

3 E-Mail: dwilson@kmwlaw.com
David K. Caplan (Bar No. 181174)
E-Mail: dcaplan@kmwlaw.com
4 Tara D. Rose (Bar No. 256079)
E-Mail: trose@kmwlaw.com
5 KEATS McFARLAND & WILSON LLP
9720 Wilshire Boulevard
6 Penthouse Suite
Beverly Hills, California 90212
7 Telephone: (310) 248-3830
Facsimile: (310) 860-0363
8

9 Attorneys for Plaintiff
ZYNGA INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION
13

14 ZYNGA INC., a Delaware Corporation,
15

16 Plaintiff,

17 v.

18 VOSTU USA, INC., a Delaware Corporation;
VOSTU LLC, a Delaware Corporation; VOSTU,
19 LLC, a Delaware Corporation; VOSTU, LTD., a
Cayman Islands Corporation; and DOES 1-5,
20

21 Defendants.
22
23
24
25
26
27
28

CASE NO. CV 11-2959 EJD

**DECLARATION OF MANOEL J. PEREIRA
DOS SANTOS IN OPPOSITION TO
DEFENDANTS' APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

Noted For Hearing:

DATE:

TIME:

PLACE: Courtroom 1, 5th Floor

3 Fundação Getúlio Vargas (FGV) located in São Paulo, where I coordinate an Intellectual Property
4 Program and a course on Civil Liability in Internet and other Mass Media. I am over the age of 18
5 and am competent to testify. I have been retained by Zynga Inc. ("Zynga") to provide expert
6 testimony in the Brazilian lawsuit (the "Brazilian Action") at issue in the defendants' ("Vostu")
7 instant application for a temporary restraining order (the "Application")

8 2. I received a J.D. degree, a Master of Laws degree and a Doctor of Laws degree from
9 the University of São Paulo Law School, and a Master of Comparative Jurisprudence degree from
10 the New York University School of Law.

11 3. I have published several articles and books on Intellectual Property law, particularly
12 copyright law issues, and on Internet related matters. Since 2003 I have contributed the Brazil
13 Chapter of the International Copyright Law and Practice, (Paul Edward Geller ed., Lexis Nexis
14 2010).

15 4. I am familiar with the copyright laws of both Brazil and the United States, and I
16 have worked with the Brazilian government in the revision of the Brazilian copyright legislation. I
17 served as former chairman of the First Chamber and Counselor of the Brazilian National Copyright
18 Council.

19 5. A true and correct copy of my *curriculum vitae* is attached hereto as **Exhibit 1**.

20 6. I submitted an expert report to the Court in the Brazilian Action supporting Zynga's
21 claims before the Civil Court of the State of Sao Paulo.

22 7. I have reviewed the documents submitted by Vostu in support of its Application,
23 including but not limited to the "Declaration of Ronaldo Lemos in Support of Vostu's *Ex Parte*
24 Application for Temporary Restraining Order Enjoining Zynga From Pursuing Brazilian Litigation"
25 (the "Lemos Declaration") and the "Memorandum of Points and Authorities in Support of Vostu's
26 *Ex Parte* Application for Temporary Restraining Order Enjoining Zynga from Pursuing Brazilian
27

3 under United States law may have a different outcome when compared with a ruling on a copyright
4 infringement claim by a Brazilian court under Brazilian law. In reality, Brazilian courts may
5 interpret and apply copyright concepts in distinctly different ways in infringement cases,
6 notwithstanding the fact that both United States and Brazil are subject to the Agreement on Trade-
7 Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”) and the Berne
8 Convention for the Protection of Literary and Artistic Works (the “Berne Convention”).

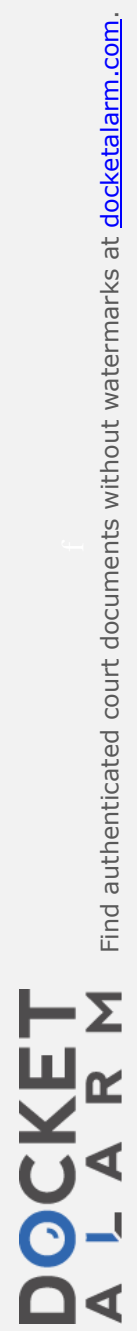
9 9. Neither the TRIPS Agreement, nor the Berne Convention for the Protection of
10 Literary and Artistic Works (the “Berne Convention”), which is incorporated into the TRIPS
11 Agreement, require member states’ copyright laws to be so similar that a claim in one jurisdiction
12 would be decided in the same way in another jurisdiction. The TRIPS Agreement and the Berne
13 Convention merely require each member state (i) to provide a minimum standard of protection as
14 defined under the TRIPS Agreement and the Berne Convention, and (ii) to provide the same
15 substantive rights to foreign copyright holders that it provides to its own nationals. See Berne
16 Convention, Article V(1). In fact, the Berne Convention expressly contemplates that member states
17 will enact different substantive copyright laws, and expressly authorizes “greater protection [than
18 specified by the Berne Convention] which may be granted by legislation in a country of the Union.”
19 Berne Convention, Art. 19.

20 10. As a matter of practice, Courts may adopt different approaches to decide over an
21 infringement case because common law and civil law are still distinct systems of law in spite of the
22 affinities that the globalization has improved. In addition, the United States copyright law still
23 preserves more differences than other common law countries when compared to the European
24 copyright laws, from which the Brazilian copyright law derives. For instance, the United States
25 laws conceptualize copyright broadly as property while the civil law countries apply the dualism of
26 the original French system, which comprises both economic and the so-called “moral rights”. Those

3 11. As one scholar pointed out on the question of originality particularly:
4 *“Do such criteria of originality and creativity, although abstractly formulated in*
5 *language that varies from one body of law to another, lead to much the same results*
6 *when applied to concrete cases? It would seem so in the most ordinary and easy*
7 *cases, but it becomes increasingly difficult to answer this question as one moves on*
8 *to difficult cases, especially those involving types of productions that courts confront*
9 *as matters of first impression. Nor do the results in these borderline cases always*
10 *depend on express differences in legal criteria, but rather on often-implicit*
11 *judgments of policy or, still less clearly, of culture and tastes”*. Paulo Edward Geller,
12 International Copyright: An Introduction § 2[2][c][i], in International Copyright Law
13 and Practice (Paul Edward Geller ed., Lexis Nexis 2010).

14 12. There are additional significant differences between the copyright laws of Brazil and
15 the United States. Equitable defenses are typical of the common law systems. While comparable
16 doctrines may be available in civil law countries, the history of the Brazilian case law has shown a
17 pattern of protectionism towards authors in infringement actions that only recently has been
18 weakened. Fair use defense is framed in open-ended terms under the United States Copyright Act,
19 but Brazil, as the European and Latin American countries, adopts the closed-list system and
20 generally enforces it through a restrictive analysis. In case of violation of the copyright moral rights
21 the Brazilian courts have granted the so-called moral damages, a monetary award that goes beyond
22 copyright royalties and other economic compensation. But courts are not as generous in granting
23 such award as would a United States court do.

24 13. I understand that Vostu claims that its games are hosted on servers that are located
25 within the United States. In my opinion, the location of Vostu’s servers has no legal relevance in
26 the Brazilian Action because Vostu’s infringing games are directed toward, and displayed to, users
27



3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 9 day of August, 2011, at São Paulo, SP, Brazil


Prof. Manoel J. Pereira dos Santos, Ph.D.