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Nixon Peabody obtains dismissal of videogame trademark claims based on First Amendment defense

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The U.S. District Court for the Eastern District of Michigan has issued a ruling in a case handled by Nixon Peabody dismissing trademark claims brought against a manufacturer and distributor of a videogame using the plaintiff's trademarked term as part of the videogame's title and packaging. In *Rebellion Developments Ltd. et al. v. Stardock Entertainment, Inc. and Ironclad Games Corp.*, the court applied a First Amendment defense developed in the context of titles for literary and expressive works to dismiss a four-count complaint based on the face of the complaint, with no discovery.

The claims stemmed from a videogame developed by Ironclad and distributed by Stardock called "Sins of a Solar Empire: Rebellion," which was part of Ironclad's "Sins of a Solar Empire" series. Ironclad and Stardock were sued by Rebellion Developments, Ltd. ("Rebellion Developments"), which owns a federally registered trademark for the mark "REBELLION" for use with video games and electronic games, among other goods. The complaint alleged that Ironclad's and Stardock's use of the term "Rebellion" as part of the title for their videogame and on packaging for that videogame infringed Rebellion Developments' rights in the mark.

In *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), the Second Circuit articulated a First Amendment defense in cases where trademark-based claims are asserted against publishers of literary and expressive works whose titles incorporate trademarks owned by others. In *Rogers*, Ginger Rogers brought suit against the producer of a film entitled "Ginger and Fred," about two fictional dancers who had imitated Ginger Rogers and Fred Astaire and became known as "Ginger and Fred." In response to the defendant's First Amendment defense, the Second Circuit held that the likelihood of confusion standard governing trademark infringement claims must be adjusted to accommodate the First Amendment's protection of free speech. Specifically, the Second Circuit held that trademark claims asserted on account of the use of a trademarked term in the title of a literary or expressive work cannot survive unless the trademarked term has no artistic relevance to the work or explicitly misleads as to source or content.

A number of other jurisdictions, including the Sixth Circuit, have followed this standard. Although several courts have held in other contexts that videogames qualify for First Amendment protection, relatively few decisions had applied the *Rogers* standard to videogames, and those reported decisions applying the standard had done so in the context of game content depicting items offered for sale under trademarks or names or referencing persons whose names may be protectable under the

Lanham Act. See *E.S.S. Entmt. 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008); *Hart v. Electronic Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011); *Dillinger, LLC v. Electronic Arts, Inc.*, 2011 U.S. Dist. LEXIS 64006 (S.D. Ind. June 16, 2011) *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765-66 (E.D. Mich. 2008). Furthermore, none of these decisions applied the *Rogers* standard to dismiss such claims without having the videogame itself in evidence.

In *Rebellion Developments*, the court adopted all of Nixon Peabody's arguments on behalf of the defendants and held that Ironclad's game qualifies for First Amendment protection and that the *Rogers* standard was properly applied on a motion to dismiss in order to prevent the chilling effect on speech that lengthy and expensive litigation can have. The court held that the artistic relevance of the term "Rebellion" to the "Sins of a Solar Empire: Rebellion" game was established based on web pages attached to the complaint describing a storyline for the game. The court further held that the title did not explicitly mislead as to source or content because there was no "overt" misrepresentation of source or content. Likelihood of confusion factors such as alleged intent and alleged instances of actual confusion were held to be irrelevant.

The decision sets an important precedent for applying the *Rogers* standard to titles of videogames and for vindicating this defense through a motion to dismiss so as to avoid lengthy and expensive discovery.

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