

World Trademark Review Daily

First Amendment trumps trademark in Call of Duty case
United States - Edwards Wildman Palmer UK LLP

Confusion

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In *Novalogic Inc v Activision Blizzard* (No 12-4011), in a battle between two video game heavyweights - [Novalogic Inc](#) and [Activision Blizzard](#) - a California federal court has held that Novalogic's attempt to enjoin Activision from using the phrase 'Delta Force' and a 'Delta Force' logo in "Call of Duty: Modern Warfare 3" is barred by the [First Amendment](#).

"Call of Duty: Modern Warfare 3" is one of the most popular video games of all time, surpassing \$1 billion in sales after just 16 days. What is all the excitement about? The first person shooter game was hyped as a fully cinematic experience with a compelling story, musical score and state-of-the-art visual effects – all elements found in a summer blockbuster. The game is very realistic; the weapons, locations and violence are all very lifelike. It was Activision's commitment to authenticity that precipitated this row. The game uses the names and logos of actual combat forces, including the Army Rangers and the British Special Air Services, and, of course, the Delta Force.

Novalogic filed action against Activision, as well various Activision licensees, for federal and state trademark infringement, false designation of origin and contributory infringement based on the use of Novalogic's trademark DELTA FORCE and a 'Delta Force' logo in the video game and on various other goods. In lieu of answering, Activision filed for summary judgment arguing the First Amendment bars Novalogic's claims.

As a preliminary matter, the court firmly concluded that video games are entitled to as much First Amendment protections as any motion picture or similar work. This conclusion, however, did not resolve whether the First Amendment allows Activision to use 'Delta Force' and its emblem. To get to the bottom of this question, the court applied the so-called *Rogers* test, namely, whether:

1. Activision's use of the marks have no artistic relevance to the underlying work; or
2. Activision use explicitly misleads as to the source of the game.

Discussing the first prong, the court found that the game has significant artistic relevance, in that Activision's use of the marks to describe the US Army unit helps satisfy consumer demand for authenticity. As to the second prong, the court held that Activision did not mislead consumers because 'Delta Force' and its insignia have an established and well-known meaning that predates Novalogic's use. If Novalogic's mark was a coined term, instead of a phrase associated with the armed forces, Activision's position would have likely been untenable.

This decision builds on a line of cases that provide video game companies wide latitude under the First Amendment to use terms which, in other commercial contexts, would rise to the level of infringement under federal law. This trend may be in conflict with *Hart v Electronic Arts*, where the Third Circuit rejected the defendant's First Amendment defense for a claim arising under state right of publicity laws. Currently, it is unclear whether the First Amendment provides video game companies more robust protection under federal law than state. California, where the right of publicity laws are particularly strong (compared to the rest of the country), may be the next battleground for settling this particular constitutional question for the videogame industry pending the results of the two cases currently on appeal before the Ninth Circuit, *Keller v Electronic Arts* and *Davis v Electronic Arts*, which both involve state right of publicity claims.

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