

11 JUN 2014



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9 June 2014

Sheridans
Whittington House
Alfred Place
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Our ref: RM/ 490820-00006

FAO: Andrew Bravin

Dear Sirs,

Infringement of Tempest and Tempest 2000

We write on behalf of our client, Atari Interactive, Inc., further to our client's letter to your clients, Jeffrey Minter and Llamasoft, of 1 April 2014, and in response to your letter of 11 April 2014.

Please can you confirm the corporate details of your client Llamasoft. Can you also please confirm that you have your clients' authority to accept proceedings on their behalf in this matter.

The Atari Tempest Games

Our client is the owner of the copyright in the computer games known as TEMPEST (first published in the USA in 1981) and TEPMEST 2000 (first published in the USA in 1994) (together the "**Tempest Games**").

The Tempest Games are well-known classic computer games which enjoy significant reputation among computer game enthusiasts in the United Kingdom, the USA and worldwide, as evidence by the abundance of references to the Tempest Games in articles, gaming magazines and websites.

By way of illustration, YouTube features 31,600 video clips in response to the search term "TEMPEST 2000", 10,600 video clips in response to the search term "TEMPEST 1981" and 7,400 video clips in response to the term "ATARI TEMPEST". The Tempest Games are invariably referred to as 'classics' and listed among the 'best video games of all times'.

The original TEMPEST game was created as an arcade game. TEMPEST and TEMPEST 2000 were later released for numerous gaming platforms and desktop operating systems including the Atari console, the Nintendo DS handheld console, the Game Boy platform, PlayStation, Xbox 360 as well as for Microsoft, Apple Macintosh and iOS systems among many others.

TEMPEST and TEMPEST 2000 are still highly popular games. TEMPEST is still available commercially on various gaming and computer platforms including in various Atari compilations on PC (Atari 80 Games in One), iOS (Atari Greatest Hits) and on Xbox Live.

Our client owns the copyright in all aspects of the Tempest Games including the drawings created for the graphic user interface (or the screen frames), the artwork, animation, moving images and other visual works featured on the screens, the screen lay-outs, colour combinations, the text displayed as

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part of the game, the selection and arrangement of visual, artwork and textual elements used in the games, the computer code underlying and operating the games, the user documentation and help pages, technical documentation, specifications, reference designs, instructions, architecture and design documents and other design and technical documentation created by our client in the course of creating the Tempest Games.

Our client and its predecessor in title have registered their title in the US copyright in the works referred to above. A summary of our client's US copyright registrations is set out in an appendix to this letter.

The TxK game

Your clients are responsible for the creation, publication, promotion and distribution of the computer game known as TxK ("**TxK**") and they promote it, among other channels, through their website at <http://minotaurproject.co.uk>. We understand that Mr Minter has personally created TxK. Mr Minter is closely associated with TxK and the game is promoted by reference to him personally.

TxK is a blatant copy of the Tempest Games. Contrary to your assertion, there is nothing remotely "original" in TxK and in no meaningful sense can TxK be described as your clients' "own independent creation". TxK is quite plainly a remake or updated version of the Tempest Games. Indeed, your client made every effort to keep TxK very closely to the visual design, look and feel and identity of the original Tempest Game. TxK has been acknowledged by numerous commentators as a sequel to the Tempest Games.

Mr Minter himself has openly attested to the fact that TxK is a copy of the Tempest Games. In his blog on your clients' website he refers to a previous game of a similar style that your clients created (Space Giraffe) saying that "*some people didn't like the complete immersion in the eyeball-searing psychedelia and the gameplay modifications that made [Space Giraffe] not quite the pure shooty T2K [a reference to TEMPEST 2000] upgrade that the initial look of the game seemed to promise*". A little further down Mr Minter continues:

"And so that brings us to our new project – TxK on the Playstation Vita. We're going to base it on the essence of the original T2K [Tempest 2000]. It'll be the pure, straightforward shooter that maybe you hoped for when you first saw Space Giraffe. We're not going to overload you with ultra psychedelia, but we will make it fluid and colourful and awesome-looking on the Vita's delicious, vibrant OLED screen. We're going to give you a perfect treat for your eyes, ears and thumbs with a modern extrapolation of one of the best shooters ever made on hardware that's just perfectly suited for it, and in a way that retains the purity of the original design". [the emphasis were added]

TxK, as Mr Minter promised, is indeed based on the essence of the Tempest Games and retains the purity of the original design of the Tempest Games. TxK takes the entirety of the screen frame designs and artwork of the Tempest Games, the look and feel and sound effects of the original games, as well as the functionality of the game, the gameplay, rules and principles underlying the game.

The copying of the screen artwork of the Tempest Games

Your clients have closely copied the original artwork and visual elements of the Tempest Games, in their entirety, with very minor variations. The copied artwork (the copyright in which is our client's property) includes the following elements:

1. the playing field being formed from a set of open and closed three dimensional geometric shapes, drawn with longitude 'vectors', forming an image of a tube or a funnel (where the cross section of the playing field is a circle) or other three dimensional elements or plains (the

complexity of which defines the level of the game) defined by their cross section shapes (e.g., a square, a U shape, a wave, a set of steps, crosses, flowers etc.), and during most of the play time viewed from the 'inside' perspective (looking 'through' the tube), in each case the basic shape 'close' to the viewer (the close rim of the tube or playing field) being mirrored by the same shape in the 'distance', at the centre of the viewing field, and both shapes being connected by a set of straight longitude lines or vectors;

2. the playing field lines portrayed in bright electric colours changing as the game progresses;
3. the playing field being portrayed against a black background;
4. the playing field being shown in perspective as an object rotating in space and seen from different angles (as the opening sequence of the game or a particular stage in the game);
5. the background (in TEMPEST 2000 and in TxK) being embellished with 'stars', blasts and similar colourful elements and portrayed in a 'forward movement' (creating the illusion of a high speed spaceship flight through the stars in the 'Star Wars' style);
6. an element (the 'spaceship' operated by the player) in the shape of an angular claw, made of 4 connected sections, the outer two sections being pointed, the claw itself being placed on and running along the outer perimeter (or the rim) of the playing field (on the player side of the playing field view);
7. the pointed aspects of the 'spaceship' or claw, as it runs along the rim of the playing field, always pointing to the centre towards the 'distant' end at the centre of the playing field (so where the claw is placed on the top side of the tube rim its pointed ends point down; if it is positioned at the bottom, they point up etc.);
8. the claw shooting down along the vector lines towards the distant end of the playing field (from which 'enemy' elements emerge);
9. the two 'vector' lines along the pointed ends of the claw always coloured in contrast to the rest of the playing field to emphasise the position of the claw on the playing field rim; the visual result is that the claw runs along the rim and the coloured vectors follow its movement up and down the length of the playing field;
10. the claw itself is portrayed in different bright colours contrasting with the colour of the lines that define the playing field;
11. the claw changes colour as the game progresses, but its predominant colour (in TEMPEST, TEMPEST 2000 and in TxK) is always yellow;
12. images of flight 'through' the playing field, which serve as a transition from one stage or sequence of the game to the next.

The visual elements described above are all aspects of the game artwork and animation that make up the screen frames of the game. The screen artwork and animation in TxK are quite plainly a copy of the artwork and animation created for TEMPEST and TEMPEST 2000. The original artwork from TEMPEST and TENPEST 2000, including each of the original 'static' shapes of the playing fields, the design of the claw, and the colour combinations and colour dynamics, the images of the playing field in perspective and through its centre during play time and the flight through the playing field between sequences, have all been taken, in their entirety, from the Tempest Games and adopted into TxK.

As an illustration, we enclose with this letter a few screen shots comparing the TxK artwork and screen design to the original TEMPEST screens. The close similarity is immediately evident.

In this context, we should point out that your reliance on cases such as *Navitaire v. Easyjet*, *SAS Institute Inc. v. World Programming Ltd* and *Nova Productions Ltd v. Mazooma Games Ltd* is wholly misplaced. The decisions in *SAS Institute Inc. v. World Programming Ltd* and the earlier case of *Navitaire v. Easyjet* concerned the protection of computer language, ideas, concepts and functionality. They did not deal with the screens layout designs and artwork. The starting point in all these cases is that there was no copying of any of the screen artwork (or, in the case of *Navitaire*, nothing in the screen artwork that was protected as original copyright work).

Nova Productions v Mazooma Games considered the copying of the concept of a computer game. The Court of Appeal decision opens with the factual finding of the first instance judge that: "*the visual appearance and the rule of Pocket Money [the claimant's game], Trick Shot and Jackpot Pool [the defendant's games] are all very different. There are certainly similarities between them which I address below. Nevertheless, each of the games looks and, to my mind, plays in a very different way*". The judge pointed out further that the two alleged infringing games were also very different from each other, whilst both were alleged to infringe the same work. The debate in that case (and in the other cases you cited) was all about allegations of copying at a very "general level".

This is not the case in regard to TxK, which takes the screen artwork and design of the Tempest Games and keeps very close to the original both in the design of the screen frames themselves and in the visual dynamics of the game and the overall look and feel of the game.

The copying of the gameplay and the look and feel of the Tempest Games

In addition to the pure visual elements and artwork that were taken from the Tempest Games, TxK adopts the same textual elements, rules, scoring methods, game level parameters and other principles of the Tempest Games, including as follows:

1. The controls, scoring and numerals used in TxK all follows the model of Tempest Games and are intended to maintain the look and feel of a classic arcade game. Numerals and other characters are all designed in 'vector graphics' style that mimics the look and feel of the Tempest Games themselves.
2. TxK adopts the gameplay, scoring methods and rules of the Tempest Games. For example, TxK adopts the "Jump" feature from TEMPEST 2000, which allows players to press a button and 'jump' their spaceship off the playing field and 'rain down' shots on enemies below.
3. TxK features an electronic music sound track and sound effects which are indistinguishable from those used in TEMPEST 2000, creating the same atmosphere and an environment familiar to players of the Tempest Games.
4. TxK copies a collection of terms and phrases which were coined by our client's predecessors in title in connection with the Tempest Games and are repeatedly displayed on the game screen throughout the game and referenced in the user manual in TxK as they are in the Tempest Games. These include some of the following terms and phrases: "A.I. Droid", "Particle Laser", "Collect Powerups", "Jump Enabled", "Eat Electric Death" and "Supperzapper Recharge" ("Suppertapper Recharge" in TxK).
5. The controls in TxK are limited to 'Left and Right' directional inputs like the classic arcade cabinet version of TEMPEST. Unlike most modern computer games, 'Up/Down/Diagonal' directions do not register.
6. As mentioned above, the different levels of the game in TxK are defined by playing field shapes that are direct copies or derivatives of the shapes featured in the Tempest Games.
7. TxK also copies the transitory elements of the game from TEMPEST 2000. In between each

main level, there is a 'mini game' in which players steer their spaceship (the claw) through a series of rings (formed from the main playing field) thereby scoring bonus points. The visual element has its origin in TEMPEST in which the transitional element between sequences of the game displayed movement through the playing field.

Overall, TxK adopts the 'look and feel' of the Tempest Games (particularly TEMPEST 2000, although the basic artwork is taken directly from TEMPEST). Computer game enthusiasts and numerous commentators immediately recognised TxK as a sequel and updated version of the Tempest Games. No attempt whatsoever was made by your clients to differentiate TxK from the Tempest Games. To the contrary, every attempt was made to keep faith to the original.

As mentioned above, your clients promote TxK as a game that keeps faith to the essence, purity and original design of the Tempest Games. Your clients quite openly seek to associate TxK with the Tempest Games and to emphasise the closeness of TxK to the original Tempest Games. Your clients even claim to be the originators of the Tempest Games.

The name TxK is designed to create a link to TEMPEST and TEMPEST 2000

Even the choice of name of "TxK" is a clear reference to TEMPEST 2000 (and to TEMPEST 3000), which is intended to be understood by game enthusiasts and undoubtedly is understood by many. TEMPEST 2000 is often referred to by game enthusiasts by using the shorthand "T2K" (and TEMPEST 3000 is referred to as "T3K"). The name "TxK" suggests to the target market that the game is the next generation of TEMPEST 2000 and TEMPEST 3000. Indeed, your client himself refers to TEMPEST 2000 in his blog as "T2K" (and refers to TEMPEST 3000 as T3K), explaining that TxK is an upgraded version of "T2K".

Passing off

As a result of the adoption of the artwork and design, the visual dynamics, the principles and rules of the game, the look and feel and the name chosen for TxK, numerous members of the public have been and will continue to be deceived to believe, wrongly, that there is a connection between TxK and our client, or a connection to the classic Tempest Games. Numerous comments have been made as to this connection, referring to TxK invariably as a sequel or an updated version of the Tempest Games and comparing the features of the games.

Your clients are encouraging the linkage of their TxK game to the classic Tempest Games and they promote TxK by reference to TEMPEST 2000, portraying TxK as an upgrade and updated version of TEMPEST 2000 and explicitly referring to our client's Tempest Games as your client's own work (where in reality your clients contributed to the development of TEMPEST 2000 as contractors working for our client's predecessor in title. Further, your client's development work on TEMPEST 2000 was merely an updating of the original TEMPEST game to which your clients made no contribution).

Access and use of technical documentation and confidential information

Your clients were engaged by our client's predecessor in title as part of the team of designers that was given the task of updating and upgrading the original TEMPEST game of 1981 and which resulted with the release by our client of TEMPEST 2000 in 1994. In connection with that work, Mr Minter and Llamasoft were given access to a great deal of confidential information and trade secrets relating to the technical aspects of the TEMPEST game and he, together with the rest of the team, created a great deal of additional confidential technical information. Your clients owe a duty of confidence to our client in relation to that body of information which was partly made available to them for their work and partly created by your clients and other as part of their engagement for our client's predecessor in title.

Mr Minter had full access to the design documents, specifications, reference documents, architecture documents and computer code used for both TEMPEST and TEMPEST 2000, which comprise both copyright materials and trade secrets or confidential information that belong to our client.

The striking similarities of TxK to the Tempest Games, both on the visual side and at the level of game principles, gameplay and rules, combined with your clients' intimate familiarity with the architecture, design documents and computer code of TEMPEST and TEMPEST 2000, suggest that your clients, in all likelihood, have used our client's design and architecture documents, code and other copyright material and confidential technical information in developing TxK. Indeed, it would be extremely difficult for Mr Minter, as a developer who had worked on TEMPEST 2000, to recreate the computer game (or an upgraded version) in the form of TxK without, consciously or subconsciously, accessing and reproducing the technical documentation and confidential information gained and created by himself together with other developers in the team in the course of his work on TEMPEST 2000 and which Mr Minter received from our client's predecessor in title for the purpose of that work. Our client will seek proper disclosure from your clients to ascertain the degree and extent of abuse of its copyright and confidential information by your clients.

Our client's causes of action

Based on the foregoing, our client asserts the following causes of action against your clients:

1. Infringement (by way of reproduction and making adaptations of the whole or a substantial part) of our client's UK copyright:
 - a. in the drawings and other artwork created for its computer games TEMPEST and TEMPEST 2000;
 - b. in the graphic user interface artwork including the screen frame layout designs, graphical works and animation and including in the selection and arrangement of visual, graphical and textual elements, all as comprised and embodied in the screen frames or graphic user interfaces of TEMPEST and TEMPEST 2000;
 - c. subject to disclosure and further information, in the design documents, specifications, reference documents and architecture documents created in connection with the development of the Tempest Games; and
 - d. subject to disclosure and further information, in the computer programme created for the Tempest Games.
2. Infringement of our client's UK copyright by the creation of infringing copies, distribution of infringing copies and the communication to the public of the infringing work (TxK).
3. Infringement of our client's US copyrights in violation of the United States Copyright Act, 17 U.S.C. § 101, et seq., through the sale and distribution of TxK, which is substantially similar to TEMPEST and TEMPEST 2000, including without limitation, the drawings and artwork, graphic user interface, game play, text and, subject to disclosure and further information, the computer program for TEMPEST and TEMPEST 2000.
4. Passing off of TxK as a computer game that is connected to our client and/or connected to the classic Tempest Games. The cause of action is based on the fact that our client owns valuable goodwill in relation to the Tempest Games and that all elements of the TxK game, including the artwork, animations, visual effects, design, gameplay, rules and principles, background music and sound effects, textual elements, the scoring methods and visual display of numbers and characters, the dynamics and the look and feel of TxK as well as the name "TxK" are all based closely on the Tempest Games, designed to look and feel as close as possible to the

Tempest games and calculated to deceive the public as to the origin of TxK and the connection between TxK and our client (and to the classic Tempest Games). Further, your clients pass off the TxK game in promoting the game by reference to the Tempest Games and by claiming (wrongly) to be the originators of the Tempest Games. The deception of the public causes, or is liable to cause, damage to our client's goodwill and to our client's ability to commercialise the Tempest Games.

5. Trade dress infringement and unfair competition in violation of Section 43(a) of the United States Lanham Act, 15 U.S.C. § 1125(a) and under state common law of the United States. The overall appearance, game play and look and feel of TxK is likely to cause confusion as to the source or origin or approval and authorisation of TxK by causing consumers and members of the trade to believe that TxK is a TEMPEST game or is a sequel to or revision of the Tempest Games, or was produced by or authorised, endorsed or sponsored by our client or the producer of the Tempest Games or is connected in some way with our client or the producer of the Tempest Games.
6. Subject to disclosure and further information, breaches of duties of confidence owed to our client in relation to the work product of your clients in relation to TEMPEST 2000 and in relation to other trade secrets and confidential technical information received by Mr Minter and Llamasoft in confidence from our client's predecessor in title in relation to TEMPEST and TEMPEST 2000 in connection with their work as contractors in connection with the development of TEMPEST 2000.

In view of the above infringements and abuses of our client's rights, which your clients have carried out with full knowledge of our client's copyright, trade dress rights and goodwill in the Tempest Games, our client is entitled to seek damages from your clients in respect of the harm caused to our client's goodwill and in respect of the financial losses caused to our client as a result of the commercialisation of TxK by your clients, and in respect of the earnings made by your clients through such infringement activities, and including 'additional damages' under section 97 of the Copyright, Designs and Patents Act 1988 in view of the flagrancy of your clients' infringements of our client's copyright and (in respect of the infringements of our client's US copyright and trade dress rights in the US) our client's actual damages, your clients' profits, treble damages, punitive damages and statutory damages under the United States Copyright Act, Lanham Act and state common law.

Our client's demands

Our client demands that your clients immediately:

- (a) withdraw the TxK game from the market and refrain from any commercial exploitation of the game in the UK, in the USA and anywhere else in the world;
- (b) procure that TxK is removed from all distribution channels including through any retailers, distributors, licensees, online games or App stores and other websites;
- (c) advise Sony Computer Entertainment that TxK is removed from the market due to the infringement of our client's intellectual property rights;
- (d) undertake to our client that they will not, without our client's prior written authorisation, create additional copies of TxK, sell, offer to sell, distribute, communicate to the public, make available to the public or otherwise exploit the TxK game, either on their own or through any other person and that they shall not authorise, license or permit any person to do such things;
- (e) undertake to our client that they will not in the future infringe our client's copyright in the TEMPEST and TEMPEST 2000 computer games (including in the screen artworks, user documentation, technical documentation and in the computer code underlying the games) and

that they will not in the future pass off any computer games as products connected with our client or with our client's computer games;

- (f) furnish our client with a full report of all sales, licences and other forms of exploitation of TxK and all revenues generated by your clients from the commercialisation of TxK, together with a written statement signed under oath by Mr Minter confirming that such information is true, complete and not misleading;
- (g) deliver to our client or (at our client's choice) destroy, all copies of TxK in your client's possession and control (including all media containing digital copied of TxK) and delete all digital copies on hardware in your client's possession or control, including all copies of the source code and executable code making up TxK;
- (h) return to our client all copies in their possession or control of confidential information belonging to our client including all such copies of design documents, specifications, reference documents, architecture documents and computer code relating to the TEMPEST and TEMPEST 2000 computer games;
- (i) confirm to our client by a written statement signed under oath by Mr Minter that your clients have no other copies or records in their possession or control of the materials, documents, computer code and information referred to in paragraphs (g) and (h) above; and
- (j) undertake to pay our client's damages (or, at our client's choice, to compensate our client on an account of profits) for the infringement of copyright, passing off, trade dress infringement and breach of duties of confidence and to pay our client's legal costs.

Our client invites your clients to provide us, by no later than 14 days from the date of this letter, in consideration of our client's agreement not to issue legal proceedings against your clients in respect of the infringements referred to in this letter, with a written undertaking that they agree to and will comply with the requirements set out above. Unless such undertaking is provided and complied with, our client intends to issue legal proceedings against your clients to enforce its rights and will seek to recover full compensation as well as its legal costs.

Our client's rights are reserved.

Yours faithfully,

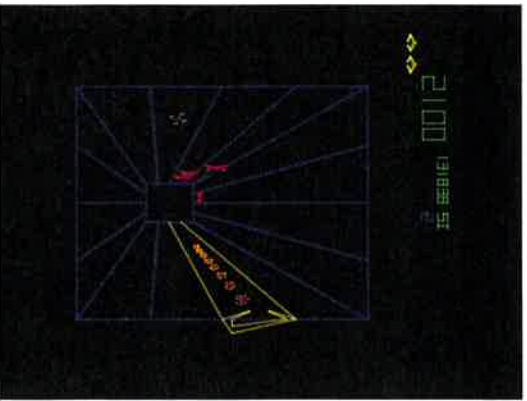
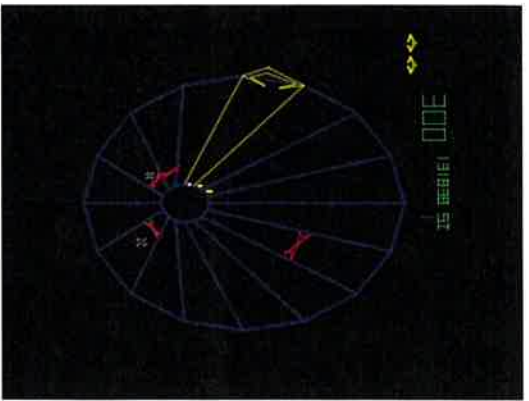
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Appendix – copyright registrations

Date	Registration Number	Title/ Description/Notes	Type of Work
1981-09-30	V Au000029003	Tempest / drawn by B. Morgan, L. Fitts / Schematic diagram; sheets (4 p.)	Visual Material
1981-09-30	PA0000116230	Tempest / 1 videocassette (14 min.) : sd., col. ; 3/4 in. / Video game - Deposit includes description (6 p.)	Visual Material
1981-10-13	V Au000033746	Tempest main P. C. board : circuit side--037384-01.	Visual Material
1981-10-13	TX0000781742	Tempest troubleshooting guide complete with signatures and memory map.	Text
1981-10-13	V Au000033747	Tempest main P. C. board : component side--037384-01.	Visual Material
1981-10-13	TX0000784339	Tempest: operation, maintenance, and service manual. / Tempest : operation, maintenance, and service manual / Drawing package supplement to Tempest operation, maintenance, and service manual; Includes parts lists & Drawing package supplement to Tempest operation, maintenance, and service manual.	Text
1981-10-13	V Au000033748	Tempest auxiliary P. C. board : component side--037586-01.	Visual Material
1981-09-30	TX0000784726	Tempest computer program (object code) / Tempest / Printout / C.O. correspondence	Computer File
1982-01-13	TX0000868940	Tempest/Cabaret operation, maintenance, and service manual. / Tempest operation, maintenance, and service manual, complete wity illustrated parts lists : Cabaret : introducing Atari's first color X-Y video game. / Cabaret - Tempest/Cabaret operation, maintenance, and service manual / Includes drawing package suppl.	Text
1981-10-13	V Au000033745	Tempest auxiliary P. C. board : circuit side--037586-01.	Visual Material

Classic Tempest



TXK

