

## Freedom of Expression: Use of Humvees in Call of Duty Franchise Games Not Infringement

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More than 250,000 Humvees have been built since the 1980s, making them a distinct feature of the nation's military history over the past quarter-century. As a result, the vehicle has become a recognizable staple in military-themed movies, television shows, newscasts, and video games. According to a group of curious law professors, the Humvee has been featured in over 1,000 movies and shows. But the maker of Humvees thought the inclusion of its military vehicles in the wildly successful *Call of Duty* video games infringed on its trademark rights. The Southern District of New York disagreed, however, and reaffirmed that video games, such as movies and television shows, can feature real-life trademarks, such as Humvees, without infringing on the owner's trademark. See *AM Gen. LLC v. Activision Blizzard, Inc.*, 17 Civ. 8644 (GBD), 2020 U.S. Dist. LEXIS 57121 (S.D.N.Y. Mar. 31, 2020). Citing the First Amendment, the District Court determined the game developer could not be held liable for trademark infringement for featuring Humvees in its *Call of Duty* video games. Dismissing the lawsuit, the court found the video game maker had the right to use a real-life well-known military vehicle in an expressive work focused on realistically depicting modern combat and warfare.

In 1983, the United States Department of Defense contracted with AM General LLC to build the Humvee, which is still an essential vehicle for military operations not only in the United States but in over 50 countries. In the past, AM General has granted licenses to companies looking to use the Humvee trademark in connection with a wide variety of products, including video games, movies, and television series. Activision Blizzard Inc. developed the first-person shooter series *Call of Duty*, which is "characterized by its realism, cinematic set-pieces, and fast-paced multiplayer mode." Selling over 130 copies, the *Call of Duty* games depict Humvees in various ways—sometimes the vehicle is mentioned in dialogue and can be seen in the background, and other times players can assume control of a Humvee. Additionally, Humvees are used in trailers and strategy guides for the games. Activision also licensed a toy company to manufacture toys related to the game, two of which are vehicles with distinctive Humvee elements.

AM General sent Activision a cease-and-desist letter objecting to the use of Humvees in games and toys. After Activision released another game in the series containing Humvees, AM General filed lawsuit for trademark and trade dress infringement. Activision argued its use of the Humvees was non-infringing free speech in an expressive work.

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Courts have traditionally interpreted the Lanham Act to avoid suppressing protected speech under the First Amendment when the defendant's product is artistic or expressive. The *Rogers* test has been used by courts to allow "artistic or expressive works to make use of trademarks under most circumstances without facing liability under the Lanham Act." See [Battle of the Empires: Permissive Trademark Infringement in Creative Works](#). Under this test, the "balance [between trademark interests and First Amendment speech interests] will normally not support application of the [Lanham] Act unless [the use of the trademark] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless [the use of the trademark] explicitly misleads as to the source of the content of the work." In the Second Circuit, this test is applicable to any work of artistic expression.

The *Rogers* test is a two-prong inquiry. Under the first prong, the court determines whether the use of the trademark has any "artistic relevance to the underlying work whatsoever. This is not a rigorous inquiry, and in fact, if "the contested use has [any] artistic relevance, the court must proceed to the second prong of the test. The second prong considers whether the use "explicitly misleads as to the source or the content of the work." A "finding of likelihood of confusion must be particularly compelling to outweigh the First Amendment interest." The evaluation of misleadingness is subject to the *Polaroid* factors, which assess consumer confusion. In cases where there is a "persuasive explanation" that the use of the trademark was an "integral element" of artistic expression, courts have found the artistically relevant use outweighs a moderate risk of confusion. An "integral element" is one that "communicate[s] ideas—and even social messages," either "through many familiar literary devices (such as characters, dialogue, plot, and music" or "through features distinctive to the medium (such as the player's interaction with the virtual world)."

Applying the *Rogers* test, the Southern District of New York found the use of Humvees in *Call of Duty* had artistic relevance – actual vehicles used by the military created a realistic and lifelike gaming experience. Amplifying, the court found the use of Humvees in the video game "easily met the artistic relevance requirement" by giving players "a sense of a particularized reality of being part of an actual elite special forces operation and serv[ing] as a means to increase specific realism of the game." Therefore, the use of Humvees served an artistic purpose and had artistic value.

Relying on the *Polaroid* factors, the court found the use of Humvees was not explicitly misleading. In balancing the factors — strength of the plaintiff's mark, degree of similarity, proximity of the products, bridging the gap, evidence of actual confusion, good faith, quality of defendant's product, and consumer sophistication —the Southern District found the inclusion of Humvees in the game was not misleading and did not give rise to consumer confusion as to the source of the game (*i.e.*, no one would think *Call of Duty* was made or sponsored by the maker of Humvees).

The court granted summary in favor of Activision who presented a persuasive explanation regarding the Humvee use as an "integral element" of the artistic expression—"the uses of Humvees in the *Call of Duty* games enhance the games' realism." The judge proclaimed "[i]f realism is an artistic goal, then the presence in modern warfare games of vehicles employed by actual militaries undoubtedly furthers that goal."

This ruling in favor of freedom of expression was not so much legally groundbreaking as it was the latest to reaffirm that video games, like movies and television shows, can feature real-life trademarks that have artistic value to the work without paying for a license. To hold otherwise would allow private companies to dictate and limit others' artistic expression and creative free speech giving trademark owners a "monopoly over reality."

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