforce non-compete agreements is a strong factor in Silicon Valley’s success relative to its east coast counterpart Massachusetts’s Route 128 and are reconsidering their own policies.<sup>179</sup> The lack of non-competes allows talent to “cluster,” making it easier for “workers to share expertise and discoveries,” which facilitates innovation by allowing industry-wide dissemination of knowledge and best practices.<sup>180</sup> Non-competes can work against that ideal, especially for start-up companies. “[Non-compete] agreements can stifle innovation because they particularly hurt experienced, specialized workers—the type of

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<sup>176</sup> *Id.* at 8.

<sup>177</sup> Lohr, *supra* note 79.

<sup>178</sup> Off. of Econ. Policy U.S. Dep’t of the Treasury, *supra* note 164 at 10.

<sup>179</sup> Lohr, *supra* note 79.

<sup>180</sup> Off. of Econ. Policy U.S. Dep’t of the Treasury, *supra* note 164 at 22.

individuals who are often recruited to help guide a start-up.”<sup>181</sup> Harvard professor Lee Fleming posits, “Some instead seek employment in large companies that can defend them against litigation related to non-compete agreements . . . they tend to avoid start-ups, which don’t have the resources to protect them,” or even leave their field altogether,<sup>182</sup> which would be less conducive to innovation.<sup>183</sup> Recall our aforementioned Kickstarter trio of Inafune, Igarashi, and Mayes all formed start-up companies as homes for their respective spiritual successor games. Paul Maeder of Highland Capital Partners wonders, “Now what happens if we have non-competes that discourage start-ups *before they even get started* [emphasis added]? They’re the silent killer.”<sup>184</sup>

In jurisdictions where non-compete agreements are enforceable, courts attempt to strike a balance between allowing employers to reap the benefits of training employees with allowing for mobility of employees. In these jurisdictions, restraints of trade in this manner have to be reasonable to be enforceable.<sup>185</sup> However, a mutant de facto non-compete based on intellectual property rights

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<sup>181</sup> Chris Kanaracus, *Noncompete Pacts Called Bad for Tech Innovation*, COMPUTER WORLD, <http://www.computerworld.com/article/2534357/it-management/noncompete-pacts-called-bad-for-tech-innovation.html> [https://perma.cc/UW3F-AMGD] (June 20, 2008, 1:00 AM PT).

<sup>182</sup> *Id.*

<sup>183</sup> Off. of Econ. Policy U.S. Dep’t of the Treasury, *supra* note 164, at 22 (Yet another compounding factor—a tendency for highly-skilled works to move from states that do enforce non-competes to states that do not, which inhibits dissemination).

<sup>184</sup> Kanaracus, *supra* note 181.

<sup>185</sup> Natalie McLaughlin & Mike Griffaton, *Employers’ non-compete agreements must be reasonable to be enforceable*, COLUMBUS BUSINESS FIRST, <https://www.bizjournals.com/columbus/news/2017/10/06/employers-non-compete-agreements-must-be.html> [https://perma.cc/8WS9-NEGF] (Oct. 6, 2017).

potentially could circumvent the requirement that a non-compete be reasonable.

**B. *Specific Harms of a Mutant Non-Compete Based on Intellectual Property Rights***

Washington Technology Industry Association CEO Michael Schutzler once said, “Nobody really likes a non-compete until they have intellectual property to protect.”<sup>186</sup> His statement shows us a link between non-compete agreements and intellectual property. This link is applicable when it comes to trade secrets and other intangible assets (such as customer relationships), but perhaps not as applicable for copyright.<sup>187</sup> These separate (but admittedly potentially related) areas have their own sets of laws that grant rights and protections. The danger comes when one set of laws is used to supplant the other, especially if the legal action stems from some nebulous intellectual property-based claim when the true intention is to chill competition.

*Dastar v. Twentieth Century Fox* tells us that one intellectual property regime could not, and should not, be used to extend the life of another intellectual property regime.<sup>188</sup> In this case, Twentieth Century Fox’s attempted to enforce intellectual property rights against Dastar on a book (and derivative film adaptation) whose copyright had expired by basing their claim on “reverse passing off” (a trademarks concept, covered by the Lanham Act).<sup>189</sup> Its attempt at essentially reclaiming material that had gone into the public domain copyright-wise by using a trademarks-based claim ultimately failed at the United States Supreme

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<sup>186</sup> Thibodeau, *supra* note 77.

<sup>187</sup> ... or trademark or patents.

<sup>188</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 32 (2003).

<sup>189</sup> *Id.* at 23.

Court level.<sup>190</sup> As the Court stated, “We have been ‘careful to caution against misuse or overextension’ of trademark and related protections into areas traditionally occupied by patent or copyright.”<sup>191</sup> “To hold otherwise would be akin to finding that § 43(a) created a species of perpetual patent and copyright, which Congress may not do.”<sup>192</sup>

The potential problem described in this paper “mutates” the *Dastar v. Twentieth Century Fox* concept by jumping beyond another intellectual property regime and into the realm of non-competes. Like in the *Dastar* holding, this type of chilling that constitutes a de facto non-compete would be a misuse or extension of copyright, but it would create an extension into an area traditionally occupied by contract and employment law.<sup>193</sup> This goes against trends in the technology industry of loosening restraints on trade. Conceptually, there are justifications within both intellectual property law and covenants not to compete: to protect good will, to prevent poaching of customers, to avoid confusion, to prevent unauthorized copying. However, these are separate areas of law from that of non-compete. It is inappropriate to use one to artificially impose or extend the other; “a statutory interpretation that renders another statute superfluous is of course to be avoided.”<sup>194</sup> It would be akin

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<sup>190</sup> *Id.* at 37-8.

<sup>191</sup> *Id.* at 34.

<sup>192</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. at 37 (2003); “§ 43(a)” refers to section 43 of the Lanham Act - 15 U.S.C. 1125 “False Designations of Origin, False Descriptions, and Dilution Forbidden.”

<sup>193</sup> James Pooley, *Expert Analysis: Trade Secret Bill Resolves ‘Inevitable Disclosure’ Controversy*, LAW360 (February 17, 2016), <https://www.law360.com/articles/759425/trade-secret-bill-resolves-inevitable-disclosure-controversy> [<https://perma.cc/Z9C8-R2XV>] (In the past, companies have also attempted to use the doctrine of inevitable disclosure to try to enforce de facto non-competes).

<sup>194</sup> *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. at 35 (2003).

to a publisher claiming to a departing developer “you cannot use this copyright because it is our copyright” when that publisher really means “you cannot use this copyright because you used to work here,” echoing Atari’s similar attempts to restrict Activision in the early 1980’s.

Beyond just the general harms of non-competes, there are several harms specific to this mutant non-compete that would affect developers, companies, and the gaming industry. These include uncertainty as to duration and scope, potential damage to reputations, and failures to meet market needs.

### **1. Uncertainty as to Duration and Scope**

Traditional non-compete agreements are often not perpetual, because they have to be reasonable in order to be enforceable. In contrast, copyrights tend to have a long duration, and trademarks and trade secrets are potentially perpetual and do not have statutory ends to their durations. Aside from temporal uncertainty, should the departing developer himself or herself not be an intellectual property attorney, there would be uncertainty as to the scope of what he or she may work on. To phrase this uncertainty as a question: “What kind of game am I allowed to make?” If a developer cannot practice his or her art and craft without certainty of what is allowable with respect to IP, that in itself is chilling. Similar to how painters and sculptors have a specific style, game developers might also have their own specific styles that they may be prevented from utilizing.

### **2. Potential Damage to Reputation & Hireability**

If a game developer is labeled a “copier” (like Inafune has), this may affect that developer’s reputation within the video game industry. Having a reputation as an infringer would dampen anyone’s job prospects, if the cloud of potential litigation follows her out the door of her previous

publisher. Companies tend to want to avoid litigation, and they themselves would be chilled from hiring this developer.

### 3. Failure to Meet Market Needs

Video game publishers and developers, no matter the level of fame, all have an interest in creating video games that consumers actually want to play. By allowing mutant non-competes to chill game developers, some of these games may not get made. The video game industry has already seen how market forces can cause publishers to re-think the direction of their franchises and become more aligned with what gamers might actually want to play. Over the years, the *Resident Evil* franchise went from the survival horror genre to the action genre, much to the dismay of many fans. However, after the release of spiritual successor *Evil Within*, Capcom pledged the new *Resident Evil* game will also return to its classic survival horror roots,<sup>195</sup> which is what its non-Capcom spiritual successor *Evil Within* was attempting to emulate. Additionally, sometime after the release of Inafune's *Mighty No. 9*, Capcom announced *Mega Man 11*, signaling an intention to return to the dormant franchise.<sup>196</sup> This shows that publishers are willing to incorporate lessons from the market to meet market demand. Also, there is something also to be said about the synergy that happened when Capcom and Inafune worked together on *Mega Man*, because generally, *Mighty No. 9* has not been critically well-

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<sup>195</sup> Scott Butterworth, *Resident Evil 7 Producer Explains What the Full Game Will Actually Be Like*, GAMESPOT, <http://www.gamespot.com/articles/resident-evil-7-producer-explains-what-the-full-ga/1100-6440991/> [<https://perma.cc/K7YH-LYW8>] (June 16, 2016, 16:37 PM).

<sup>196</sup> Michael McWhertor, *Mega Man 11 Announced for 2018 Release*, POLYGON, <https://www.polygon.com/2017/12/4/16734582/mega-man-11-announced-capcom-2018-release-date> [<https://perma.cc/4WUQ-8ZJY>] (December 4, 2017, 2:20 PM EST).

received.<sup>197</sup> The internet had no shortage of snark towards *Mighty No. 9* when *Mega Man 11* was announced (“Bold move by Capcom to announce a spiritual successor to *Mighty No. 9*”).<sup>198</sup> Perhaps a specific combination of a company’s backing of a developer is what led to *Mega Man*’s success; with ingredients missing, a spiritual successor might not be as well-received as its predecessor. Seemingly neither party was meeting a market demand.

Next, we present a proposal that seeks to prevent this type of chilling effect that amounts to a mutant non-compete.

## V. A PROPOSED STATUTORY SOLUTION TO PREVENT MUTANT NON-COMPETES IN THE VIDEO GAME INDUSTRY

This paper suggests a legislative solution to help solve the potential problem of intellectual property holders within the video game industry misusing intellectual property rights to discourage and undermine potential competition from former employees.

### A. *The Proposed Statute*

The legislature finds and declares that there is an increasing danger within the video game industry in potential lawsuits brought by employers against

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<sup>197</sup> Ben Kuchera, *A Detailed Explanation of Why Mighty No. 9 Was Terrible*, POLYGON, <https://www.polygon.com/videos/2017/4/25/15424046/mighty-no-9-wasnt-good-sorry> [https://perma.cc/LQE3-TCJC] (April 25, 2017, 2:00 PM EDT); Mike Fahey, *Mighty No. 9 Tries Real Hard, But No*, KOTAKU (June 22, 2016, 2:30 PM), <http://kotaku.com/mighty-no-9-tries-real-hard-but-no-1782427135> [https://perma.cc/VJ79-SWU3].

<sup>198</sup> Allegra Frank, *Mega Man 11 is giving Fans Another Chance to Mock Mighty No. 9*, POLYGON, <https://www.polygon.com/2017/12/5/16737828/mega-man-11-mighty-no-9-comparisons> [https://perma.cc/4FWA-RPKA] (December 5, 2017, 3:46 PM EST)

former employees to chill the valid exercise of established creative freedom as defined by intellectual property rights, with the goal of undermining competition beyond accepted non-competition norms. These potential lawsuits concern plaintiffs utilizing intellectual property rights to create an artificial covenant not to compete against defendants, who formerly were employed by the plaintiff or for whom they performed work-for-hire. The use of intellectual property law in this manner is done so in such a way as to escape the purview of contract law, employment law, and non-competition law. The Legislature finds and declares that it is in the public interest to encourage fair competition in matters of video games and related entertainment, and that the participation of creators should not be chilled through abuse of intellectual property law. To this end, this section shall be construed broadly.

A cause of action rooted in intellectual property rights against a party in furtherance of restricting that defendant's right to compete or be employed elsewhere under applicable state law shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the intellectual property claims.

Should the defendant prevail on the special motion to strike, the defendant shall be entitled to recover his or her costs and attorney's fees. However, should the court find that the defendant's motion to strike is frivolous or is intended for the sole purpose of causing an unnecessary delay, the court shall award costs and reasonable attorney's fees to the plaintiff prevailing on the motion.

This rule applies to any intellectual property claim used to supplant non-intellectual property-based causes of action, including those related to (but not limited to) covenants not to compete, non-disclosure



agreements, inevitable disclosure, and breaches of fiduciary duty.<sup>199</sup>

### ***B. Purpose of the Statute***

The purpose of the legislation is to keep intellectual property law separate from employment law, non-competition law, and contract law. The statute has both procedural (“special motion to strike”) and fee-shifting provisions to deter plaintiff’s from using intellectual property-based causes of action to supersede other areas of law. Even though there may be employment agreements that stipulate any intellectual property created by the employee is assigned to the employer, this legislation would discourage nebulous intellectual property-based causes of action against the employee after departure should the employee go on to create a similar but non-infringing work. Thus, any potential intellectual property-based claims are tested on their own for infringement; any employment-, non-competition-, and contract-based claims are tested on their own for reasonableness and enforceability.

### ***C. Origins of the Statute***

This proposed legislation is inspired by anti-SLAPP (Strategic Lawsuit Against Public Participation) laws, typically found at the state level and centered around anti-defamation suits.<sup>200</sup> Anti-SLAPP laws seek to give potential

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<sup>199</sup> See CAL. CIV. PROC. CODE §425.16-8; see CAL. CIV. PROC. CODE §1987.1-2; see CAL. CIV. CODE §47.

<sup>200</sup> Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*, in 22 CAUSES OF ACTION 317, §3,5 (2d ed. July 2017 Update) (SLAPP cases typically see plaintiffs, in trying to silence some form of criticism or opposition from defendants, bring suit against the defendants for defamation. In trying to curtail the defendants’ First Amendment rights, the plaintiffs

defendants a tool against litigation that would burden them with the cost of legal defenses against nebulous IP-based claims when the plaintiff's clear intention is to stifle competition. These types of laws and this paper's proposed legislation parallel each other in that both seek to discourage misusing established law (anti-defamation and intellectual property) to burden potential opposition (criticism and competition, respectively). Ideally, both exist to discourage even the specter of a bad faith lawsuit.

#### *D. Application*

We apply the proposed statute to our hypothetical Kojima-Konami situation. Recall that Konami, in response to Kojima's upcoming military stealth game, threatens to file a lawsuit against Kojima, claiming some ill-defined combination of copyright and trademark infringement.<sup>201</sup> The relief they seek are injunctions against Kojima's game being published or declaratory action that the upcoming game infringes upon Konami's intellectual property rights. Konami, with much more financial resources than Kojima Productions, conceivably can stall out production of the new Kojima game. When aspects of this new game are examined piecemeal, the new game would not be infringing on any of Konami's previous *Metal Gear* installments nor any other copyrights or trademarks owned by Konami. This new Kojima Productions project has as much in common with *Metal Gear* as it does with other games within the genre, like *Splinter Cell* or *Ghost Recon*; the main difference, however, is that Kojima previously worked on *Metal Gear*. Any objective observer could see that Konami is threatening legal action to prevent Kojima from competing with them, his

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attempt to burden defendants with costs of legal defense until the defendants abandon their criticism or opposition).

<sup>201</sup> For purposes of this illustration, the lawsuit would be brought in the United States.

former employer. Should the case make it to court, Kojima, as defendant, would have available a special motion to strike any frivolous intellectual property-based claims, and may be entitled to recover costs and reasonable attorney's fees. If there are any claims against Kojima as to non-disclosure or violation of non-competition agreement, then those claims should be brought and determined separately. Conversely, if the court finds that Kojima's motion to strike is solely to unnecessarily delay the legal action, then Konami would be entitled to recover costs and reasonable attorney's fees.

## **VI. CRITICISMS TO THE PROPOSED STATUTORY SOLUTION**

We address two possible criticisms to the above proposed statutory solution which allows a special motion to strike and fee-shifting should a party bring an intellectual property-based cause of action that is attempting to stifle competition unfairly. The first is that a statute like this would disincentivize intellectual property rights, specifically in copyright and trademark. The second is that this proposed legislation is too narrowly aimed at video games.

### ***A. Potential Objection #1: Disincentives to IP rights***

One potential criticism to this proposed legislation is that it would disincentivize intellectual property rights, specifically copyright and trademark. By this line of thought, any game developer that leaves his employer will be freer to create new video games that potentially infringe on that employer's intellectual property rights. The departed game developer could create games that not only capitalize on his own "brand" among fans, but "double-dips" by unfairly capitalizing on the prior employer's good will with fans. The former employer has invested a lot into building a video game brand through research and development and

marketing, and is now left with less legal recourse to battle potential infringement.

This approach is not proposing any sort of change to existing copyright and trademark law; it is suggesting deterrents from using copyright and trademark law in place of non-compete. This is not a disincentive to intellectual property rights at all—intellectual property statutes and case law would remain intact and can evolve on their own. If anything, it would actually strengthen intellectual property law by preventing its abuse as a tool for hampering competition and employee mobility. If intellectual property rights are abused in the scenarios presented in this paper, what is actually enforced becomes nebulous. Allowing poorly-defined precedents for future cases weakens intellectual property rights.

Copyright law already tells courts how to treat clone games as well as how scenes a faire and idea-expression provides limits on what is protectable. Rip-off games do not happen because of lax enforcement of non-competition; rather, how to treat alleged rip-off games is defined by intellectual property law. There will always be games that are similar to each other, whether they share the same genre, mechanics, or archetypes. Other publishers will always try to capitalize on the popularity that a hit franchise has brought to a particular type of game. This suggested statute will help courts treat all alleged intellectual property infringers the same, regardless of where they used to work.

Additionally, allowing for competition is good for consumers, as long as a competitor is not violating well-established intellectual property law. Allowing for potential competition may also lead to better treatment of game developers. “If anything, the success of these Kickstarters [for spiritual successor games by departing game developers] should be a lesson to game companies to better

manage their talent.”<sup>202</sup> It may have allowed for developers to continue working for their publishers on the properties that fans wanted to see—Kojima may have continued to make *Metal Gear* games and Inafune may have continued to make *Mega Man* games. Allowing for these types of collaborations to continue or allowing departing developers to work on the type of game their audiences want would better serve the market.

***B. Potential Objection #2: The proposed legislation is too narrowly aimed at video games***

This is a potential objection with which this paper agrees. On its face, the legislation, if applied strictly to video games, seems incongruent with other forms of art and entertainment which do not have a similar type of statute. However, this statutory solution was designed in such a way that it can be applied to other works beyond just video games and could be extended into these other areas.

This statutory solution can just as easily be applied to film or television. Besides anti-SLAPP legislation, the proposed statutory solution drew inspiration from a recent case involving actor Danny Trejo and filmmakers ITN Flix.<sup>203</sup> ITN Flix contracted with Trejo in 2005 to star in a movie called *Vengeance*, in which Trejo played a vigilante character.<sup>204</sup> The contract stipulated that ITN Flix had “the right to commercially exploit his [Trejo’s] name, image, and likeness” and that Trejo could “not play a vigilante character in any other films or appear in films that may be ‘hurt’ or be

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<sup>202</sup> Boyes, *supra* note 22.

<sup>203</sup> ITN Flix, LLC v. Hinojosa, No. 2:14-cv-8797-ODW(RZx), 2015 U.S. Dist. WL 10376624, at \*1 (C.D. Cal. May 13, 2015), *aff’d* in part, *vacated* in part, *rev’d* in part, 686 F. App’x 441 (9th Cir. 2017).

<sup>204</sup> *Id.*

‘similar’ to *Vengeance*” for “at least” eight years.<sup>205</sup> In 2010, filmmaker Robert Rodriguez directed and released the first *Machete* film, starring Trejo, in which Trejo played a vigilante character.<sup>206</sup> ITN Flix sued Rodriguez for interference with contract (among other causes of action)<sup>207</sup>, claiming ITN Flix had the exclusive rights to Trejo’s likeness and what amounts to his role as a vigilante in movies. The court found ITN Flix’s attempts to prevent Trejo the opportunity to play this type of character (especially at his age and the roles he has been historically cast) to be an unenforceable restraint of trade.<sup>208</sup> Had ITN Flix attempted to sue Rodriguez over copyright infringement due to the similarities of the “Trejo-as-vigilante” character in *Machete*, this paper’s proposed statute would deter ITN Flix from doing so when ITN Flix is clearly trying to restrain Trejo’s employment prospects. This limitation on what types of characters an actor may play is not an isolated instance (such as the rumored instance where Gillian Anderson could not take on a role in the film *Hannibal*), and the proposed statute may be applicable to future similar cases.<sup>209</sup>

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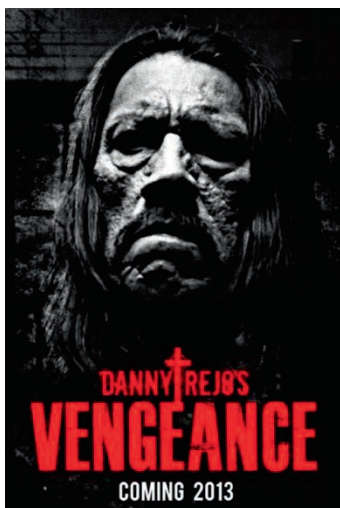
<sup>205</sup> *Id.* at 2.

<sup>206</sup> *Id.* at 3.

<sup>207</sup> *Id.* at 4.

<sup>208</sup> *Id.* at 8.

<sup>209</sup> James Hibberd, ‘*Hannibal*’ Casts ‘*X-Files*’ Star Gillian Anderson, ENTERTAINMENT WEEKLY, <http://ew.com/article/2012/12/12/hannibal-gillian-anderson/> [https://perma.cc/3PGK-VWX7] (December 12, 2012) (In a somewhat similar situation, Gillian Anderson played FBI agent Dana Scully on the Fox TV show *The X-Files*; it is rumored that her *X-Files* contract prohibited her from playing an FBI agent in other works, which prevented her from a potential role as FBI agent Clarice Sterling in the *Hannibal* film. Although not necessarily involving an IP-based cause of action, it would have been interesting to see if a court would determine this provision in her contract to be an unreasonable restraint of trade. If anything, the proposed statute would prevent Fox from bringing an IP-based cause of action to block Anderson from playing the role of Clarice Sterling.).



## VII. CONCLUSION

Although spiritual successor video games are not a new phenomenon, recent successfully crowd-funded video games by high profile developers have brought attention once again to this trend and implicate potential issues in non-competes disguised as intellectual property rights. Although the current state of copyright law does give some guidance in how to handle infringement in these types of games, allowing copyright and other intellectual property law to drive restraints on trade is both a misuse of law and an avenue to market failure. Utilizing this proposed statutory solution would keep these different areas of law separate so that one does not artificially extend the other. It also addresses disparities in legal and financial resources, thereby allowing business as well as creativity to continue more predictably for both publishers and departing developers. Facilitating more efficient uses of ideas and the intellectual property rights that protect them will bring recognition to the value that both developers and publishers bring. This approach will permit the game industry to continue building

castles with familiar bricks, and to deliver games that fans would actually want to play, made by their favorite developers.