

*Trade Dress***Humvee Maker Targets Activision's 'Call of Duty' in Trademark Case**

Humvees appearing in Activision Blizzard Inc.'s "Call of Duty" series of combat video games infringe the trademark rights of the military vehicle manufacturer, AM General LLC, according to a lawsuit filed Nov. 7.

AM General's complaint asks the U.S. District Court for the Southern District of New York to stop the game maker from using its trademarks, such as "Humvee" and "HMMWV," as well as distinctive elements of the vehicles' appearance in their video games, advertisements, and licensed products such as toys (*AM General LLC v. Activision Blizzard, Inc.*, S.D.N.Y., No. 17-8644, complaint filed 11/7/17).

As video games become more realistic, disputes between intellectual property owners and video game makers are becoming more common, and not only because of trademarks. There have been several disputes over the appearance of real people in games, such as college athletes, and even former Panamanian dictator Manuel Noriega.

Trademark lawyers who spoke with Bloomberg Law said that AM General will have a hard time making its case against the video games, but the toys might be a different story.

Artistic Relevance Beats Trademark Concern "Because the trademark is embodied in an expressive work, the test is whether there's artistic relevance to the use of the trademark," J. Michael Keyes of Dorsey & Whitney LLP, Seattle, told Bloomberg Law. "The artistic relevance test is easily satisfied particularly here because of the subject of the game. It's not a gratuitous use of the trademark."

Activision might face a tougher situation in instances where it went outside the entertainment medium to licensed products, specifically, "Call of Duty"-branded Mega Bloks and Mega Construx plastic block construction sets.

"I think they're in bigger trouble with the toy products," Cynthia Blake Sanders of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, Baltimore, told Bloomberg Law.

Blake Sanders also said that AM General's trademark dilution claims might have more traction. The federal

trademark dilution law gives owners of "famous" trademarks protection beyond ordinary trademark infringement claims.

So, if a trademark owner might not be able to stop the appearance of a trademark in a creative work through a trademark infringement claim, a dilution claim might be more robust.

"They may be able to broaden their existing trademark claims to cover the entertainment use," using dilution, Blake Sanders said.

'Call of Duty' Has Defeated Lawsuit Before AM General, which was spun off from American Motors Corp. in 1982, won the contract to replace the U.S. Army's jeep in 1983. The High-Mobility Multipurpose Wheeled Vehicle, known as the HMMWV or Humvee, first saw action in 1989 in Panama and became a familiar sight in wartime news coverage in the Gulf War in Iraq and later conflicts.

Activision's popular "Call of Duty" video game series launched in 2003 with a focus on World War II settings. But its fourth release in 2007 was in a more modern setting. Subsequent versions have featured a variety of settings and time periods.

Activision Blizzard declined to comment on the lawsuit in response to a Bloomberg Law request. In a press release Nov. 8, Activision said that its latest "Call of Duty" release, "Call of Duty: WWII," made more than \$500 million in its first three days.

This isn't the first time Activision has faced a lawsuit for using a real brand in a video game. In 2014, Mil-Spec Monkey Inc., which makes patches popular among military personnel, sued Activision for showing its "Angry Monkey" patch being worn in a "Call of Duty" game.

In that case, the U.S. District Court for the Northern District of California said the appearance of the patch was artistically relevant to the game and protected by the First Amendment.

McDermott, Will & Emery represented AM General.

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