

Team: 110

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

Starka Games LLC

VS

Omnia Ltd.

Submission of the Claimant

Legal Pleadings: 4347 words

TABLE OF CONTENTS

TABLE OF CONTENTS	2
LIST OF REFERENCES	4
TABLE OF ABBREVIATIONS.....	7
STATEMENT OF FACTS	8
SUMMARY OF THE MAIN ARGUMENTS	9
LEGAL PLEADINGS	11
A. A. OMNIA SHOULD PAY STARKA TOTAL AMOUNT OF EUR 846,933 OF UNPAID ROYALTIES UNDER THE GDPA	11
I. EUR 615,863 OF REPORTED BUT UNPAID ROYALTIES ARE NOT SUBJECT TO MUTUAL RELEASE CLAUSE IN SECTION 4 OF THE TERMINATION AGREEMENT	12
(i) Mutual release clause of the Termination Agreement has no legal effect.....	12
(ii) Alternatively, the mutual release clause of the Termination Agreement does not cover the claim of EUR 615,863 of reported but unpaid royalties.....	13
II. EUR 231,070 OF UNREPORTED AND UNPAID ROYALTIES ARE NEITHER SUBJECT TO MUTUAL RELEASE CLAUSE IN SECTION 4 OF THE TERMINATION AGREEMENT, NOR FALL UNDER LIMITATION OF SECTION 6.4 OF THE GDPA	14
(i) The same logic in relation to the mutual release clause of the Termination Agreement applies to claims for both reported but unpaid and unreported and unpaid royalties	14
(ii) The Section 6.4 of the GDPA is an exclusion clause of a standard-form contract which should be construed as not active	14
CONCLUSION OF THE FIRST CLAIM	16

B. ALL INTELLECTUAL PROPERTY RIGHTS TO THE SINB BELONG TO STARKA UNDER THE GDPA.....	17
I. THE SINB IS A PART OF THE DEVELOPER TECHNOLOGY	17
(i) Initial 20% of the SiNB source code is the pre-existing proprietary software under the GDPA	17
(ii) The rest of the SiNB technology is derivative from Starka’s pre-existing technology and of general use and applicability in video games	18
(iii) The Developer Technology is not a work-for-hire under the GDPA.....	19
II. ALTERNATIVELY, IF THE COURT DECIDES THAT THE SINB OR A PART OF THE SINB IS NOT THE DEVELOPER TECHNOLOGY, STARKA, AS WELL AS ANY THIRD PARTY, HAS AN IMPLIED LICENSE TO USE SINB	22
CONCLUSION OF THE SECOND CLAIM	23
 REQUEST FOR FINDINGS	 24

LIST OF REFERENCES

PRIMARY AUTHORITIES (LEGISLATION):

(Obliland's) Law on Copyright and Designs dated January 1, 1980 (as amended).

(United States') Constitution.

(United States') Copyright Act of 1976.

UNIDROIT Principles of International Commercial Contracts 2016.

PRIMARY AUTHORITIES (CASE LAW):

Arnold v Britton and others [2015] UKSC 36.

Blair v Osborne and Tompkins [1971] 2 QB 78.

Convergent Wealth Advisors LLC v. Lydian Holding Co. 2012 WL 2148221 (S.D.N.Y.,2012).

Darlington Futures Ltd v. Delco Australia Pty Ltd (1986) 161 CLR 500.

Eastman Kodak Co. v. Altek Corp., 936 F. Supp. 2d 342 (S.D.N.Y. 2013).

Effects Assoc., Inc. v. Cohen, 908 F.2d 555, 558-59 (9th Cir. 1990).

Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).

Harrison v. Maynard, Merrill & Co., 61 F. 689, 690-91 (2d Cir. 1894)

Imation Corp. v. Koninklijke Philips Elecs. N.V.,586 F.3d 980 (Fed. Cir. 2009).

Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).

Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 1605146 (Del.Ch., 2012).

Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970).

Royal v. Radio Corp. of Am., 107 U.S.P.Q. 173, 173 (S.D.N.Y. 1955).

Smith and others v South Wales Switchgear Ltd [1978] 1 All ER 18.

Transocean Drilling UK Ltd v. Providence Resources Plc [2016] EWCA Civ 372.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

SECONDARY AUTHORITIES:

Afori O. F., 'Implied License: An Emerging New Standard in Copyright Law' (2008) 25 Santa Clara Computer & High Tech LJ 275.

Chern J. A., 'Testing Open Source Waters: Derivative Works under GPLv3' (2009) 13 Chap L Rev 137.

Deneau K., 'The Historical Development and Misplaced Justification for the Derivative Work Right' (2013) 19 BU J Sci & Tech L 68.

Greenwood L., 'Principles of interpretation of contracts under English law and their application in international arbitration', *Arbitration International*, 2019, 35, 21–27.

Heineman N., 'Computer Software Derivative Works: The Calm before the Storm' (2008) 8:2 J of High Technology L 235.

Karton J., 'The Arbitral Role in Contractual Interpretation', *Journal of International Dispute Settlement*, Volume 6, Issue 1, March 2015, Pages 4–41

McKendrick E., 'Contract Law. Macmillan Law Masters.' Palgrave, London, 1997.

Newman C. M., 'What Exactly Are You Implying: The Elusive Nature of the Implied Copyright License' (2014) 32 *Cardozo Arts & Ent LJ* 501, 527.

Nimmer M. B., Nimmer D., 'NIMMER ON COPYRIGHT', Matthew Bender & Co., Inc., 2005.

Roberts J. L., 'Work Made for Hire: The Fiction, The Reality and the Impact upon Software Development' (1988) 1 *Harv J L & Tech* 97.

Rosen, L., 'Derivative Works', January 1, 2003, blog entry: <https://www.linuxjournal.com/article/6366> (last accessed: January 15th, 2020).

Stallman R., 'Transcript of Richard Stallman in Torino, (March 18, 2006)', <http://www.fsfeurope.org/projects/gplv3/torino-rms-transcript.en.html#q2-linking> (last accessed: January 20th, 2020)

Torvalds L., 'Re: GPL only modules', 2006, blog entry: <https://lkml.org/lkml/2006/12/17/79> (last accessed: January 20th, 2020).

University of Washington, 'Derivative Works',

<https://web.archive.org/web/20160329033233/https://www.law.washington.edu/ita/swp/law/derivative.html> (last accessed: January 16th, 2020).

Winkelmann H., Glazebrook S., France E., 'Contractual Interpretation', Courts of New Zealand Papers, 2019, https://www.courtsofnz.govt.nz/speechpapers/CInt.pdf/at_download/file (last accessed: January 20th, 2020).

TABLE OF ABBREVIATIONS

Game	F2P MMO (<i>free to play massively multiplayer online</i>) video game entitled <i>Outer Space Oddity</i> , developed by Starka and published by Omnia.
GDPA	Game Development and Publishing Agreement, entered into as of June 10 th , 2013 by and between Omnia and Starka.
Obliland Copyright Law	OBLILAND Law on Copyright and Designs dated January 1, 1980, as amended
Omnia	Omnia Limited registered in Obliland under number 571938364819, with registered office at 187 Peggy Street, floor 12, Seatown, Obliland, the publisher of the Game.
SiNB	<i>Space is New Brain</i> , an innovative AI technology developed by Starka and used in the Game.
Starka	Starka Games LLC registered in Terryland under number NA2453, with registered office at Nicholas Ave. 34/1, Talestown FE-9076, Terryland, the developer of the Game.
Termination Agreement	Termination Agreement made as of November 21 st , 2018 by and between Omnia and Starka.

STATEMENT OF FACTS

1. The present case is between two companies: Starka acting as the claimant and Omnia acting as the respondent. The claimant is a game development company based in Terryland. The respondent is a leading global game publisher and developer, based in Obliland.
2. In March 2013, Omnia approached Starka with a proposal to hire Starka to assist Omnia in development of *Outer Space Oddity*, a new PC F2P MMO (*free to play massively multiplayer online*) video game. In particular, Omnia wanted to implement Starka's famous AI (*artificial intelligence*) technology in its new title. Omnia provided the template of the GDPA, which was concluded by the parties on June 10th, 2013 with only minor changes introduced. Starka started working on the Game soon after.
3. The cooperation between the parties seemed fine. Omnia never voiced any doubts about Starka's performance under the GDPA. The work on the Game and the help from the GitHub community allowed Starka to further develop its AI technology – the SiNB. The Game was released worldwide on schedule, on August 3rd, 2015 and became very successful both critically and commercially, giving both parties a steady flow of income.
4. According to the GDPA, after the Game started to make profit, Omnia was supposed to pay 25% of all gross revenues for the sales of the Game to Starka. As a consequence of Omnia's accounting system, payments from Omnia often came later than agreed and in instalments, contrary to the GDPA.
5. In the summer of 2018, after Omnia significantly cut the Game's marketing and User Acquisition investments, the Game dropped in monthly revenue. Starka decided to initiate the termination of the GDPA. Parties signed the Termination Agreement on November 21st, 2018.
6. Soon after, a new CFO of Starka discovered that Omnia has underpaid at least EUR 615,000 of the royalties under the GDPA to Starka. This fact was immediately brought to Omnia's attention. In response, Omnia denied any underpayments. Starka performed an independent audit which discovered that Omnia underpaid EUR 846,933 under the GDPA. Out of this sum, EUR 615,863 was reported but unpaid and EUR 231,070 was unreported.
7. On July 19th, 2019, Starka filed an official claim to Omnia requesting Omnia to pay the outstanding royalties. To date, Omnia did not comply with this request. Later, Omnia accused Starka of breaching Omnia's intellectual property rights by using the SiNB in other video game, alleging that the technology was created as a work-for-hire under the GDPA.

SUMMARY OF THE MAIN ARGUMENTS

8. Starka claims Omnia should pay outstanding royalties in a total amount of EUR 846,933. Starka's claim is based on a breach of contract (GDPA) by failing to pay the full amount of royalties as defined in the GDPA.
9. Starka submits it is not subject to mutual release clause in Section 4 of the Termination Agreement and to Section 6.4 of the GDPA which limit the scope of Starka's right to claims under the GDPA, as these provisions are not legally effective. The argumentation for this claim is based primarily on the wording of the contracts between the parties.
10. Starka is not subject to the Section 4 of the GDPA because the conditions for legal effect of this mutual release clause, interpreted according to established rules of contract interpretation, have not been met. Starka never received the "final Royalty Report". An independent audit revealed that Starka did not receive the full payment for period from October 1st, 2018 to November 30th, 2018. Alternatively, the claim is based on the scope of mutual release clause which does not cover the issue of audit-related royalty claims, as the Termination Agreement expressly provides.
11. Starka is not subject to the Section 6.4 of the GDPA as well. The legal ground of this argument is based on the fact that this provision forms an exclusion clause and Omnia is the party who relies on the provision. The legal rule is that the exclusion clauses are subject to strict interpretation and construed according to the *contra proferens* rule. Application of these rules to the wording of the GDPA leads to a conclusion that the conditions for legal effect of Section 6.4 have not been met – Starka never received a proper Royalty Statement, as defined in the Section 6.3 of the GDPA.
12. Starka's second claim is a response to Omnia accusing Starka of breaching Omnia's intellectual property rights to SiNB. Starka submits that all intellectual property rights to SiNB belong to Starka as the SiNB is the Developer Technology under the GDPA.
13. The entirety of the SiNB falls within the definition of the Developer Technology. Initial 20% of the code is the Starka's pre-existing technology as it was created before the conclusion of the GDPA.
14. The rest of the code is derivative to the pre-existing software. The argument is based on the facts of the case, intent of the parties and the law of equity. Starka transformed its pre-existing technology creating SiNB. The new code dynamically links to the pre-existing code. The technology of the linking is irrelevant to the question of derivative status. It is also equitable to

decide the claim in Starka's favour because it is in line with the principles of copyright to encourage the progress of science, whereas by its actions Omnia tries to inhibit such progress.

15. Finally, SiNB is not a work-for-hire under the Obliland law. Obliland law only incorporates the doctrine of employee work meanwhile the contract, drafted by Omnia, clearly states that there is no employment relationship between the parties. The second type of the work-for-hire is not incorporated to the Obliland law. However, even if it was, the legal conditions for construing SiNB as work-for-hire are not met – SiNB does not fall within one of the statutorily enumerated categories, nor was specially ordered or commissioned under the GDPA.
16. Alternatively, if the Terryland Alternative Dispute Resolution Centre decides that SiNB or part of SiNB is not Developer Technology, Starka claims that it has, as well as any third party, an implied license to use SiNB. The implied license is based on fact-specific analysis. Starka's argument is based on a fact that Omnia knew at least from April 2015 that Starka uploaded the SiNB code to GitHub and never objected thereto. It is implausible for an industry leader such as Omnia to know about it and do nothing if Omnia was ever against it. What is more, the equity argument is applicable to this claim as well.

LEGAL PLEADINGS

A. OMNIA SHOULD PAY STARKA TOTAL AMOUNT OF EUR 846,933 OF UNPAID ROYALTIES UNDER THE GDPA

17. Omnia and Starka have entered into the GDPA on June 10th, 2013. Main obligation of Starka under the GDPA was to deliver the Game and to support it after its commercial release. In exchange for its services, Starka was supposed to receive from Omnia the Development Fees and 25% of the Gross Revenues for the Game (the Royalties¹).
18. Starka claims breach of contract (GDPA) by Omnia by failing to pay outstanding royalties. The independent audit revealed that underpaid royalties sum comprises of EUR 615,863 of reported but underpaid royalties and EUR 231,070 of unreported and underpaid royalties².
19. In response to Starka's claim Omnia pointed out the Section 4 of the Termination Agreement provided for a cut-off date for unreported and unpaid Royalties³. They also added that in addition to the Section 4 of the Termination Agreement, the Section 6.4 prohibits Starka from claiming the unreported and unpaid Royalties⁴.
20. Starka submits that both contractual provisions raised by Omnia are not applicable to the claim at hand. Construction of these contractual provisions in accordance with standard rules of interpretation leads to a conclusion they are not effective. Conditions for the legal effect of Section 4 of the Termination Agreement have not been met (I). Section 6.4 of the GDPA forms an exclusion clause which construed in accordance with established rules is not legally effective to date as well (II).

¹ Any reference to royalties in the Submission, capitalized or not, refers to the Royalties as defined in the Section 6.2 of the GDPA.

² Problem, para 16, 20.

³ Problem, para 17. Schedule 5b.

⁴ Problem, para 17.

I. EUR 615,863 OF REPORTED BUT UNPAID ROYALTIES ARE NOT SUBJECT TO MUTUAL RELEASE CLAUSE IN SECTION 4 OF THE TERMINATION AGREEMENT

(i) Mutual release clause of the Termination Agreement has no legal effect

21. It is a standard and widely established common law rule that the meaning of a contract provision should be understood primarily from the natural and ordinary meaning of the actual words used⁵. Intentions of the parties not clearly communicated in the agreement are not relevant⁶. It is generally understood that the same words used in different parts of the contract have the same meaning and to the opposite – different terms carry different meanings⁷. Particularly in arbitration, priority is given to the plain meaning of the clearly drafted terms⁸.
22. Section 4 of the Termination Agreement (entitled “Mutual Release”) provides *in fine* a clarification of the mutual release clause, stating that “neither Party shall have any claim, demand or request based on the GDPA” effective from the moment Starka has received “(i) the final Royalty Report and (ii) full payment for the time period commencing October 1st, 2018 and continuing through November 30th, 2018”.
23. An independent audit performed on behalf of Starka between June 17th and July 15th, 2019⁹ covered (*inter alia*) the period from October 1st to November 30th, 2018¹⁰. It has established that as a result of neglectful accounting Omnia has underpaid to Starka the amount of EUR 10,157 for such period¹¹. The second condition for the legal effect of the discussed clause has not been met. This circumstance alone is enough to render the discussed provision ineffective, because both conditions have to be met for it to be effective.
24. The argument is further reinforced by the fact that the second condition has not been fulfilled as well. The only document Starka received for the discussed period was the document Omnia called “Royalty Statement” (which will be discussed in the further part of this Submission)

⁵ Arnold v Britton and others [2015] UKSC 36. Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 1605146 (Del.Ch., 2012). Convergent Wealth Advisors LLC v. Lydian Holding Co. 2012 WL 2148221 (S.D.N.Y.,2012). W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

⁶ Helen Winkelmann, Susan Glazebrook and Ellen France, ‘Contractual Interpretation’, Courts of New Zealand Papers, 2019, https://www.courtsofnz.govt.nz/speechpapers/CInt.pdf/at_download/file (last accessed: January 20th, 2020).

⁷ Imation Corp. v. Koninklijke Philips Elecs. N.V.,586 F.3d 980 (Fed. Cir. 2009). Eastman Kodak Co. v. Altek Corp., 936 F. Supp. 2d 342 (S.D.N.Y. 2013).

⁸ Joshua Karton, The Arbitral Role in Contractual Interpretation, Journal of International Dispute Settlement, Volume 6, Issue 1, March 2015, Pages 4–41 [in:] Lucy Greenwood, ‘Principles of interpretation of contracts under English law and their application in international arbitration’, Arbitration International, 2019, 35, 21–27.

⁹ Clarifications, A6 (the answer to the question Q6).

¹⁰ Clarifications, A10 (the answer to the question Q10).

¹¹ Ibidem.

issued by Omnia on January 25th, 2019¹². Starka has never received from Omnia any document called “final Royalty Report”. Capitalized terms in the Termination Agreement have the same meaning as in the GDPA¹³. It suggests that the language of both contracts should be interpreted together. Therefore, the “final Royalty Report” from the Termination Agreement is a different document to the Royalty Statement from the GDPA. Receipt of the document Omnia called “Royalty Statement” does not fulfil the first condition.

25. Both conditions required for the mutual release clause of the Termination Agreement to be effective, that is the receipt of the “final Royalty Report” and full payment for the period from October 1st to November 30th, 2018, have not been met in relation to all claims based on the GDPA, including the claim at hand.
26. Thus, the EUR 615,863 of reported but unpaid royalties are not subject to the mutual release clause of Section 4 of the Termination Agreement.

(ii) Alternatively, the mutual release clause of the Termination Agreement does not cover the claim of EUR 615,863 of reported but unpaid royalties

27. Section 2 of the Termination Agreement states that after the termination of the GDPA, from December 1st, 2018, Omnia “shall account to Developer¹⁴ pursuant to GDPA” while Starka retains all audit rights. What is more, the Section 3 of the Termination Agreement provides that paragraphs 4 (“Intellectual Property”), 6 (“Royalties”) and 8 (“General Provisions”) survive the termination of the GDPA “for all matters arising out of the relationship of the Parties”.
28. The discovery of the exact amount of unpaid royalties was a consequence of Starka making use of Starka’s audit rights granted under the GDPA. It is exactly the intent of Starka to hold Omnia accountable pursuant to the GDPA for defective performance of Omnia’s main obligation under the GDPA – to pay the royalties. The basis for this obligation is established in the Section 6 of the GDPA, which survives the termination of the GDPA by force of Section 3 of the Termination Agreement.
29. Therefore, the mutual release clause does not apply to claims arising from Omnia not paying the royalties agreed upon the GDPA, such as the claim at hand.

¹² Ibidem.

¹³ Termination Agreement, Section 5.

¹⁴ That is Starka, as defined in the Preamble of the Termination Agreement

II. EUR 231,070 OF UNREPORTED AND UNPAID ROYALTIES ARE NEITHER SUBJECT TO MUTUAL RELEASE CLAUSE IN SECTION 4 OF THE TERMINATION AGREEMENT, NOR FALL UNDER LIMITATION OF SECTION 6.4 OF THE GDPR

(i) The same logic in relation to the mutual release clause of the Termination Agreement applies to claims for both reported but unpaid and unreported and unpaid royalties

30. The analysis presented in paragraphs 21 to 29 above is applicable to the claim of reported and unpaid royalties as well.
31. Language of the Termination Agreement does not provide for any distinctions in situation of different claims related to unpaid royalties. The mutual release clause sets the same rule on the activation of the clause for “any claim (...) based on the GDPR”. Additionally, Section 6 (“Royalties”) survives the termination of the GDPR.
32. The claim for EUR 231,070 is the same in nature as the claim for EUR 615,863. It is based on a breach of the GDPR by Omnia by failing to pay all the royalties, which forms the main Omnia’s obligation under the GDPR. As it has been already proven, the mutual release clause is not in legal effect. Alternatively, it does not cover the claims based in the breach of the Section 6 of the DPA, such as the one at hand.
33. Therefore, the claim for EUR 231,070 is not subject to the mutual release clause in Section 4 of the Termination Agreement.

(ii) Section 6.4 of the GDPR is an exclusion clause of a standard-form contract which should be construed as not active

34. Standard-form contract is a contract between two parties, where the terms of the contract are set by one of the parties, and the other party has little or no ability to negotiate the terms. The exclusion clause is the term in contract that either limits or excludes the party’s liability for the breach of contract¹⁵. The common law provides that the exclusion clauses should be construed and interpreted in line with a certain set of rules. The emphasis should be placed on the language of the contract if there is no ambiguity¹⁶. If there are any ambiguities, a strict interpretation

¹⁵ Ewan McKendrick, ‘Exclusion Clauses’[in]: Ewan McKendrick, ‘Contract Law. Macmillan Law Masters.’ Palgrave, London, 1997.

¹⁶ Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372. Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500.

should be applied and the court ought to construe the exclusion clause against the party who drafted it and is seeking to rely on it (the *contra proferentem* rule)¹⁷.

35. The GDPA forms a standard-form contract. Omnia has provided the template of the GDPA, which has set the final terms and conditions of GDPA with only minor changes introduced¹⁸. Section 6.4 of the GDPA forms the exclusion clause, as it limits the liability of Omnia for breach of contract in relation to payment of the royalties if an objection is not given by Starka to Omnia within one year after Starka's receipt of the Royalty Statement. According to Section 6.4 of the GDPA *in fine*, after such period, Starka is deemed to not be able to start any legal proceedings in relation to discrepancies in payments.
36. Section 6.4 of the GDPA in dispute at hand states that the one-year term after which Starka is barred from questioning Omnia's accounting under the GDPA and from maintaining any actions against Omnia in this matter starts from the moment Starka receives the Royalty Statement for a given period. Royalty Statement is a term defined in Section 6.3 of the GDPA as a "written statement providing a complete, itemized description of the calculation of the Royalties paid for the preceding calendar quarter". The same provision *in fine* clarifies that "at the minimum", the Royalty Statement should include (i) the information on the types and cost on in-Game items sold, (ii) amount of Royalties earned by Starka and (iii) the Royalties owed.
37. Natural and ordinary meaning of the provision in dispute is clear. The one-year term starts when Starka receives the Royalty Statement from Omnia, containing at least (*inter alia*) the information on types and cost of in-Game items sold. The statements Starka received from Omnia did not include the minimal amount of information required on the basis of the GDPA, as they never included any information on the types and cost of in-Game items – only the bulk figures of revenues from all in-Game items sold each week¹⁹. No actual Royalty Statement was received by Starka during the whole term of the GDPA.
38. Starka, in line with principles of good faith and fair dealing²⁰ and cooperation between the parties²¹, invoiced the sums indicated in Omnia's statements, however never gave up its rights for sums amounting to actual royalties due. Omnia, on the other hand, did not act in accord with such principles. As already mentioned, Omnia failed to properly do the accounting on its side

¹⁷ UNIDROIT Principles of International Commercial Contracts 2016, Article 4.6. *Smith and others v South Wales Switchgear Ltd* [1978] 1 All ER 18.

¹⁸ Problem, para 5.

¹⁹ Schedule 2.

²⁰ UNIDROIT Principles of International Commercial Contracts 2016, Article 1.7.

²¹ *Ibidem*, Article 5.1.3.

and often paid the invoices late and in instalments²², even though payment of remuneration was Omnia's main and basically sole obligation under the GDPA.

39. If the court still finds the exclusion clause ambiguous, application of the strict interpretation and *contra proferentem* rule leads to the same construction of the exclusion clause in dispute at hand. It is Omnia who drafted and seeks to rely on the exclusion clause of Section 6.4 of the GDPA to escape liability.
40. It is also worth mentioning that even though it has been established that the parties signed the GDPA²³, the GDPA (contrary to all other documents presented in case at hand) does not include the signatures of the parties²⁴. Omnia did not provide Starka with a notice about the inclusion of the exclusion clause. There was no previous course of business between the parties. Such occurrence raises doubts regarding the proper incorporation of the exclusion clause in the GDPA.
41. In light of the above, the one-year term of the exclusion clause in Section 6.4 of the GDPA has never started in relation to any part of the term of the GDPA and does not limit Starka's rights to claim EUR 231,070 of unreported and unpaid royalties owed by Omnia.

CONCLUSION OF THE FIRST CLAIM

42. Omnia based its defense to Starka's claim for unpaid Royalties on two provisions of contracts between the parties. The conditions for the legal effect have not been met for both Section 4 of the Termination Agreement and Section 6.4 of the GDPA. Starka is not subject to such mutual release and exclusion clauses and can rightfully make claims for unpaid Royalties.
43. The claim for EUR 846,933 is valid and Omnia should pay the outstanding royalties to Starka.

²² Problem, para 10.

²³ Problem, para 5, 6.

²⁴ Schedule 1.

B. ALL INTELLECTUAL PROPERTY RIGHTS TO THE SINB BELONG TO STARKA UNDER THE GDPA

I. THE SINB IS A PART OF THE DEVELOPER TECHNOLOGY

44. Section 1(b) of the GDPA defines the Developer Technology as two categories of works: “(i) Starka’s pre-existing proprietary software and (ii) any technology derivative from Starka’s pre-existing software, not specific for the Game and of general use or applicability in video games (and interactive entertainment products and services)”. Section 4.2 of the GDPA provides that all intellectual property rights to Developer Technology belong to Starka.
45. Starka submits that the SiNB is the Developer Technology as defined in the GDPA. To prove this, Starka further submits that the initial 20% of the SiNB is a pre-existing Starka’s proprietary software under the GDPA (i), whereas the rest of the technology derives from Starka’s pre-existing technology (ii). What is more, SiNB is not work-for-hire under the GDPA (iii).

(i) Initial 20% of SiNB source code is the pre-existing proprietary software under the GDPA

46. One of two categories of the Developer Technology under the GDPA is the Starka’s pre-existing proprietary software.
47. It is perfectly clear that “pre-existing proprietary software” under the GDPA is the technology that existed before the conclusion of the GDPA by the parties, that is before June 10th, 2013.
48. At the time the GDPA was concluded, Starka was already known in the video game industry for being advanced in integrating “cutting-edge” AI technology in its previous games²⁵. Starka “already owned more games-related AI code than any other company in the market”²⁶. Ownership of AI technology and expertise in that matter has distinguished Starka from any other video games developer long time before the conclusion of the GDPA. It is clear that protection of such status is of utmost importance for Starka.
49. Starka later specified that the part of SiNB functionality already developed and written before before the conclusion of the GDPA on the June 10th, 2013, amounted to 20% of its code²⁷.
50. Hence, 20% of the software is the Starka’s pre-existing proprietary software under the GDPA. Therefore, it is without doubt that Starka owns the intellectual property rights to such part of SiNB software.

²⁵ Problem, para 5.

²⁶ Problem, para 7.

²⁷ Problem, para 19.

(ii) The rest of the SiNB technology is derivative from Starka’s pre-existing technology and of general use and applicability in video games

51. Derivative work is a work consisting of “a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work”²⁸. In order to be recognised as derivative, the work must either be substantially similar to the copyrighted work or to substantially incorporate protectable material from the underlying work²⁹. Additionally, a “total concept and feel” test is used by the courts to determine the derivative status of the work³⁰.
52. The second category of the Developer Technology under the GDPA is the technology derivative from Starka’s pre-existing technology, not specific for the Game and of general use and applicability in video games.
53. Starka has created 20% of SiNB before entering into the GDPA with Omnia. The rest of the SiNB is based on this software. The SiNB uses the innovative application of AI in video games from the pre-existing technology. It adapts and transforms it for the purpose of creating even more sophisticated AI technology to be used in video games. This conclusion comes from a fact that all of the code created after the conclusion of the GDPA is dynamically linked to the base code existing before³¹.
54. Experts in the fields of programming³² and intellectual property law³³ state that in case of software, the technology of linking is irrelevant to the question whether such linking creates a derivative work. Instead, in case of computer programs, to determine whether the new work is derivative to the pre-existing work, the analysis should focus on the author’s intent³⁴.
55. It is apparent that Starka envisioned SiNB as a natural development of its pre-existing AI technology. What is more, Starka is the author of both the pre-existing technology and the

²⁸ Melville B. Nimmer & David Nimmer, §3.03[A] NIMMER ON COPYRIGHT (Matthew Bender & Co., Inc. 2005. [in:] Natalie Heineman, "Computer Software Derivative Works: The Calm before the Storm" (2008) 8:2 J of High Technology L 235.

²⁹ Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).

³⁰ Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109 (9th Cir. 1970).

³¹ Problem, para 19.

³² For example Linus Torvalds (the software engineer who created the Linux kernel), ‘Re: GPL only modules’, 2006, blog entry: <https://lkml.org/lkml/2006/12/17/79> (last accessed: January 20th, 2020). and Richard Stallman, programmer and founder of the Free Software Foundation (Richard Stallman, Transcript of Richard Stallman in Torino, (March 18, 2006), <http://www.fsfeurope.org/projects/gplv3/torino-rms-transcript.en.html#q2-linking> [in:] Joseph A Chern, "Testing Open Source Waters: Derivative Works under GPLv3" (2009) 13 Chap L Rev 137.

³³ For example Lawrence Rosen (IP and technology law specialist, lecturer in law at Stanford University), ‘Derivative Works’, January 1, 2003, blog entry: <https://www.linuxjournal.com/article/6366> (last accessed: January 15th, 2020). (see here: <https://www.linuxjournal.com/article/6366>) and the University of Washington, ‘Derivative Works’, <https://web.archive.org/web/20160329033233/https://www.law.washington.edu/lta/swp/law/derivative.html> (last accessed: January 16th, 2020).

³⁴ Lawrence Rosen, *ibidem*.

derivative technology of SiNB, so it did not need a consent to create it, in opposite to Omnia, who would need such clear consent from Starka.

56. SiNB is a technology designed and able to be broadly applicable in different video games. Its ability to serve this purpose has already been proven by facts – it is used not only on PC in the Game, but also in other famous games, such as „Epsilon” by MoonPlay³⁵, available on consoles and mobiles³⁶.
57. It is equally important to look at the parties’ behaviour in relation to SiNB in connection with the purpose of copyright law. The copyright was created as a tool to encourage people to be creative and, as a consequence, to influence the progress of science and culture³⁷. Starka envisioned the SiNB to benefit the whole video games industry, to be used by everyone interested and to be further developed by the devoted community³⁸. Starka distributed SiNB on GitHub on BSD-3 license, which does not impose any restrictions to use and modify the work, other than indicating its author.
58. On the other end of the spectrum is Omnia’s behaviour. Mere existence of this dispute proves that Omnia intends to keep the SiNB technology to itself. It tries to oppose the use of SiNB by other programmers who could develop it even more and positively influence the level of AI application in video games. It is also worth mentioning that Omnia knew at least from April 2015 that Starka put SiNB on GitHub and never objected thereto³⁹.
59. Therefore, it is both legally valid and equitable to recognise SiNB as derivative to Starka’s pre-existing technology and, as a consequence, the Developer Technology under the GDPA. Being the Developer Technology, SiNB was not transferred from Starka to Omnia and remains Starka’s own proprietary software.

(iii) The Developer Technology is not work-for-hire under the GDPA

60. Omnia claimed that the source code of SiNB was created as a work-for-hire under the laws of Obliland and GDPA’s intellectual property provisions⁴⁰. In light of the above, this statement is false and SiNB should be treated as Developer Technology. However, Starka would like to provide further arguments to disprove Omnia’s statement.

³⁵ Schedule 7.

³⁶ Problem, para 13.

³⁷ Constitution of the United States, art. I, Sec. 8. Kindra Deneau, 'The Historical Development and Misplaced Justification for the Derivative Work Right' (2013) 19 BU J Sci & Tech L 68.

³⁸ Schedule 7.

³⁹ Clarifications, A14. (the answer to the question Q14).

⁴⁰ Problem, para 18.

61. Wording of the GDPA in light of the Obliland Copyright Law alone is enough to prove Omnia's claim wrong.
62. Article 20 of the Obliland Copyright Law incorporates the doctrine of employee work to Obliland's law. It states that the employer is the owner only in case of works "made by an employee in the course of his employment". Section 8(iii) of the GDPA provides that GDPA "does not create any exclusive relationship between the Parties nor any partnership, joint venture, employment or agency between them".
63. Thus, under Obliland's law, none of the work created under GDPA (including all copyrights to the Game itself) had Omnia as the first owner of the copyright.
64. What is more, Obliland's law includes a special provision only in relation to employee works and does not incorporate the work-for-hire doctrine in its entirety. Even if it did, the conditions for SiNB to be qualified as work-for hire have not been met.
65. The work-for-hire doctrine derives from American law. Work-for-hire is statutorily defined as: "(i) a work prepared by an employee within the scope of his or her employment or (ii) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire"⁴¹.
66. The first category is the employee work. Reasoning from the paragraph 62 above is fully applicable here.
67. The second category requires the work to be "specially ordered or commissioned". Under the GDPA, the main obligation of Starka was to develop the Game⁴². Only the Game can be treated as a work ordered by Omnia under the GDPA. Starka does not submit it possesses any rights to the Game itself, even though the transfer of intellectual property rights was in consideration for payment of the royalties⁴³, which were never received in full as Claim A submits.
68. The SiNB, as explained before, is the Developer Technology and does not form a part of the Game. It is a tool Starka used in the development of the Game. It is not treated as the commissioned work by the GDPA. Therefore, it cannot be treated as a work "specially ordered or commissioned" under the GDPA.

⁴¹ 17 U.S.C. § 101 (Copyright Act of 1976).

⁴² Section 2.1 of the GDPA.

⁴³ Section 4.1 of the GDPA.

69. The SiNB must also fall within one of the categories enumerated in the statute to be treated as work-for-hire. Software falls within such categories very rarely⁴⁴. It is not a part of collective work as it is an independent work, perfectly capable to function outside of the Game⁴⁵. It could not be treated as a compilation as well because then SiNB would have to be created prior to the conclusion of the GDPA⁴⁶. All other enumerated categories do not apply to SiNB as well.
70. In light of the above, the SiNB could not be qualified as neither the employee work (present in Obliland's law) nor the work-for-hire. SiNB should be qualified as the Developer Technology.

⁴⁴ Jon L Roberts, 'Work Made for Hire: The Fiction, The Reality and the Impact upon Software Development' (1988) 1 Harv J L & Tech 97, page 106.

⁴⁵ As proven in the paragraph 56 above.

⁴⁶ Jon L Roberts, 'Work Made for Hire...', page 107.

II. ALTERNATIVELY, IF THE COURT DECIDES THAT THE SINB OR A PART OF THE SINB IS NOT THE DEVELOPER TECHNOLOGY, STARKA, AS WELL AS ANY THIRD PARTY, HAS AN IMPLIED LICENSE TO USE THE SINB

71. Implied license doctrine is deeply rooted in the intellectual property law⁴⁷. In copyright, it is widely present in common law⁴⁸. It supplements the rights granted in the contract. It requires the court to examine the parties intent⁴⁹. Most often, the intent of the parties is interpreted from the fact-specific inquiry of the behaviour of the parties which leads one of them to naturally believe it has the permission to perform a particular action. In the application of the doctrine, policy reasons could be taken into account as well⁵⁰.
72. In the case at hand, intent of the parties is apparent from their actions. On August 15th, 2014, Starka released the SiNB on GitHub⁵¹. From that moment, everyone in the world could use the technology and contribute to its development. It is hard to comprehend how Omnia, a leading global game developer and publisher could not know about SiNB's online presence.
73. However, even if Omnia tried to argue it did not know of such actions for the first few months of technology's presence on GitHub, it was made aware of that as early as April 2015. In April 2015, Ivan Bekic (Starka's director and lead developer) asked Omnia's specialists for an advice regarding the Starka's GitHub repository. The correspondence made it clear that the repository contains SiNB. On that moment Anna Vein, Omnia's leading game designer was made aware of SiNB's online presence as she was one of the recipients of the emails in the thread. Omnia did not provide any evidence of its unawareness⁵².
74. SiNB was licensed on an open source license (BSD-3) indicating Starka as the copyright holder. The license allows everyone to use the SiNB without any restrictions – it only requires the licensee to indicate Starka as the copyright holder.
75. For more than five years, Omnia has never objected to Starka sharing the SiNB online on an open source license. In fact, before the case at hand started, Omnia never objected to anyone

⁴⁷ Orit Fischman Afori, 'Implied License: An Emerging New Standard in Copyright Law' (2008) 25 Santa Clara Computer & High Tech LJ 275, page 11.

⁴⁸ Harrison v. Maynard, Merrill & Co., 61 F. 689, 690-91 (2d Cir. 1894). Blair v Osborne and Tompkins [1971] 2 QB 78. Royal v. Radio Corp. of Am., 107 U.S.P.Q. 173, 173 (S.D.N.Y. 1955). Effects Assoc., Inc. v. Cohen, 908 F.2d 555, 558-59 (9th Cir. 1990).

⁴⁹ Kim Lewison, The Interpretation Of Contracts 152 (3d ed. 2004) [in:] Orit Fischman Afori, 'Implied License...', page 276.

⁵⁰ Christopher M Newman, 'What Exactly Are You Implying: The Elusive Nature of the Implied Copyright License' (2014) 32 Cardozo Arts & Ent LJ 501, 527. Taking policy into account is present in Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).

⁵¹ Schedule 7.

⁵² Clarifications, A14 (answer to the question Q14).

using the technology. Everyone could have reasonably believed that the technology is open and available to anyone.

76. Additionally, Omnia must have realized that developing the code together within the community not only boosts the development of SiNB, but also promotes the Game itself in an efficient and inexpensive way. Omnia evidently benefited from SiNB's presence on GitHub as the better developed, more sophisticated SiNB meant the better Game.
77. What is more, the reasoning described in paragraphs 57 and 58 is applicable to this issue as well. From the very beginning, the intent of Starka was to share the technology for everyone to use and develop. On the other hand, Omnia wants to keep the technology to itself, effectively blocking the progress in the field of AI application in video games. It is in line with the spirit of copyright law to award everyone using the SiNB with implied license on terms indicated on GitHub.
78. Therefore, if the court decides that SiNB or part thereof is not the Developer Technology, Starka, and any third party, has implied license to use the SiNB, as Omnia did not object to anyone using the technology for more than five years of its online presence.

CONCLUSION OF THE SECOND CLAIM

79. All intellectual property rights to SiNB belong to Starka because SiNB in its entirety is Developer Technology and did not transfer to Omnia under the GDPA. Initial 20% of SiNB's code is Starka's pre-existing technology. The rest of SiNB directly builds upon, develops and is dynamically linked to the pre-existing technology, which makes it a derivative to Starka's pre-existing technology. Contrary to Omnia's claim, SiNB is neither employee work nor work-for-hire under the GDPA.
80. Alternatively, Starka (and any third party using the technology) has an implied license to use, modify and develop the GDPA as the SiNB is available online on BSD-3 license for more than five years and Omnia never objected thereto.
81. Either way, Starka is free to use and further modify SiNB it created to develop even better AI technology in video games in the future.

REQUEST FOR FINDINGS

In light of all submissions, the Claimant respectfully requests the Terryland Alternative Dispute Resolution Centre to find that:

- A. As a result of the breach of contract, Omnia should pay Starka total amount of EUR 846,933 of unpaid Royalties under the GDPA, both reported but unpaid and unreported and unpaid, on the grounds that such sum amounts to the sum of all the Royalties that were due to Starka but unpaid and this claim is not limited by the mutual release clause in Section 4 of the Termination Agreement and by the Section 6.4 of the GDPA.
- B. All intellectual property rights to the SiNB belong to Starka as it forms a part of the Developer Technology under the GDPA, being in part Starka's pre-existing technology and in part a technology derivative from Starka's pre-existing proprietary software of general use and applicability in video games.
- C. Alternatively, if the Centre decides that the SiNB or a part of the SiNB is not the Developer Technology, that Starka, as well as any third party, has an implied license to use the SiNB as the code of the technology was on GitHub for more than five years and Omnia never objected thereto.

On behalf of the Claimant,

Counsels of the team 110