

The Use of Trademarks in Video Games: Focusing on the First Amendment

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The traditional purpose of trademark law is to prevent consumer confusion as to the source or origin of products or services. A related purpose, represented by 15 U.S.C. § 1125, is to prevent confusion as to affiliation or sponsorship. The use of a trademark within expressive works, such as movies, television shows, or video games, could confuse consumers as to the relationship between the maker of the work and the owner of the mark, which is all the more likely given the widespread awareness of product placement deals in movies and other works. Plaintiffs challenging the unauthorized use of their marks in expressive works, however, are on a losing streak. I argue that this losing streak should continue, and the basis for these hoped for losses should be tied to the First Amendment test elaborated in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), rather than a likelihood of confusion test. The *Rogers* balancing test involves a heavy thumb on the scale against liability for defendants. It is therefore more likely to deter the chilling effects of lawsuits than the traditional likelihood of confusion test, and to the extent the *Rogers* test facilitates the use of marks in expressive works without the payment of licensing fees, it will reduce the cost of "realism" to consumers. The utility of the *Rogers* test will be explored in this paper with an emphasis on two pending cases involving the unlicensed use of trademarks in video games, one case pending before the United States Court of Appeals for the Ninth Circuit and one pending before the United States District Court for the Northern District of Texas. The paper will also include an empirical analysis of one group of video games to determine whether games affiliated with the same trademark owners are likely to be of consistent quality. To the extent they are not of consistent quality, it would be one more reason to deny trademark owners licensing fees for nothing more than the use of their marks.