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Trademark use Within an Expressive Work Must Only Pass the Rogers test, Not a Likelihood of Confusion Analysis: Mil-Spec Monkey v. Activision

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The likelihood of confusion test is often called the “cornerstone” of trademark infringement law. It may be in many circumstances, but it does not apply to allegations of infringement within expressive works, as the recent Northern District of California case of *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, No. 14-cv-2361 (N.D. Cal. Nov. 24, 2014), makes clear. If the trademark use occurs within an expressive work, the only test that applies (at least in certain circuits) is the *Rogers* test. The *Rogers* test is a far harder standard to meet, requiring that the trademark use have “no artistic relevance to the underlying work” or “explicitly mislead[] as to the source” of the work.

The *Mil-Spec* case revolves around the latest version of the *Call of Duty* video game series. Like the earlier editions in the series, the latest version, *Call of Duty: Ghosts*, has its players participate in realistic combat missions, either in single-player campaigns that involve plots and storylines, or with and against other players in multiplayer contests. The court highlights the fact that while the game takes place in a fictional setting in the near-future, the game strives to be “highly realistic,” with military equipment based on weapons and vehicles that currently exist, incorporating the names and logos of existing armed forces and organizations, and the use of advanced graphics.

The Plaintiff, Mil-Spec Monkey, Inc. (“Mil-Spec”), is a military supply company that sells clothes, equipment, bags, and other gear that would be of interest to members of the military. Of issue in the case, Mil-Spec also designs and sells morale patches, which are unofficial military-like patches that are worn by military personnel in unofficial contexts. The military prohibits the wearing of morale patches on uniforms and in other official settings. Mil-Spec’s patches are quite popular, in particular its “angry monkey” patches, which contain the face of a very angry monkey. In addition to appearing on morale patches, Mil-Spec uses the angry monkey as its trademark, and it has registered the mark with the USPTO.

Call of Duty: Ghosts allows players in multiplayer mode to customize their digital personas – choosing gender, uniform, weapons, accessories, and whether to include any patches on their uniform. Crucially, one of the patches that the game allows players to put on their characters is highly similar to the Mil-Spec “angry monkey” patch. The patches are visible during the course of the game if one of the players has chosen to put them on his or her character. The angry monkey patch also makes a brief appearance during the course of gameplay featured in an advertisement for the game. Mil-Spec brought a lawsuit against Activision alleging a variety of claims including copyright infringement and trademark infringement. Activision moved for summary judgment on the trademark and unfair competition claims, on the basis that its use of the angry monkey patch was protected by the First Amendment.

In response, Mil-Spec submitted evidence showing that it was possible consumers would be confused into believing that Mil-Spec was associated with the game, including a declaration from a military blogger who was actually confused about Mil-Spec’s connection to the game. But the court held that likelihood of confusion was

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not the test. First, the court held that the video game was an “expressive work” that “rendered it worthy of as much First Amendment protection as any motion picture or any other expressive work,” noting that the game contains a narrative, distinct characters, and a virtual environment that players interact with.

Second, the court held that because *Call of Duty: Ghosts* is protected by the First Amendment, the test for whether use of a trademark within that work is infringing is the *Rogers* test. That test, originally developed by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 944 (1989), holds that use of a trademark in an expressive work is only infringing if “(1) the use of the mark has no artistic relevance to the underlying work whatsoever, or (2) it has some artistic relevance, but explicitly misleads as to the source or the content of the work.” The court held that Activision’s use of the angry monkey patch failed both prongs.

The court held that use of the patch was relevant to the underlying work because *Call of Duty* was attempting to portray a realistic military combat experience, and morale patches such as the angry monkey patch are an authentic element of the military experience. This was the case even though depictions of the patch in the game were not completely accurate. The court also held that use of the patch was also not explicitly misleading because the *Call of Duty* game is clearly branded as coming from Activision, and Activision has never purported to share a relationship with Mil-Spec. Mil-Spec’s evidence of confusion, even actual confusion, did not rise to the high level necessary for “explicitly misleading.” Finally, the court also rejected Mil-Spec’s argument that a trademark must be a “cultural icon” before use of the mark in an expressive work falls under the *Rogers* test. The court held that was not the case, and there was no “threshold test” for a trademark to fall under the *Rogers* test.

Therefore, the court granted Activision’s motion for summary judgment on the trademark and unfair competition claims. The only claim that remains is one for copyright infringement, and the parties continue to litigate that claim.

The court’s summary judgment decision in this case shows that trademark owners continue to have a very high bar to meet in order to prevent the use of their trademarks within creative works. The full decision can be accessed [here](#).

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