

**First Amendment protects use of third-party's trademark in video game
United States - McDermott Will & Emery UK LLP**

Infringement

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In *Mil-Spec Monkey Inc v Activision Blizzard Inc* (Case No 3:14-cv-02361, November 24 2014), confirming that video games, including customisable multi-player games, qualify as expressive works entitled to [First Amendment](#) protection, a California district court has granted summary judgment in favour of video game publisher on trademark infringement claims brought by the owner of a trademarked military patch design, which appears in the video game publisher's military combat-themed video game.

Plaintiff [Mil-Spec Monkey Inc](#) (MSM), a military supply and outfitting company, brought claims of copyright and trademark infringement against [Activision Blizzard](#) for its inclusion of MSM's 'angry monkey' military morale patch in the multi-player edition of Activision's *Ghosts* video game, the 10th game in the defendant's *Call of Duty* series. MSM's morale patches are worn by military personnel in unofficial contexts to express personal interests or identity, and MSM's 'angry monkey' patch is the most well-known and popular of its morale patch designs. MSM owns a federal trademark registration for the 'angry monkey' design and claims that it has used the 'angry monkey' trademark in commerce since 2007.

In the *Ghosts* game, an image similar to MSM's 'angry monkey' patch appears as one of 32 standard issue patches (and one of over 600 patches that can be "unlocked" throughout the game) that are available for players to customise their soldier avatars, among other customisation options including gender, uniform style and gear accessories. Patches then appear within the *Ghosts* game to identify player characters, as well as in certain game menus. Because the patches and other customisable options are not mandatory, however, it is possible that the 'angry monkey' patch would never appear during a particular game play series. Outside of the game itself, the 'angry monkey' patch image appears for two seconds in Activision's promotional trailer for the video game.

In response to MSM's claims of trademark infringement, Activision moved for partial summary judgment on the theory that use of the 'angry monkey' design in the *Ghosts* video game is protected by the First Amendment, and does not cause consumer confusion as to the source or sponsorship of the game and the patches depicted in the game. Citing the Supreme Court's decision in [Brown v Entertainment Merchants Association](#), the court explained that video games are core speech entitled to safeguards of the First Amendment.

To determine whether the First Amendment precluded MSM's trademark infringement claims, the court relied on the US Court of Appeals for the Ninth Circuit's two-pronged analysis from *Rogers v Grimaldi*, which explained that an artistic work's use of a trademark that would otherwise violate the [Lanham Act](#) is not actionable unless the use of the mark "has no artistic relevance to the underlying work whatsoever" or if it has some artistic relevance, but "explicitly misleads as to the source of the content of the work".

On the issue of artistic relevance, the court noted that the *Ghosts* video game, as with each of the *Call of Duty* games, incorporates real combat force names, military gear, known locations and other "real-world" references to create an authentic universe consistent with the game creators' vision. Therefore, the court determined that the video game's inclusion of the well-known 'angry monkey' morale patches that are worn by military personnel in real life bears "some artistic relevance" to the creators' goal of offering players a feeling of personal identity and authenticity during game play.

The court concluded that MSM had failed to demonstrate a genuine issue of material fact as to whether Activision used the 'angry monkey' trademark in an explicitly misleading manner. Instead, the court noted that Activision's video game packaging was clear as to its source and origin and that Activision's use of the trademarked patch design in promotional materials did not mislead consumers, nor did it affirmatively purport in any way to share a relationship with MSM, and was therefore protected by the First Amendment.

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