

Call of Duty games can depict Humvees without a license, says judge

A New York judge has ruled that publisher Activision isn't infringing trademark by featuring Humvees in its *Call of Duty* series. The decision, handed down yesterday, is a mark in favor of game developers depicting actual military equipment to create a sense of realism.

Humvee maker AM General sued Activision in 2017, claiming *Call of Duty* players were "deceived into believing that AM General licenses the games." Activision denied the claim, saying it had a First Amendment right to depict official military equipment in a war game. Using trademark to control creative work was "dangerous under any circumstance," its lawyers wrote, "but the claims in this case are particularly egregious because they involve a US military vehicle paid for by American taxpayers and deployed in every significant military conflict for the past three decades."

District court Judge George Daniels wrote that Activision's games passed the "Rogers test," referring to a 1980s ruling on the use of trademarked names in artistic works. "It was *metaphysically* possible for [Activision] to have produced video games without the presence of Humvees," Daniels says. But they increase *Call of Duty*'s feeling of realism and serve a purpose beyond simply trading on the Humvee brand. "If realism is an artistic goal, then the presence in modern warfare games of vehicles employed by actual militaries undoubtedly furthers that goal."

Moreover, *Call of Duty* beats the "Polaroid factors" standards

that determine whether a trademark's use will confuse consumers. "Put simply, [AM General's] purpose in using its mark is to sell vehicles to militaries, while [Activision's] purpose is to create realistically simulating modern warfare video games for purchase by consumers."

As *The Hollywood Reporter* detailed last year, AM General claimed Activision was knowingly infringing on the trademark, but some of the evidence was sealed. The court ultimately decided it wasn't convincing – amounting only to references that Activision knew it was using the Humvee name, the presence of Humvees at some promotional events, and boilerplate text in a user manual.

The Humvee case doesn't upend any legal doctrines. But for years, major studios hesitated to include real firearms or other military gear without approval, although they began dropping official licensing deals in response to pressure from gun control advocates. In 2013, EA settled a suit with helicopter maker Bell Textron over its game *Battlefield 3*.

This is the second legal victory for a games studio this week – after publisher Take-Two prevailed in a lawsuit over whether it could depict LeBron James' tattoos in the *NBA 2K* franchise.

<https://www.theverge.com/2020/4/1/21203414/activision-wins-humvee-call-of-duty-trademark-infringement-lawsuit>