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AM LAW LITIGATION DAILY

## Litigators of the Week: In Mobile Gaming Showdown, a Side-Battle Over ‘Bots’

By Ross Todd

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**O**ur Litigators of the Week are **Lazar Raynal** and **Chris Campbell** of **King & Spalding**. Last week they brought home a \$42.9 million verdict—everything they requested—for mobile gaming client Skillz Platform Inc. after jurors in San Jose, California found that rival AviaGames willfully infringed a patent for pairing like-skilled players.

But we’re just getting to the interesting part.

Last year the King & Spalding team asked to reopen discovery claiming AviaGames used “bots” in real-money skill-based games on its platform. U.S. District Judge Beth Labson Freeman delayed the initial trial date, originally set for this past November, in light of a federal probe into AviaGames’ use of bots.

**Lit Daily: Who is your client and what was at stake?**

Lazar Raynal: Skillz, the pioneering and first successful peer-to-peer, skill-based gaming platform.

**How did this case come to you and the firm?**

Raynal: The CEO and GC asked us to take over the case from another firm with only four months remaining prior to the original trial date, chart a clear direction and try the case.

**Who was on your team and how have you divided the work?**

Raynal: I led the factual story and attack on the credibility of the main fact witnesses. I delivered



Courtesy photos

**Chris Campbell, left, and Lazar P. Raynal, right, of King & Spalding.**

the opening and the rebuttal to defendant’s closing. I was supported on that side of the case by partner **Jessica Benvenisty** and associates **Mike Lombardo** and **Matt Wood**. Jessica Benvenisty also put on our damages expert. The jury awarded Skillz the full amount requested, \$42.9M—a damages figure that runs from the date of suit in April 2021 to the verdict, with the issue of permanent injunction or a running royalty pending post-trial briefing.

Chris Campbell: I led the technical side of the case and the attack on the CTO of the defendant, the opposing damages expert, as well as a third-

party fact witness the defense flew in from Australia who the defense claimed was the source of their infringing platform. I delivered the closing. I was supported by partner **Britton Davis**, who directed and crossed the technical experts, partner **Brian Eutermoser**, as well as associates **Rahul Sarkar**, **Yushan Luo**, Matt Wood and **Roy Falik**.

**You asked the judge to reopen discovery last year after summary judgment was fully briefed saying that you'd uncovered evidence that AviaGames used bots to "rig" its games. How'd that discovery come about?**

Campbell: Games of skill require that humans be matched against humans, not bots. Skillz suspected the defendant used bots in its games instead of matching a human to another human. Immediately upon taking over the case, King & Spalding deployed its native Chinese-speaking language team to sift through thousands of documents, produced at the very end of fact discovery, to hunt for evidence of defendant's use of bots. Upon finding the bots, King & Spalding immediately filed an emergency motion asking the court to reopen discovery, with trial just over three months away. The court granted the emergency motion to reopen discovery, which led to parallel paths of trial preparation, "bot" discovery and aggressive motions by the defense to limit that discovery. The bot discovery led to the production of tens of thousands additional documents, supplemental expert reports, fact depositions and a trial continuance due to a criminal subpoena issued to defendant.

Raynal: During the original fact discovery phase, several defense witnesses, including the defendant's co-founder, Vickie Chen, testified under oath that defendants do not use bots in cash games. We challenged that testimony and put forth proof it was not truthful. During the "bot" discovery phase, Ms. Chen invoked the Fifth Amendment at her supplemental deposition. A mere 10 days prior to trial, Ms. Chen withdrew her invocation of her 5th Amendment

right and sat for a renewed deposition, a considerable portion of which was played via video to the jury at trial. Ms. Chen did not appear in person at the trial.

The "bot" discovery ultimately led the court to find, via a crime-fraud exception order, that the defendant engaged in two frauds—the first against customers of its platform and the second against financial institutions reliant on the defendant's representations about its games. That evidence was not presented to the jury due to the potentially prejudicial nature. However, Skillz has another case pending against the same defendant regarding the conduct that the court found to be fraudulent.

**In what ways did that discovery complicate your case, logistically speaking? And how did it strengthen it when it finally got to the jury?**

Campbell: The Chinese language documents made document review laborious and time consuming, and required we obtain certified translations to admit them into evidence. The content of these and other documents greatly strengthened our case, as they revealed how defendant stole our client's technology while pretending to be a business partner pursuant to a contract with Skillz, whereby Skillz gave the defendant access to Skillz's highly confidential software and patented gaming platform technology.

**You established the theme of "fairness" very early during your trial presentation. Walk me through all the ways you wanted to highlight "fairness" with the jurors here. That was essentially the heart of your client's patent, right?**

Raynal: Fairness was the theme of the trial for a reason. The patented technology is fundamentally about fairness in skill-based gaming. The evidence confirmed that fairness is the most important concern of users. And numerous Skillz documents, as well the testimony of every witness in the case, confirmed that fairness is a core principle to online skill-based gaming. The

trial testimony of Skillz’s founders underscored the importance of fairness at trial.

By contrast, we showed how the defendant’s conduct was the antithesis of fair gaming, including its use of bots in games where cash prizes are on the line. Moreover, we asked the jury to do what it thought was fair in the opening, during the witness testimony, and in our closing argument. Skillz was hurt by the infringement and entitled to fair damages. Thankfully, that is what the jury awarded.

### **How did you make your case to the jury that the infringement here was willful?**

Campbell: By showing the motive to harm and bad acts of the defendant in their own words from contemporaneous documents.

First, we presented the jury with the SDK Software License Agreement entered into between Skillz and the defendant, which established a business partnership between the companies. That agreement and the underlying partnership provided the defendant with access to Skillz’s technology, arming the defendant with the information needed to launch its games on the Skillz platform.

Second, at trial, we provided the jury with evidence showing the defendant was intent on subverting that partnership. We showed the jury that after entering into its partnership with Skillz—a partnership where defendant agreed not to make any modification to or attempt to re-create the Skillz software—the defendant launched a clandestine initiative dubbed as “Project X.” Project X had one objective—to harvest as much information from Skillz and the Skillz platform, while defendant was developing a competing platform itself, all the while

pretending to be Skillz business partner under the SDK Software License Agreement.

Third, we presented to the jury evidence that the defendant knew or should have known about the Skillz patent and nevertheless engaged in intentional and deliberate conduct to steal Skillz’s patent technology despite its partnership with Skillz. Notwithstanding the Project X documents, defendants claimed they could not be willful infringers because they did not know about the Skillz patent prior to suit. But the defendant’s documents themselves both belied that narrative, as did post-suit documentation clearly reflective of defendants state of mind and intent.

The defendant’s documents obtained during “bot” discovery were devastating. They clearly support the jury’s finding of willful infringement. Those documents variously reflected that the defendant set out to “crack[]” Skillz’s games, was intent on “killing skillz” and “acquiring Skillz paying users as soon as possible,” and sought to obtain information about the Skillz platform “at the algorithm level.” One internal document produced by defendants noted: “On a certain level, it can be said that bad money drives out good money.”

### **What can other companies take from Skillz’s experience here?**

Campbell: Trust your IP. Aggressively enforce it if it is infringed—particularly where that very IP is protecting your core business line whose market share is being stolen by willful infringers.

### **What will you remember most about this matter?**

Raynal: The client’s gratitude when the clerk read the jury verdict awarding every dollar requested, along with a finding of willfulness.