

Team: 106

**GAMES INDUSTRY LAW SUMMIT:
LEGAL CHALLENGE 2020**

Starka Games Ltd.

vs

Omnia Ltd.

Submission of the Respondent

Legal pleadings: 4 968 words

TABLE OF CONTENTS

List of references.....	3
Primary authorities (legislation)	3
Primary authorities (case law).....	3
Secondary authorities	3
Table of abbreviations	4
Summary of the main arguments.....	6
Legal pleadings.....	8
A. Omnia shall not pay any royalties claimed by Starka	8
a. The parties were in equal bargaining position when negotiating the GDPA.....	8
i. The use of standard provisions.....	8
ii. Starka's choice not to seek legal counsel	9
b. Omnia has duly reported and paid all royalties due.....	10
i. Mutual release	10
ii. Audit rights	12
iii. Cut-off period.....	13
c. Starka is acting in bad faith.....	15
Conclusion of the First Claim	16
B. Starka has infringed Omnia's intellectual property rights in SiNB.....	17
a. Starka used SiNB for another game without authorisation, despite having assigned all intellectual property rights to Omnia	17
b. If the Tribunal finds that SiNB was not contractually assigned, SiNB is nevertheless a work for hire which belongs to Omnia.....	18
i. Starka was an independent contractor that created SiNB as a commissioned work specifically for Omnia.....	18
ii. Section 6.1 GDPA is not unconscionable.....	19
c. SiNB is not a derivative work from Starka's pre-existing technology	20
d. Starka had no right to use SiNB for <i>Epsilon Mobile</i> because it is not the copyright holder, nor the contract allowed them to post it on GitHub under a BSD-3 licence.....	21
e. The non-compete obligation	23
Conclusion of the Second Claim.....	24
Request for findings.....	25

List of references

Primary authorities (legislation)

- Unidroit Principles of International Commercial Contracts 2016.
- Obliland Law on Copyright and Designs 1980.
- Copyright Act of 1976, 17 United States Code (2016).

Primary authorities (case law)

- Merchant v Maxim Healthcare Servs., Inc., No. 2:18-CV-2757-RMG, 2018 WL 5793595, (D.S.C. Nov. 5, 2018).
- Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38.
- Interfoto Picture Library v Stiletto Visual Programmes, [1989] QB 433.
- CCNV v Reid 490 U.S. 730, 741 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).
- iXLInc. v. Adoutlet 2001 U.S. Dist. (N.D. Ill. March 29, 2001).
- Logicom Inclusive, Inc. v. W.P. Stewart & Co. [2004 U.S. Dist. (S.D.N.Y. August 9, 2004)].
- Siniougine v Mediachase [U.S. Dist. (C.D. Cal. June 11, 2012)]
- Stanacard LLC v Rubard No 12 CIV 5176, (SDNY Feb 3, 2016).
- Interlego AG v Tyco Industries Inc [1988] RPC 343.
- Clearsprings Management v Businesslinx Ltd [2005] EWHC 1487 (Ch).
- Robin Ray v Classic FM [1998] FSR 622.
- Attorney General of Belize v Belize Telecommunications [2009] UKPC 10.
- Zyware, Inc. v. Middlegate, Inc., No. 96 CIV. 2348 (SHS), 1997 WL 685336 (S.D.N.Y. Nov. 4, 1997).
- Doctor's Assocs., Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996).
- Longshore v. Chater, 934 F. Supp. 94, 101 (S.D.N.Y. 1996).

Secondary authorities

- Richard A. Lord, Williston on Contracts, 4th ed.

Table of abbreviations

GDPA	The Game Development and Publishing Agreement dated 10 June 2013 between Starka and Omnia
ICC principles	Unidroit Principles of International Commercial Contracts 2016
Omnia	Omnia Limited incorporated under the laws of Obliland under No. 571938364819 with its registered office in Seatown, Obliland
OSO	The free to play MMO video game “ <i>Outer Space Oddity</i> ” commercially released in August 2015
SiNB	AI technology “ <i>Space is New Brain</i> ” which tailors a video game for the player’s individual preferences
Starka	Starka Games LLC incorporated under the laws of Terryland under No. NA2453, with its registered office in Talestown, Terryland

Termination Agreement

The Termination Agreement signed on 21 November 2018 between Starka and Omnia

17 U.S.C. (2016)

Copyright Act of 1976 17 United States Code (2016).

Summary of the main arguments

1. Neither the use of standard provisions nor Starka's choice to not seek legal counsel affect the enforceability of the GDPA, as evidenced by Article 2.1.19 of the ICC principles.
2. Starka cannot bring a claim regarding allegedly reported and unpaid royalties due to the mutual release in the Termination Agreement. If the mutual release is not deemed in force, the cut-off period of Section 6.4 GDPA bars Starka from contesting royalty statements older than one year.
3. Starka is not entitled to bring a claim regarding supposedly unreported royalties for the period August 2015-September 2018, pursuant to Section 6.4 GDPA. The audit rights mentioned in Section 2 of the Termination Agreement survived only for the audit of the last royalty statement and final payment. Consequently, Omnia has duly paid all royalties due to Starka.
4. Further, Starka used the code for SiNB in another game without Omnia's consent, breaching not only the GDPA but also intellectual property law, pursuant to which Omnia retained all copyrights over OSO and therefore, SiNB. Firstly, SiNB was expressly assigned in the GDPA since it is the technology on which the game mechanics run. Should the Tribunal find otherwise, Omnia still owns SiNB as it qualifies as a work for hire. Either as a contribution to a collective work commissioned by Omnia, i.e. OSO, or a compilation of computer programs, again all the other code for OSO, SiNB rightfully belongs to Omnia. In addition, the express assignment in section 6.1 GDPA is not unconscionable nor suffers from any other defect that may render it invalid.
5. Moreover, SiNB only exists due to Omnia's contract with Starka, its pre-existing code required crucial amendments to fit into Omnia's game design document and is under no circumstances derivative of Starka's pre-existing technology.
6. Furthermore, Starka licensed SiNB naming itself as the copyright holder when neither the GDPA nor Omnia allowed it. While Starka claims Omnia is prevented from

claiming infringement due to Ms Vein being aware of the release on GitHub and thus a licence should be implied, Ms Vein awareness or lack thereof does not amount to consent. Also, there cannot be an implied licence to use SiNB where there has been an expressed assignment. To hold the contrary would be inequitable and against commercial reality. Finally, Omnia does not claim Starka's relationship with a competitor violated any GDPA obligations and maintains the decision to lower investment in the marketing of OSO was a strategic decision that in no way breached the GDPA.

Legal pleadings

A. Omnia shall not pay any royalties claimed by Starka

a. The parties were in equal bargaining position when negotiating the GDPA

7. Despite Starka not formulating any claim in their pleadings based on the alleged imbalance in negotiating the GPDA, it nevertheless appears to be important to clarify this issue. Starka extensively argues that the parties were not in equal position during negotiations of the GDPA. It relies on two main arguments.

i. The use of standard provisions

8. Starka argues that “*parties have to discuss all aspects of regulations in the contract*”¹ and that, as Starka failed to influence every aspect of the negotiations, not all the material elements of the transactions have been agreed upon. Thus, supposedly leading to an unenforceable contract.
9. Starka questioning the validity of the GDPA is not only contradictory to the rest of its claims, which rely entirely on the contractual provisions of this same GDPA², but is also grossly erroneous.
10. Firstly, a contractual document is not unenforceable merely because some of the terms are suggested by one party. As defined in Article 2.1.19 (2) of the ICC principles, “*Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.*” The general rules on contract formation apply, meaning standard terms are binding “*upon the mere signature of the contract document as a whole*”³. Starka does not bring in any evidence that the contract is invalid nor that there is a legal reason for it to be unenforceable.
11. Even though the GDPA appears to not have been signed by either party, Starka indicated assent to Omnia’s offer by conduct, by starting to develop OSO in June 2013

¹ § 2 Legal Pleadings, Submission of the Claimant.

² For instance, id. §23, 24 with 27 and §44 with 61.

³ ICC principles, Comment 3 under article 2.1.19.

and thus performing its contractual obligations.⁴ Under contract law, an entire contract can be implied through the parties' conduct and surrounding circumstances.⁵

12. Moreover, Starka claims Mr Bekic could not negotiate the main provisions of the contract. However, as rightfully pointed out by the Claimant, game ownership is one of the main provisions in a game industry deal.⁶ The developer technology provisions, which concern intellectual property ownership, were negotiated by Mr Bekic on Starka's behalf.⁷ Consequently, the GDPA provisions are not vitiated neither because some may have been standard terms nor because they are unenforceable.

ii. Starka's choice not to seek legal counsel

13. In a second point, Starka claims that Starka not having legal counsel during the GDPA negotiations further proves an imbalance in the contractual negotiations.⁸

14. However, having legal counsel is not a prerequisite to the formation of a valid contract. A contract is formed by offer, acceptance and consideration. As long as the parties have the capacity to enter into a contract, the agreement includes all essential or material terms and its subject matter is not unlawful, illegal, unconscionable, fraudulent or against public policy, then it is enforceable. The GDPA fulfils all the criteria of a valid contract.

15. Additionally, Starka was not a novice at negotiating contracts. It had already developed several successful games and thus signed many contracts.⁹ If Mr Bekic did not seek legal advice during the negotiation, it was negligence on his part. As the founder of a successful company, he is a professional of the industry and should have sought independent advice if he did not fully understand the consequences of the document he was signing.

⁴ Facts para. 7 and ICC Principles Article 2.1.6.

⁵ Richard A. Lord, Williston on Contracts, 4th ed, §§ 1:5, 3:2.

⁶ § 3 Legal Pleadings, Submission of the Claimant.

⁷ Clarifications question n°8.

⁸ § 6-8 Legal Pleadings, Submission of the Claimant.

⁹ Facts para. 5.

16. If a party makes the choice of not seeking legal advice, it cannot rely on its misunderstanding of the contractual terms to challenge the contract's validity. As reminded in *Marchant v Maxim Healthcare Servs., Inc*, “*Plaintiff cannot defeat the terms of an otherwise valid contract, which she acknowledges she received and signed, by simply asserting at a later point in time that she did not understand what she was signing.*”¹⁰

17. Finally, Starka’s behaviour was inconsistent with the claims it now brings forth. According to Article 1.8 of the ICC principles, “*A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.*” Starka encouraged Omnia to provide standard contracts. When Mr Bekic suggested that the GDPA be terminated, he requested Omnia to provide the first draft.¹¹ Starka cannot contest a situation it has itself incited.

b. Omnia has duly reported and paid all royalties due

18. After nearly five years of collaboration, Starka decided to put an end to the contractual relationship between the parties. The Termination Agreement was signed to that effect and both parties parted ways on goods terms. Yet Starka is suddenly bringing new claims out of the blue.

19. Starka requests additional payments for royalty statements which were settled as early as 2015, despite having no contractual grounds to do so. Starka attempts to bypass three contractual provisions to justify its claims.

i. Mutual release

20. Firstly, to override the mutual release provision of the Termination Agreement, Starka argues that the mutual release is not yet in force.

¹⁰ *Marchant v Maxim Healthcare Servs., Inc.*, No. 2:18-CV-2757-RMG, 2018 WL 5793595, at *2 (D.S.C. Nov. 5, 2018).

¹¹ Schedule 3.

21. Mutual release provisions are central to a termination agreement. The mutual release constitutes the consideration of the Termination Agreement, as evidenced by the recitals “*WHEREAS, the Parties have decided to mutually terminate the GDPA and to mutually release each other from any and all claims and demands heretofore raised by either against the other*” and “*NOW, THEREFORE, in consideration of the foregoing recitals and the mutual agreements and promises set forth herein (...)*”. Arguing that the mutual release is not yet in force puts the validity of the Termination Agreement at stake.
22. Furthermore, the mutual release reads “*For the sake of clarity, once DEVELOPER has received the final Royalty Report and full payment for the time period commencing October 1st, 2018 and continuing through November 30th, 2018, neither Party shall have any claim, demand or request based on the GDPA, with the sole exception of any claim originating from DEVELOPER Audit Rights as stated under Section 2 of this Termination Agreement.*”
23. According to Starka, the final royalty report was not received nor was the final payment made, meaning that the mutual release has not come into effect.¹²
24. However, it cannot be contested that Omnia issued a royalty statement for the period October-November 2018 on 10 January 2019. Starka subsequently issued an invoice for the amount stated and Omnia transferred to Starka the full amount on 25 January 2019.¹³ Starka issuing an invoice for the amount stated in the final royalty report shows that Starka did not challenge it, instead it accepted it as the final report.
25. The mutual release provisions are essential to the Termination Agreement. Starka has accepted the royalty statement issued by Omnia as the final royalty report and full payment, meaning the mutual release is in force.

¹² §20 Legal Pleadings, Submission of the Claimant.

¹³ Clarifications question 10.

ii. Audit rights

26. Secondly, to take advantage of the persistence of audit rights even after the Termination Agreement, Starka now claims that both allegedly reported and unpaid and unreported and unpaid royalties were uncovered during the audit.¹⁴

Allegedly reported but unpaid royalties

27. However, the first claims regarding allegedly reported but unpaid royalties amounting to EUR 615,000 were made on 17 January 2019, whereas the independent audit was carried out from 17 June 2019 to 15 July 2019. It is therefore impossible that allegedly reported but unpaid royalties were made pursuant to the audit. Supposedly reported but unpaid royalties were allegedly uncovered from the analysis of the royalty statements which have always been in Starka's possession.¹⁵ The supposed difference is between the amounts stated in the statements, then invoiced by Starka and paid by Omnia. Therefore, such claims do not fall under Section 2 of the Termination Agreement nor under Section 6.5 and 6.6 of the GDPA.

28. Rather, allegedly reported and unpaid royalties are subject to the cut-off period provided for in Section 6.4 of the GDPA : "*No action, suit, or proceedings of any nature with respect to any Royalty Statement or other accounting rendered by PUBLISHER hereunder may be maintained against PUBLISHER unless such action, suit or proceeding is commenced against PUBLISHER in court of competent jurisdiction within one (1) year after DEVELOPER's receipt of the Royalty Statements, if any, pursuant to this Agreement.*"

Allegedly unreported and unpaid royalties

29. Pursuant to Section 2 and 4 of the Termination Agreement, audit rights survive after termination of the GDPA. However, the aim of a termination agreement is to conclude a contractual relationship. Having an audit carried out years after the relationship ends

¹⁴ §12 and 22 Legal Pleadings, Submission of the Claimant.

¹⁵ Schedule 5a.

does not make sense from a legal nor from a business point of view. It has never been the parties' intent for this survival to apply with no time limit.

30. When interpreting a written contract, the court identifies the intention of the parties by reference to "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*".¹⁶
31. In the case at issue, allowing a party to question statements made over a year ago would be unreasonable and make no commercial sense. The GDPA was clear that statements could not be questioned a year after they had been received, and there is no reason to interpret that the Termination Agreement intended this not to be the case. Therefore, it can only be understood that the survival of audit rights covers only the audit of the last royalty statement and final payment.

iii. Cut-off period

32. Thirdly, to override the cut-off period of Section 6.4 GDPA, Starka now claims that the cut-off period has not yet begun.

Allegedly reported but unpaid royalties

33. Regarding allegedly reported but unpaid royalties, Starka claims that "*only after a duly reported royalty statement does the period begin*".¹⁷ This is not stated in the letter of the GDPA nor it can be inferred from it. Therefore, Starka is requesting the Tribunal to interpret the provisions of the GDPA, in a way that goes beyond its wording.
34. As previously mentioned, when interpreting a written contract, the court identifies the intention of the parties by reference to the reasonable person test.¹⁸

¹⁶ Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38.

¹⁷ §25 Legal Pleadings, Submission of the Claimant.

¹⁸ Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38.

35. The claim that only duly reported royalty statements can trigger the cut-off period does not make sense. Why would a party contest a royalty statement that it deems duly reported? This provision is obviously meant to allow Starka to challenge royalty statements which, in Starka's opinion, are not duly reported. Therefore, a reasonable person would have understood that the Section 6.4 cut-off period is triggered by any royalty statement and not just duly reported ones.
36. Additionally, when writing to Mr Nanda, Mr Bekic mentioned that the payments made were allegedly inconsistent with the royalty statements issued, meaning these were used as the base to compare payments made. As evidenced by the choice of words "*reported but unpaid*", Starka admits that the royalties have indeed been mentioned in the reports and thus that the royalty statements are correct.¹⁹
37. Therefore, the cut-off period starts after the receipt of any royalty statement, regardless of its accuracy. Even if the Tribunal was to consider that only duly reported statements triggered the cut-off, Starka has admitted that these royalties were properly reported.
38. As the present action was commenced on 5 November 2019, it is impossible for Starka to now present a claim of EUR 615,863 regarding reports received over a year earlier.²⁰

Allegedly unreported and unpaid royalties

39. Regarding supposedly unreported and unpaid royalties, Starka claims "*there is no royalty statements for this situation to initiate the 1-year period*".²¹
40. However, in its 19 July 2018 letter, Starka refers to these allegedly unreported royalties by mentioning that "*The audit has revealed a number of errors in the royalty statements, including but not limited to miscalculations and misstatements (...) As a result, Omnia had underreported EUR 231,070 to Starka Games during the mentioned period.*" If Starka challenges the accuracy of said statements, it inevitably

¹⁹ Schedule 5a.

²⁰ Facts para. 20.

²¹ §25 Legal Pleadings, Submission of the Claimant.

acknowledges that royalty statements for these periods exist. As mentioned previously, the Section 6.4 cut-off period is triggered by any royalty statement.

41. Thus, the statements regarding these royalties were received by Starka and the cut-off period began at that point in time. Consequently, Starka's claims regarding reports received from August 2015 to September 2018 fall within the scope of the cut-off period.

c. Starka is acting in bad faith

42. Each party owes one another a duty of good faith, meaning the parties to a contract should treat each other fairly and be clear with each other.²²

43. Starka extensively claims that Mr Bekic did not understand the full extent of what he was signing. Yet at the same time, it relies on the terms of the GDPA and the Termination Agreement when it fits into its erroneous arguments.²³

44. Furthermore, Starka claims that it could not uncover the allegedly reported and unpaid royalties due to "*irregular and over-complicated systems regarding royalty statements belonging to Omnia Ltd.*"²⁴ Starka's arguments are once again contradictory as it also claims that the alleged discrepancies are significant and even obvious.²⁵

45. Starka's pleadings are inconsistent with each other and with the company's previous actions. By bringing these claims, Starka is undoubtedly acting in bad faith.

²² Article 1.7 ICC principles; *Interfoto Picture Library v Stiletto Visual Programmes*, [1989] QB 433, 499 (Bingham, LJ).

²³ For instance, §23, 24 with 27 and §44 with 61 Legal Pleadings, Submission of the Claimant.

²⁴ § 16 Legal Pleadings, Submission of the Claimant.

²⁵ § 7 Statement of facts, Submission of the Claimant.

Conclusion of the First Claim

46. To conclude, as the parties were in equal position when negotiating, there is no evidence that the GDPA cannot be enforced. Starka's attempts to bypass all contractual provisions agreed upon cannot succeed.
47. The mutual release provision prevents Starka from bringing a claim regarding allegedly reported and unpaid royalties. Even if the Tribunal finds the mutual release clause is not in force because it finds there is no final royalty statement and full payment for the October-November period, Starka would still not be entitled to bring a claim contesting royalty statements older than one year pursuant to Section 6.4 GDPA.
48. The audit carried out from August 2015 to November 2018, which allegedly uncovered unreported and unpaid royalties, was not within the contractual scope, as the audit rights survived only for the final royalty report and last payment. Therefore, the only claim that can lawfully be brought by Starka concerns the October-November 2018 period.

B. Starka has infringed Omnia's intellectual property rights in SiNB

a. Starka used SiNB for another game without authorisation, despite having assigned all intellectual property rights to Omnia

49. After signing the Termination Agreement, Starka immediately used the source code of SiNB for a direct competitor of Omnia, in blatant breach of the GDPA's intellectual property provisions and Omnia's exclusive rights.²⁶ In its legal pleadings Starka forgets to mention that the GDPA explicitly assigned all intellectual property rights to Omnia.²⁷ Indeed, Section 4.1 of the GDPA reads "*Subject to Section 4.2 below all and any Intellectual Property Rights in the Game, including without limitation in the name, gameplay mechanics and any technology on which the gameplay mechanics run, characters, settings, themes, storyline and characteristics, shall belong to, vest in and be the exclusive property of PUBLISHER*".

50. This assignment is purposely very broad, as it was meant to encompass all works created by Starka with Omnia's help. It is irrefutable that SiNB, a technology which tailors OSO for the player's individual preferences falls into the scope of this definition. SiNB is precisely the technology on which gameplay mechanics run, adjusting the player's preferences as per previous in-game activity.

51. Starka confusingly claims Mr. Bekic signed the GDPA and simultaneously denies SiNB is a work made for hire due to the lack of a written and signed agreement.²⁸ However, as argued above, the lack of signature of the GDPA does not prevent the work from being assigned nor from it being a work made for hire.²⁹ Briefly, neither the ICC principles nor Obliland law require a signed agreement for an assignment to occur.³⁰

²⁶ S. 4.1 GDPA and Art. 12 Law on Copyright and Designs.

²⁷ § 39 Legal Pleadings, Submission of the Claimant.

²⁸ Statement of Facts § 3, Summary of the Main Arguments § 1, Legal Pleadings, § 1, 4, 10, compared with § 39 and 41, Legal Pleadings, Submission of the Claimant.

²⁹ § 5.

³⁰ Art. 21 Obliland law and ICC principles Art. 1.2.

b. If the Tribunal finds that SiNB was not contractually assigned, SiNB is nevertheless a work for hire which belongs to Omnia

52. Omnia agrees with Starka that it is not an employee under the work for hire doctrine of US Copyright Law.³¹ Omnia never intended this to occur as Section 8 ii of the GDPA makes clear it was not meant to create an employee/employer relationship or an agency relationship, however this does not mean SiNB is not a commissioned work. Starka used SiNB in the code for *Epsilon Mobile*, in breach of not only the GDPA but also Obliland intellectual property law.³² Under the work for hire doctrine, and since there was no agreement to the contrary, copyright in SiNB vests exclusively in Omnia.³³
53. A work is made for hire if it is done by an employee within the scope of his employment or it is specially ordered or commissioned by the customer. If it is specially commissioned, an independent contractor is hired to do a job by a client, in exchange for a fee which is agreed expressly in writing. Unless expressly agreed otherwise in writing, the person to whom the work was prepared for owns all the rights comprised in the copyright.³⁴

i. Starka was an independent contractor that created SiNB as a commissioned work specifically for Omnia

54. Contrary to what Starka claims, the courts have found in several instances that computer programmes may fall into the categories of the definition of work made for hire.³⁵ While none include computer programmes, they can still be subsumed into collective works or compilations.³⁶

³¹ 17 U.S.C., § 101(2).

³² Facts para. 18.

³³ Art. 20 Obliland Law on Copyright and Designs.

³⁴ 17 U.S.C., § 101(2) and 201(b). See also CCNV v Reid 490 U.S. 730, 741 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).

³⁵ iXLInc. v. Adoutlet 2001 U.S. Dist.LEXIS 3784 (N.D. Ill. March 29, 2001) and Logicom Inclusive, Inc. v. W.P. Stewart & Co. [2004 U.S. Dist. LEXIS 15668 (S.D.N.Y. August 9, 2004)]. (n 36). Siniougine v Mediachase [2012 U.S. Dist. 2012 WL 2317364 (C.D. Cal. June 11, 2012)], Stanacard LLC v Rubard No 12 CIV 5176, 2016 WL 462508 (SDNY Feb 3, 2016),

³⁶ Stanacard LLC v Rubard No 12 CIV 5176, 2016 WL 462508 (SDNY Feb 3, 2016), 8.

55. In *Siniougue v Mediachase*, the court stated that computer programmes can be classified under contributions to a collective work if they are “*separate and independently protectable works that are intended to be combined with a customers own programming and content to create a collective whole*”.³⁷ Software programmes can also qualify as compilations since “*they include an original selection, arrangement, and organisation of nonliteral elements in their code*”.³⁸ Starka was commissioned to develop a whole game, following Omnia’s game design document. The code for SiNB was an integral but separable part of the game, which could make it a contribution to OSO that, pursuant to Section 4.1 GDPA, was wholly assigned to Omnia. Similarly, OSO is a compilation of computer programmes, of which SiNB is a part of.³⁹ Consequently, if it is held that SiNB was not the technology on which the gameplay mechanics run, and therefore not assigned to Omnia, it should still be considered either a contribution to OSO, the collective work, or part of the compilation of computer programmes that is OSO.
56. Starka insists the status of SiNB in the GDPA is unclear and that it was not fully aware of the consequences.⁴⁰ However, it already states the payment of royalties is “*in consideration of the work-for-hire to be performed*”, which is the development of OSO, logically including SiNB. Pursuant to Section 101(2) 17 U.S.C. the written agreement must state that the work is a work for hire. This has been misinterpreted by Starka to mean that it should be placed throughout and thoroughly explained, this is an additional unfair requirement which the legislature never intended or included. Starka’s misunderstanding is irrelevant to establishing whether the commissioned work is a work for hire or not.

ii. Section 6.1 GDPA is not unconscionable

57. Starka makes the unsubstantiated claim that SiNB is not a work made for hire because they argue Section 6.1 GDPA is unconscionable⁴¹. However, the GDPA is not procedurally unconscionable, simply because it is not a contract of adhesion where the party with more bargaining power imposes the terms to the weaker one without

³⁷ [2012 U.S. Dist. 2012 WL 2317364 (C.D. Cal. June 11, 2012)]; at 5.

³⁸ Ibid.

³⁹ See n 35.

⁴⁰ § 37 and 41 Legal Pleadings, Submission of the Claimant.

⁴¹ § 38 and 41 Legal Pleadings, Submission of the Claimant.

allowing any negotiation or bargaining. In addition, it is not substantively unconscionable, it is perfectly reasonable to qualify a commissioned videogame, including its software, as a work for hire. Otherwise, in the case of independent contractors, the law would determine authorship and ownership to the contractor. If the Tribunal found Section 6.1 unconscionable, it would discourage every video game publisher from entering into agreements with developers. Starka has failed to assert the GDPA is an unconscionable bargain, one which “*no man in his senses and not under delusions would make on one hand, and ... no honest and fair man would accept on the other.*”⁴² The Tribunal should not deem the GDPA to be unconscionable as any honest or fair man would have accepted the GDPA’s contractual provisions.⁴³

58. In *Zyware Inc v Middlegate Inc*, the Court examined the case of a developer claiming the work for hire agreement he had entered into was unconscionable because it was drafted by the other party and the claimant had no legal counsel. The developer’s claim was dismissed as “*the doctrine of unconscionability has little applicability in a commercial setting involving corporations dealing with each other at arms’ length.*” and the claimant failed to prove unconscionability regarding the facts surrounding the execution of the work for hire agreement.⁴⁴ The Court also referred to *Longshore v Chater*, where it was held that “*as long as a party has signed a writing, he is presumed to have read and understood it.*”⁴⁵ These cases emphasise the minimalist approach⁴⁶ by which courts are unwilling to intervene in commercial dealings, as it is presumed parties have sufficient knowledge of the implications of their agreements.

c. SiNB is not a derivative work from Starka’s pre-existing technology

59. Starka claims SiNB is part of the developer technology because it is derivative from its pre-existing work. It relies on a simplistic view of software development, merely stating SiNB is derivative since 20% of the code for it was written before agreeing to the

⁴² Doctor's Assocs., Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996) at 113.

⁴³ Attorney General of Belize v Belize Telecommunications [2009] UKPC 10 [16] (Hoffman, LJ).

⁴⁴ Zyware, Inc. v. Middlegate, Inc., No. 96 CIV. 2348 (SHS), 1997 WL 685336 (S.D.N.Y. Nov. 4, 1997), at 5.

⁴⁵ Longshore v. Chater, 934 F. Supp. 94, 101 (S.D.N.Y. 1996) 13.

⁴⁶ Robin Ray v Classic FM [1998] FSR 622,642 (Lighthouse, LJ).

GDPA.⁴⁷ Starka seems to have forgotten that it posted the code for SiNB in August 2015 on GitHub, coinciding with OSO's commercial release, which shrouds doubt over whether it would have been posted at all had it not been because of Starka's contract with Omnia. SiNB being posted only after OSO was completed is proof that SiNB is part of OSO and not derivative from Starka's pre-existing technology. Further, without Omnia's game design document, which was strictly followed by Starka, SiNB would not have been created, therefore indicating that Starka has not added anything original to its pre-existing code in creating SiNB.⁴⁸

60. For a derivative work to be established originality still needs to be present. In the Law on Copyright and Designs 1980 Article 9 states "*the copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work*". Further, in *Interlego AG v Tyco Industries Inc*, the court established that skill, labour and judgement must be expended beyond that of copying the original, this includes even a small alteration which adds an additional element.⁴⁹ Starka's submission fails to mention how the code for SiNB is original compared to the pre-existing code.
 - d. **Starka had no right to use SiNB for *Epsilon Mobile* because it is not the copyright holder, nor the contract allowed them to post it on GitHub under a BSD-3 licence**
61. Starka argues as Omnia did not object to the use of the code under the BSD-3 license then it must be deemed to have accepted it and is barred from contesting it.⁵⁰ It further argues that despite not being a provision allowing Starka to licence SiNB, because of Starka's unequal bargaining position, a licence should be implied.⁵¹
62. Firstly, while Ms. Vein was copied onto the email where the licence was mentioned, there is no evidence that she in fact read it. Nevertheless, even if she had, it should not be implied Omnia agreed to it. Specifically, because she was not in a position of

⁴⁷ § 48 Legal Pleadings, Submission of the Claimant.

⁴⁸ Facts para. 7.

⁴⁹ [1988] RPC 343,372.

⁵⁰ Legal pleadings, § 68, Submission of the Claimant.

⁵¹ Legal pleadings, § 69, Submission of the Claimant.

authority to do so. It is surprising that Starka relies on the time passed and claims it amounts to permission to licence SiNB while waiting five years to make claims over royalty statements. Starka had a clear cut period to raise issues with those statements yet negates Omnia's possibility of claiming infringement because some employees supposedly knew about the BSD-3 licence. Starka once again violated the GDPA and Omnia's exclusive rights over SiNB by not only licensing it without authorisation but naming itself as copyright holder.

63. Secondly, the express assignment or Omnia's ownership due to the work made for hire doctrine prevents any type of licensing rights in favour of Starka from being implied. In *Clearsprings Management v Businesslinx Ltd* the court held the defendants could not just reuse the commissioned code, as elements of the code were designed specifically for the structure of that business and used their confidential information.⁵² However, that was a case of equitable ownership where the parties had not contemplated ownership over the commissioned software. If Starka was allowed to release the source code on an open source licence, Omnia would have paid for nothing. It must be reminded, Omnia approached Starka specifically for their knowledge of AI technology. Had it intended for such a licence to exist, it would have cut costs seeking a less well known developer.

64. As established in *Robin Ray v Classic FM*, courts follow a minimalist approach in implying terms. The court will only imply a term if it is necessary to give business efficacy, it is reasonable and equitable, so obvious that it goes without saying, capable of clear expression and if it does not contradict any express terms of the contract.⁵³ In addition, in *Attorney General of Belize v Belize Telecommunications*, the court held that it could not introduce terms to make the contract fairer or more reasonable. The court is only interested in giving the instrument its original meaning, by reference to the reasonable person test.⁵⁴

65. As previously mentioned, Section 4.1 GDPA is an express assignment of copyright. Moreover, the deal between Omnia and Starka is perfectly efficient as is. If a license

⁵² [2005] EWHC 1487 (Ch) [37].

⁵³ [1998] FSR 622,642 (Lighthouse, LJ).

⁵⁴ [2009] UKPC 10 [16] (Hoffman, LJ).

was to be implied, it would not be reasonable for Omnia to have paid for the development of a software used freely by everyone. Therefore, the criteria to imply a term are not fulfilled. A reasonable person would understand that by agreeing to Section 4.1, Starka relinquished all rights on SiNB and did not have an implied license to post it on GitHub or elsewhere. By posting SiNB on GitHub under a BSD-3 licence, Starka breached Omnia's intellectual property rights.

66. Because of Starka's conduct, Omnia has suffered a substantial financial loss. After the release of *Epsilon*, the active users of OSO dropped by 30%, resulting in a significant decrease in monthly revenue.⁵⁵ The release of *Epsilon Mobile*, in which Omnia used the source code of SiNB in breach of Omnia's exclusive rights, undoubtedly led to a further decrease in revenue.
67. A copyright owner is entitled to recover the actual damages suffered as a result of the infringement, as well as profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.⁵⁶ Therefore Omnia is entitled to damages, which amount to the losses incurred since the release of *Epsilon Mobile*.

e. The non-compete obligation

68. Starka claims it did not violate its non-compete obligation by developing a game for Moonplay.⁵⁷ Moreover, Starka argues it initiated termination because Omnia breached its obligations under the GDPA by cutting investment in the development and marketing of the game.⁵⁸ However, Omnia does not assert Mr Bekic violated his non-compete obligation and strongly disapproves of any claim of breach of the GDPA. In contrast, what is at stake is the use by Starka of Omnia's intellectual property without consent, Omnia has never claimed the GDPA was terminated irregularly or without reason. Quite simply, the parties agreed to terminate the GDPA, at Starka's request, due to Mr Bekic's budding relationship with Moonplay.⁵⁹

⁵⁵ Facts para. 12.

⁵⁶ 17 U.S.C., § 504 (b).

⁵⁷ § 86 Legal Pleadings, Submission of the Claimant.

⁵⁸ § 78 Legal Pleadings, Submission of the Claimant.

⁵⁹ Facts para. 14.

69. Firstly, Starka argues there was a breach of Section 4.2 GDPA, whereby Omnia agreed to give effect to the Developer's intellectual property rights. Starka continues explicitly stating that Omnia has violated this obligation by decreasing investment into the development and marketing of OSO. This is illogical for two reasons. First, once the game launched, it was already fully developed, thus it might have been difficult for Omnia to invest in this area. Second, Omnia had full and exclusive control over strategic decisions, including marketing.⁶⁰ Clearly, Omnia's obligation in Section 4.2 is completely unrelated from the investment in the game, which is not an obligation in any sense of the word, as Omnia's only obligation was to pay royalties in consideration for the work for hire. Therefore, Starka seemingly claiming Omnia acted in bad faith over what were not obligations is baffling.⁶¹ Secondly, Omnia does not contest whether Starka breached its non-compete obligation.

Conclusion of the Second Claim

70. Overall, Starka has misunderstood the fundamentals of copyright law; copyrights over SiNB were validly assigned to Omnia in the GDPA. SiNB is in fact the technology on which gameplay mechanics run. If the Tribunal nevertheless finds SiNB was not assigned, OSO, of which SiNB is a part of, is owned by Omnia pursuant to the work for hire doctrine. Starka was an independent contractor of Omnia and the computer programme SiNB falls under either a contribution to a collective work or a compilation. In addition, SiNB should not be considered derivative from the developer's pre-existing technology. Starka did indeed have some of the code for SiNB already written, but without Omnia's game design document, it would never have come to fruition. Consequently, Starka's use of SiNB in *Epsilon Mobile* infringes Omnia's exclusive rights and breaches the GDPA, which entitles Omnia to damages. Similarly, Starka had no right to post the source code for SiNB on GitHub as it was not allowed to issue any type of licence. Finally, Omnia has not asserted Starka has violated the non-compete obligation and categorically denies any breach of contract related to the decrease in marketing investment.

⁶⁰ S. 3.2 GDPA.

⁶¹ § 80 Legal Pleadings, Submission of the Claimant.

Request for findings

For the foregoing reasons, Respondent respectfully requests the Tribunal to fully dismiss Claimants claims and to adjudge and declare that:

- A. Starka is not due any of the amounts it claims regarding allegedly reported but unpaid royalties because of the mutual release in force. Alternatively, if the Tribunal finds that the mutual release is not in force, Starka is not entitled to bring a claim contesting royalty statements older than one year, pursuant to Section 6.4 of the GDPA.
- B. Omnia shall not pay any amount claimed by Starka regarding supposedly unreported and unpaid royalties for the period August 2015-September 2018, as Starka's contractual audit rights did not cover this period, which is subject to Section 6.4 of the GDPA.
- C. Starka has infringed Omnia's intellectual property rights in SiNB, which were assigned to Omnia. SiNB was never part of the developer technology but rather is the technology on which the gameplay mechanics run.
- D. Alternatively, copyright over SiNB nevertheless vests in Omnia under the work for hire doctrine.
- E. Therefore, Starka licensed SiNB without authorisation breaching the GDPA and Omnia's intellectual property rights, and no right to do so should be implied.

Respectfully submitted on 1 March 2020.

On behalf of the Respondent,

Counsels of team 106