JANUARY 2023

DEVOTED TO LEADERS IN THE INTELLECTUAL PROPERTY AND ENTERTAINMENT COMMUNITY

VOLUME 43 • NUMBER 1

THE Licensing Journal®

Edited by Gregory J. Battersby and Charles W. Grimes

Wolters Kluwer

Video Games

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In the Eyes of the Law, Driving Simulation Games Are Works of Art

Sometimes, the best place to determine whether a work qualifies as art is in a courtroom. In a recent decision, Judge John H. Chun of the District Court for the Western District of Washington found that a driving simulator video game, *Spintires*, is an expressive work entitled to First Amendment protection. *See Saber Interactive Inc. v. Oovee, Ltd.*, No. 2:21-cv-01201-JHC, Dkt. 51 (W.D. Wash. Oct. 6, 2022). *Spintires* simulates driving through various wilderness tracks in a variety of real-world vehicles. While Oovee has licensed some of the vehicles depicted in *Spintires*, it has not licensed all of them. For the unlicensed vehicles, Oovee provides the following disclaimer:

> All other trademarks are the property of their respective owners. All characters and vehicles appearing in Spintires® are fictitious (except where licensed). Any representations to real-life persons (living or dead), or real-world vehicle designs (except where licensed), is purely coincidental.

It is, of course, one of the unlicensed vehicles appearing in *Spintires*, the K-700, that is at the heart of the dispute in *Saber Interactive v. Oovee*.

In November 2015, Oovee released an update to *Spintires* that included, and seemed to emphasize, the K-700, which is a distinctive tractor with articulated steering. Peterburgsky traktorny zavod JSC, which is known under the brand name "Kirovets," manufactures and sells the K-700. Kirovets exclusively licensed certain of its intellectual property rights in its vehicle designs to a video game developer call Saber, which sells its own driving simulation video game, *Mudrunner*. The license with Kirovets gives Saber the right to take legal enforcement action against infringers of Kirovets's licensed IP rights.

Licensee Sues for Unlicensed Use

Oovee's unlicensed use of the K-700 in *Spintires* led Saber to sue Oovee on September 2, 2021. On April 26, 2022, Saber filed a Second Amended Complaint ("SAC") which included three claims: (1) unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125; (2) unfair competition under Washington's Consumer Protection Act ("WCPA"), Washington Revised Code ("RCW") 19.86.010; and (3) unjust enrichment. Oovee moved to dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, arguing that the First Amendment bars Saber's claims, and, even if it does not, Saber failed to plead facts sufficient to survive a motion to dismiss.

The SAC alleged that Oovee engaged in unfair competition under the Lanham Act by using Saber's trademark and trade dress without authorization. Saber argued that the First Amendment does not bar its unfair competition claim because *Spintires* is not an expressive work, and *Spintires*' disclaimer is misleading. In the Ninth Circuit, courts use the "likelihood-of-confusion" test when evaluating an infringement claim under the Lanham Act unless artistic expression is at issue. When the alleged infringement involves artistic expression, courts apply a test set forth in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which balances the First Amendment interest in protecting artistic expression against the interest in securing trademark rights under the Lanham Act.

The *Rogers* Artistic Expression Test

Rogers requires a defendant to make a threshold showing that its allegedly infringing use is part of an expressive work. If successful, the plaintiff then has the heightened burden of showing the likelihood-of-confusion test and one of *Rogers*'s two prongs: (1) the unauthorized use of the trademark has no artistic relevance to the underlying work whatsoever or (2) the use of the trademark explicitly misleads as to the work's source or content. Saber argued that *Spintires* is not an expressive work because it does not express ideas or social messages, it has no characters, dialogue, or plot, its music is simplistic and only in the background, and the simulated world is generic and computer generated. Judge Chun cited a U.S. Supreme Court case

and a Ninth Circuit case holding that video games may qualify for First Amendment protection, and then discussed another case in which the Ninth Circuit affirmed a district court's conclusion that a race car driving simulation video game contained express elements such as the race car drivers being characters and the plot being the drama of the races. *VIRAG, S.R.L. v Sony Computer Entertainment America LLC*, No. 3:15-cv-01729-LB (N.D. Cal. Aug. 21, 2015), *aff'd*, 699 F. App'x 667, 668 (9th Cir. 2017). In view of the case law, Judge Chun determined that many of the features of *Spintires* alleged in the SAC establish that *Spintires* is an expressive work, explaining that "[u]sers interact with the virtual world by selecting a vehicle (which is like a character) and by navigating the virtual environment (which is like a plot)."

As to the first *Rogers* prong, Saber failed to explain how Oovee's use of the K-700 is artistically irrelevant, so the court did not consider the first prong. The court also determined that Saber could not meet the second prong, that Oovee's use of the K-700 explicitly misleads consumers about its source or endorsement. The court concluded that Saber did not satisfy the second prong because it failed to point to an expressly misleading statement. The court noted that, while "the disclaimer is far from a model of clarity," it does not explicitly mislead customers into thinking that Saber or Kirovets is associated with *Spintires*. Moreover, use of the K-700 mark alone is insufficient to satisfy the second *Rogers* prong.

Court Ruling a Win for Video Games?

The court dismissed Saber's claim for unfair competition under the Lanham Act, because the First Amendment protects Oovee's use of the K-700. Under the same rational, the court also dismissed Saber's claim for unfair competition under the WCPA. In addition, the court dismissed the trade dress claim because Saber failed to plead any facts to create a reasonable inference that the identified features of the K-700 are non-functional. Finally, the court dismissed the unjust enrichment claim because, under *Rogers*, Oovee did not impermissibly infringe Saber's trademark rights and, therefore, did not receive a benefit at Saber's expense. Accordingly, the court dismissed all claims against Oovee in the SAC but granted Saber leave to file a Third Amended Complaint.

Saber Interactive is a win for anyone seeking validation for the idea that video games can be works of art, just like books, movies, etc. This decision also shows that courts take a broad view about what constitutes an expressive work in the context of video games. Video games do not require a traditional narrative structure, a memorable soundtrack, or stunning visuals to qualify for First Amendment protection. If a video game lets the player select their own vehicle, hop in, and take a drive through an interactive environment, that's probably enough.

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