

Exhibit 1

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23 **UNITED STATES DISTRICT COURT**
24 **NORTHERN DISTRICT OF CALIFORNIA**

25 In Re Sony PS3 "Other OS" Litigation

26 Case No. CV-10-1811-RS

27 **PLAINTIFFS' REQUEST FOR JUDICIAL**
28 **NOTICE IN FURTHER OPPOSITION TO**
DEFENDANT SONY COMPUTER
ENTERTAINMENT AMERICA, LLC'S
MOTION TO DISMISS

Date: November 4, 2010

Time: 1:30

Hon. Richard Seeborg

1 Plaintiffs respectfully request the Court to take judicial notice of the following documents from a
2 lawsuit filed in this district captioned Sony Computer Entertainment America, LLC v. Hotz, et al., Civil
3 Action No. 3:11-cv-00167-SI (N.D. Cal.) (“Hotz”):

4
5 Exhibit A: Complaint for Injunctive Relief and Damages Based on
6 Violations of Digital Millennium Copyright Act; Violations of Computer
7 Fraud and Abuse Act; Contributory Copyright Infringement; Violations of
8 the California Comprehensive Computer Data Access and Fraud Act;
9 Breach of Contract; Tortious Interference with Contractual Relations;
10 Common Law Misappropriation; And Trespass.

11 Exhibit B: Plaintiffs’ Ex Parte Motion for Temporary Restarining Order,
12 Order to Show Cause Re: Preliminary Injunction, And Order of
13 Impoundment; Memorandum of Points and Authorities.

14 Exhibit C: Order Granting Plaintiffs’ Ex Parte Motion for Temporary
15 Restarining Order, Order to Show Cause Re: Preliminary Injunction, And
16 Order of Impoundment.

17 These documents were recently submitted by SCEA to this Court in briefing to Magistrate Judge
18 Chen related to several outstanding discovery disputes. Rule 201(b) of the Federal Rules of Evidence
19 provides that courts may take judicial notice of documents that are “not subject to reasonable dispute” in
20 that they are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of
21 accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”

22 When ruling on a motion to dismiss, courts may consider allegations contained in pleadings,
23 exhibits to the complaint, and matters properly subject to judicial notice. Outdoor Media Group, Inc. v.
24 City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007). The Court may take judicial notice of other court
25 proceedings, both within and without the federal system, if those proceedings have a “direct relation” to
26 matters at issue. See e.g., U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, 971 F.2d 244,
27 248 (9th Cir. 1992); White v. Martel, 601 F.3d 882, 885 (9th Cir. 2010).

28 The filings in Hotz have a “direct relation” to the matters at issue in this litigation. Specifically,
in the subject filings, in which defendant Sony Computer Entertainment America, LLC (“SCEA”) is the
plaintiff, SCEA makes statements that directly contradict its argument in support of its motion to dismiss

1 Plaintiffs' breach of warranty claim in the present case, which was heard on November 4, 2010, and is
2 currently under submission.

3 This case concerns SCEA's unilateral decision to effectively terminate the advertised "Other
4 OS" feature on its PS3 console. Plaintiffs allege that this conduct rendered each PS3 console unfit for
5 the ordinary purposes for which it was sold, and assert a claim against SCEA under California
6 Commercial Code §2314, which provides in relevant part that "a warranty that the goods be
7 merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of
8 that kind" and that "goods to be merchantable must be at least ... as fit for the ordinary purposes for
9 which such goods are used." SCEA moved to dismiss Plaintiffs' breach of implied warranty claim by
10 arguing that Plaintiffs and SCEA lacked privity because Plaintiffs did not purchase the product directly
11 from SCEA. [Docket No. 97]. Plaintiffs also assert a breach of express warranty claim, but SCEA did
12 not move to dismiss that claim based on a lack of privity. As explained in Plaintiffs' opposition to
13 SCEA's motion to dismiss [Docket No. 104] and at oral argument, Plaintiffs can establish the requisite
14 vertical privity for their breach of implied warranty claim, regardless of whether they purchased the
15 PS3s directly from SCEA, because SCEA has placed itself into privity with end consumers through
16 various means.

17
18 In Hotz, SCEA sued several PS3 users for injunctive relief and damages in connection with their
19 purported unauthorized access to and copying of SCEA's proprietary PS3 technology. In the complaint,
20 SCEA claimed direct privity of contract with the defendant PS3 users, although the users did not
21 purchase their PS3s directly from SCEA, but rather at retail. SCEA's complaint in Hotz (Exhibit A)
22 states, in pertinent part, as follows:

23
24 15. This Court has personal jurisdiction over each Defendant for the
following reasons, among others:

25
26 (a) ,, Hotz is also subject to personal jurisdiction pursuant to the
27 PlayStation Network Terms of Service and User Agreement ("PSN User
28 Agreement"), which is attached hereto as Exhibit A. On information and
belief, Hotz has used software updates delivered by SCEA for one or more
PS3 Systems he is using. To obtain such software, users must consent to
the terms and conditions of the PSN User Agreement, which require that

1 both parties submit to personal jurisdiction in California and further agree
2 that any dispute arising from or relating to this Agreement shall be brought
3 in a court within San Mateo County, California.

4 53. All PS3 System users who have used software updates delivered
5 by SCEA for the PS3 System are bound by the PSN User Agreement or
6 similar agreement. A copy of the PSN User Agreement is attached as
7 Exhibit A and incorporated herein by reference. On information and
8 belief, Defendants herein have consented and are subject to the terms of
9 the PSN User Agreement or similar agreement.

10 92. SCEA is informed and believes and thereon alleges that
11 Defendants agreed to the terms of the PSN User Agreement or similar
12 agreement and entered into that contract or similar agreement with SCEA.
13 The PSN User Agreement or similar agreement is a written contract that
14 limits their use of the PS3 System, related hardware, and related code,
15 including restricting access and governing allowable uses.

16 97. *SCEA has contractual relationships with users of the PlayStation
17 Network.*

18 (emphasis added)

19 SCEA further claims in its Ex Parte Motion for Temporary Restraining Order, Order to Show
20 Case Re: Preliminary Injunction, and Order of Impoundment; Memorandum of Points and Authorities
21 in Support (“TRO Motion”), filed on January 11, 2011, that “Hotz is bound by the ‘Playstation Network
22 Terms of Service and User Agreement.’” See Exhibit B. The Court ultimately issued the TRO sought
23 by SCEA. See Exhibit C. Thus, in Hotz, SCEA itself argues that SCEA maintains contractual privity
24 with all PS3 users, which supports plaintiffs’ breach of implied warranty claim in this action, and
25 contradicts arguments made by SCEA in its motion to dismiss that claim.

26 For the reasons stated herein, plaintiffs’ Request for Judicial Notice in Further Opposition to
27 Defendant SCEA’s Motion to Dismiss should be granted.

28 DATED: February 17, 2011

Respectfully submitted,

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