# EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| AM GENERAL LLC,<br><br>Plaintiff,<br><br>v.<br><br>ACTIVISION BLIZZARD, INC., ACTIVISION PUBLISHING, INC., and MAJOR LEAGUE GAMING CORP.<br><br>Defendants. | C.A. No. 2:17-cv-08644 |

**BRIEF OF *AMICUS CURIAE***
**ENTERTAINMENT SOFTWARE ASSOCIATION**

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**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## INTEREST OF AMICUS CURIAE

The Entertainment Software Association ("ESA") is a trade association whose members create and publish computer and video games. To support its members,[1] ESA, among other things, promotes their exercise of free-speech rights, protects their content from mass infringement, and collaborates with educational and health organizations to promote the benefits of entertainment software. ESA also regularly participates in litigation that affects members' interests, and in 2011 was a respondent in *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), where the Supreme Court held that video games are entitled to the same First Amendment protections as books, television shows, films, and other expressive works.

AM General LLC's ("AM General") lawsuit raises issues of substantial importance to the video-game industry. Today's video games are exceptionally diverse in their artistic expression, ranging from the action-adventure of Activision's *Call of Duty* franchise, to educational games like *Where in the World is Carmen San Diego?*, to sports-themed games like *Madden NFL*, to historical simulation games like the *Civilization* franchise, to games that are derived from motion pictures like *Star Wars* or that inspire motion pictures like *Assassin's Creed*. Whether fact-based, fictional, or somewhere in between, many of these games refer to or incorporate real-life historical and cultural elements – often including real products like the military vehicles at issue in this case, and the trademarks, trade dress, and other distinctive elements used to accurately identify and depict those products – to create realistic interactive environments that facilitate expression, enhance verisimilitude, and enrich the user experience.

If AM General succeeds in punishing Activision for exercising its First Amendment right to depict realistic U.S. military vehicles in *Call of Duty* – or in forcing Activision to endure the

[1] A full listing of ESA members is available at https://www.theesa.com/about-esa.

burdens of a trial to vindicate its First Amendment rights – ESA's members and gamers will suffer. Video-game developers and publishers will be exposed to even more frequent litigation, with some developers and publishers foregoing the use of real products in their works to avoid being dragged into court. Because AM General's theory is antithetical to the rights of ESA's members – and is irreconcilable with well-settled authority governing the use of real products in expressive works – ESA respectfully requests that this Court grant Activision's motion for summary judgment.

## INTRODUCTION

Video games are a vital and culturally significant form of expression, as the U.S. Supreme Court acknowledged in *Brown v. EMA*, when it held that "video games qualify for First Amendment protections" because they "communicate ideas – and even social messages – through many familiar literary devices." 564 U.S. at 790. The creators of video games often spend years developing interactive worlds that transport gamers into environments ranging from fantastical universes to real-life battlefields. The *Call of Duty* franchise exemplifies this compelling quality of video games: players experience the main storyline while immersed in highly realistic war zones in the United States, Russia, Cuba, Southeast Asia, and elsewhere.

Like the creators of books, films, and television shows, video-game developers regularly incorporate real products, and the trademarks, trade dress, and other distinctive elements used to accurately identify and depict those products, into their works, both visually and in dialogue. The use of these real products creates verisimilitude that informs and educates users, facilitates self-expression, or comments on the owner of the real product. Recognizing the importance of allowing content creators to use real products in their expressive works, the Second Circuit developed – and several other circuits have adopted – the *Rogers* test, which elevates creators' First Amendment rights over trademark owners' Lanham Act interests. *Rogers v. Grimaldi*, 875

F.2d 994, 998 (2d Cir. 1989). Under this test, the First Amendment bars Lanham Act claims arising from the use of a trademark in an expressive work so long as the use has at least nominal artistic relevance to the work and does not mislead the public as to the source or origin of the work. *Id.* at 1000. As applied, the test ordinarily results in the dismissal of the plaintiff's claims.

AM General's claims do not survive application of the *Rogers* test. Although Humvees have appeared in countless films and television series ***without*** AM General's permission – as Activision points out in its motion (Motion for Summary Judgment ("Mot.") at 8) – AM General has never sued a film or television producer. The reason for this is clear: the First Amendment would bar any such claim. Yet, AM General asks this Court to treat *Call of Duty* differently and, in effect, to relegate video-game developers and publishers to second-class status among the creators of expressive works, chilling their First Amendment freedoms. This Court should emphatically decline that request and instead should follow the Supreme Court's guidance in *Brown* and reaffirm that the creators of video games – including ESA's members – are entitled to the same constitutional protection that shields the creators of other expressive works.[2]

## ARGUMENT

### I. VIDEO GAMES ARE CULTURALLY SIGNIFICANT EXPRESSIVE WORKS

Since the creation of the first electronic game in the 1950s – a highly pixelated version of tic-tac-toe entitled *Noughts and Crosses*[3] – video games have evolved into complex works that are similar to interactive movies. Video games equal books, films, and television shows in terms of cultural significance and share myriad elements with these more traditional forms of expression. Like novels, many video games have multi-dimensional characters, complex

[2] ESA's brief focuses on the use of AM General's trademarks within *Call of Duty* and in promotions for the game.

[3] *See* International Center for the History of Electronic Games, *Concentric Circles: A Lens for Exploring the History of Electronic Games* 3 (2014), https://www.museumofplay.org/sites/default/files/uploads/ConcentricCircles_032514.pdf.

storylines, and carefully crafted dialogue. Like films and television shows, many video games contain story arcs, visual images, and musical scores that contribute to their emotional impact. And video games transform their users from passive observers into active participants, allowing them to inhabit both realistic and fictional environments created by the games' designers. Further, unlike more traditional expressive works, which may provide entertainment for a few hours, video games may take forty hours or more to complete, giving gamers ample opportunities to interact with the worlds designed by the games' developers.

Video games have become an integral part of American culture. In 2018, nearly 165 million adults in the United States played video games, and 75 percent of all Americans had at least one gamer in their household.[4] The gaming community is diverse: the average gamer is 33 years old, 46 percent are female, 54 percent are male, 52 percent are college educated, 37 percent are Democrats, and 33 percent are Republicans.[5] Video games are a social activity both inside and outside the home, with 57 percent of parents of gamers playing video games with their children at least once a week, and 63 percent of gamers playing video games with others.[6] One recent study from Columbia University's Mailman School of Public Health concluded that children who frequently play video games are more "socially cohesive with peers and integrated into the school community."[7] Like novels, television, and movies, video games are a common leisure activity enjoyed by a wide range of Americans.

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[4] *See* Entertainment Software Association, *2019 Essential Facts About the Computer and Video Game Industry*, http://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry (last visited on June 5, 2019).

[5] *Id.*

[6] *Id.*

[7] *Time Spent Playing Video Games May Have Positive Effects on Young Children*, Child and Adolescent Health (Mar. 2, 2016), https://www.mailman.columbia.edu/public-health-now/news/time-spent-playing-video-games-may-have-positive-effects-young-children.

### A. The Diversity of Contemporary Video Games

As gamers have become more diverse, so too have the subject matter and content of the games that they play. While gamers still enjoy classic video games like *Tetris* and *Pac-Man* and play their favorite board games like *Scrabble* or *Monopoly* in video-game format, developers create video games to appeal to gamers of all ages and interests. Consider, for example:

- ***Action-Adventure Games***: Action-adventure games challenge players to act as the protagonists in interactive storylines. The award-winning game *God of War* exemplifies this category. There, players control a Greek god, Kratos, as he undertakes a journey with his son to scatter his deceased wife's ashes.[8] Along the way, players have the opportunity to interact with gods and other mythological figures.[9] Other action-adventure games are based on popular television series, films, or novels, including *Batman*, *Spiderman*, and *Harry Potter*.
- ***Historical Games***: These games immerse users in various historical eras. In *Ultimate General Civil War*, for example, players build armies to fight in real Civil War battles using weapons from that period.[10] Students of economic history may prefer *Rise of Industry*, where players take on the role of industrialists in the early twentieth century, creating new methods of transportation, building factories, and eventually facilitating trade in their products.[11] In the popular *Civilization* video games, users build empires in eras ranging from the Bronze Age to the Space Age.[12]

[8] Ben Gilbert, *The new 'God of War' on PS4 is the first must-play game of 2018*, Business Insider (Apr. 20, 2018), https://www.businessinsider.com/god-of-war-ps4-review-2018-4.

[9] *Id.*

[10] *See* Ultimate General Civil War, https://www.ultimategeneral.com/ultimate-general-civil-war (last visited on June 5, 2019).

[11] *See* Rise of Industry: About the Game, https://www.riseofindustry.com/ (last visited on June 5, 2019).

[12] *See* Civilization, https://civilization.com/ (last visited on June 5, 2019).

- ***Life-Simulation Games***: In these games, players control the everyday lives of virtual characters. In *The Sims*, gamers design avatars (choosing hairstyles, clothes, and even personality traits) and then maneuver the characters as they go to school, get jobs, develop hobbies, and build their families.[13] The characters live in fully customizable towns, allowing players to "create new citizens, change the existing ones, or remove them and replace them with, say, replicas of the cast of 'Lost' to see what it is like to live next door to them."[14] Similarly, in *Farming Simulator*, gamers operate a farm; they must purchase land, decide what equipment to buy, choose which crops to plant, plan budgets, and bring their crops to market.[15]
- ***Educational Games***: Video-game designers also have developed games to build skills or supplement school curricula in foreign languages, math, science, and other subjects. Former Supreme Court Justice Sandra Day O'Connor recognized the educational potential of video games. After leaving the bench, she developed a video game entitled *Win the White House* that allows gamers to "take on the role of imaginary presidential candidates who must learn how to compete civilly against opponents with divergent views on issues like immigration and gun control,"[16] and another called *Our Courts* that she described as "an interactive civic education project

[13] *See The Sims 4: Features*, https://www.ea.com/games/the-sims/the-sims-4/pc/features/overview (last visited on June 5, 2019); Patrick Huguenin, *Women really click with The Sims*, N.Y. Daily News (Apr. 15, 2008), https://www.nydailynews.com/life-style/women-click-sims-article-1.283191.

[14] Stephanie Clifford, *Making the Sims Into Neighbors You Can Relate To*, N.Y. Times (May 13, 2009), https://www.nytimes.com/2009/05/14/business/media/14adco.html.

[15] Rich Lane *Meet the Real Life Farmers Who Play Farming Simulator*, The Guardian (Jul. 24, 2018), https://www.theguardian.com/games/2018/jul/24/meet-the-real-life-farmers-who-play-farming-simulator.

[16] Natasha Singer, *A Supreme Court Pioneer, Now Making Her Mark on Video Games*, N.Y. Times (Mar. 26, 2016), https://www.nytimes.com/2016/03/28/technology/sandra-day-oconnor-supreme-court-video-games.html.

for seventh- and eighth-graders" that familiarizes students with the legal system.[17]

With such a wide range of game genres and such a diverse community of participants, video games also have become a method for developers to crowd-source solutions to complex problems. For example, the University of Washington's Center for Game Science and Department of Biochemistry created a game called *Foldit*, which allows players to fold molecular structures in ways that reflect real chemistry. In 2011, the creators of *Foldit* challenged gamers to model the 3-D structure of an enzyme responsible for an AIDS-like virus found in monkeys, a problem that had baffled scientists for fifteen years. *Foldit* players found the solution within ten days, allowing scientists to begin to develop drugs to halt the spread of the virus.[18] And the United Nations has used video games to improve the design of public spaces in developing countries. In 2012, it collaborated with the creators of the game *Minecraft* on a project called "Block by Block," which challenges players to design public spaces that serve the needs of their communities. Designs created by *Minecraft* users have led to public-works projects in over thirty countries, including Haiti, Indonesia, and Mozambique.[19]

For surgeons, pilots, and others, video games are tools to hone professional skills. A 2007 study found that surgical residents and medical students who played specific video games did better on laparoscopic surgery simulators than those who avoided games.[20] A year later, researchers discovered that playing motion-control games like *Marble Mania* helped surgical

[17] Chris Baker, *Sandra Day O'Connor: Game Designer*, Wired (Jun. 4, 2008), https://www.wired.com/2008/06/justice-oconnor/.

[18] *See* Alan Boyle, *Gamers solve molecular puzzle that baffled scientists*, NBC News (Sept. 18, 2011), https://www.nbcnews.com/sciencemain/gamers-solve-molecular-puzzle-baffled-scientists-6C10402813.

[19] *See* Block by Block – Our Work, https://www.blockbyblock.org/our-work (last visited on June 5, 2019).

[20] *See* Anisha Kakasaheb Humbe, IST 446: Game Design and Development Blog, "Video Games and Hand Eye Coordination", Sites at Penn State (Apr. 23, 2017), https://sites.psu.edu/ist446/2017/04/23/video-games-and-hand-eye-coordination/.

residents improve both their fine motor skills and their performance on surgical simulators.[21] Pilots also regularly develop their skills on video-game simulators, with the U.S. Air Force now recruiting aspiring pilots from the ranks of exceptional teen gamers.[22]

### B. The Cultural Influence of Video Games

Recognizing the essential role that video games play in society, media organizations, universities, museums, government agencies, and other cultural institutions have embraced video games as a valuable medium for expression. Newspapers review new video games, as they do books, films, and television shows. One of the most highly anticipated games of 2018 was Take-Two Interactive Software's game, *Red Dead Redemption 2* ("RDR2"). RDR2 is a gripping Wild West era adventure that tells the story of an outlaw gang being pursued by bounty-hunters and mercenaries while trying to make one last big score. RDR2 is set in a huge, virtual American landscape that recreates the West, from mountains to rivers and from pristine lakes to newly industrialized towns. When the game was released, *The New York Times* published a laudatory review entitled "Red Dead Redemption 2 is True Art," subtitled "The season's best blockbuster isn't a TV show or movie. It's a video game." The critic praised the game as:

> richly cinematic and even literary, serving up breathtaking digital vistas reminiscent of John Ford films along with a mix of deftly scripted stories about outlaws, immigrants, hustlers, con artists, lawmen and entrepreneurs, all trying to eke out an existence on the edges of civilization. It's a game about power, violence, frontier justice and murky moral choices – a new American epic for the digital age.[23]

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[21] *See* Jacob Goldstein, *Surgeons Hone Skills on Nintendo Wii*, The Wall Street Journal (Jan. 17, 2008), https://blogs.wsj.com/health/2008/01/17/surgeons-hone-skills-on-nintendo-wii/.

[22] *See* Michael Hugos, *Pilots, Soldiers and Surgeons Play Serious Games*, CIO (Jan. 30, 2012), https://www.cio.com/article/2371694/pilots--soldiers-and-surgeons-play-serious-games.html; Oriana Pawlyk, *Here's How the Air Force Plans to Recruit Teenage Gamers*, Military.com (May 25, 2018), https://www.military.com/defensetech/2018/05/25/heres-how-air-force-plans-recruit-teenage-gamers.html.

[23] Peter Suderman, *Red Dead Redemption 2 Is True Art*, N.Y. Times (Nov. 23, 2018), https://www.nytimes.com/2018/11/23/opinion/sunday/red-dead-redemption-2-fallout-76-video-games.html.

The reviewer also addressed the game's realistic depiction of the negative ramifications of violence, noting that "[s]heriffs and bounty hunters chase you down, important game options disappear, whole towns become hostile territory, horses you've bonded with (making them faster or more responsive) die. Instead of indulging no-regrets fantasy violence, it is a literary experience that emphasizes – and simulates – tragedy and personal consequences."[24] RDR2 takes place in a realistic United States at the turn of the last century and real-world references are woven into the fabric of the game at every level: players participate in historical events, hunt with historical weapons, and listen to historical music performed on era-appropriate instruments. One of RDR2's era-appropriate references is to the historical Pinkerton National Detective Agency. The game's publisher was threatened with a lawsuit by the modern Pinkerton Security Service for the use of the Pinkerton trademark in the video game.[25]

The British Academy of Film and Television Arts ("BAFTA") – the U.K. equivalent of the Academy of Motion Picture Arts and Sciences – has held the prestigious British Academy Games Awards for the last fifteen years to honor excellence in the medium.[26] *Call of Duty* has won BAFTA awards for audio achievement, gameplay, story and character, and three consecutive prestigious GAME Awards.[27] The Writers Guild of America also has recognized outstanding achievement in video-game writing – right alongside film, television, and radio – since 2008.[28]

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[24] *Id.*

[25] Jon Fingas, *The real Pinkertons aren't happy with 'Red Dead Redemption 2*, Engadget (Jan. 15, 2019), https://www.engadget.com/2019/01/15/pinkerton-legal-fight-over-red-dead-redemption-2/.

[26] Tom Hoggins, *Bafta Games Awards 2019: Why this is gaming's most prestigious ceremony*, The Telegraph (Apr. 4, 2019), https://www.telegraph.co.uk/gaming/news/bafta-game-awards-2019-gamings-prestigious-ceremony/.

[27] *See* BAFTA Awards Database, Call of Duty, http://awards.bafta.org/keyword-search?keywords=call+of+duty (last visited June 5, 2019).

[28] *See* Paul Hyman, *And the award for best video game writing is…*, The Hollywood Reporter (Feb. 6, 2008), https://www.hollywoodreporter.com/news/award-best-video-game-writing-104135. Games in the *Call of Duty* franchise were nominated for Writers Guild of America awards in 2017 and 2010. *See* Dave McNary, *Writers Guild*

Because of the inarguable societal importance of video games, universities now offer classes focused on the medium. In 2017, more than 500 colleges and universities offered programs in video-game design or video-game study.[29] *The Princeton Review*, known for its annual list of best colleges, has ranked these schools, offering a list of the best places to study game design.[30] Law schools, too, have recognized the prevalence of video games, as exemplified by video-game courses offered at Georgetown University Law Center and Stanford Law School, the latter of which discussed "intellectual property, business and licensing issues, tort law, the First Amendment, and legal issues presented by virtual reality."[31] Students interested in video games have opportunities to earn scholarships funded both by universities and by outside organizations, such as the ESA Foundation and the National Association of Collegiate Esports, which facilitated $16 million in scholarships between 2016 and 2018.[32]

Government agencies and cultural institutions likewise have acknowledged video games as a creative medium. In 2011, the National Endowment for the Arts recognized video games as eligible for arts funding.[33] Around the same time, museums created exhibits dedicated to video-game history. In 2012, the Smithsonian opened an exhibit entitled "The Art of Video Games,"

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*Awards: 'Call of Duty Infinite Warfare' Among Video Game Nominees*, Variety (Jan. 12, 2017), https://variety.com/2017/digital/in-contention/writers-guild-video-game-nominations-2017-call-of-duty-uncharted-1201959412/; Gus Mastrapa, *Writers Guild Nominates Uncharted, Modern Warfare*, Wired (Jan. 15, 2010), https://www.wired.com/2010/01/wga-videogame-writing/.

[29] The Entertainment Software Association, Impact of the Video Game Industry: State by State, https://www.areweinyourstate.org/ (last visited June 5, 2019).

[30] *The Princeton Review Names the Top Undergrad & Grad Schools to Study Game Design for 2019*, The Princeton Review (Mar. 12, 2019), https://www.princetonreview.com/press/game-design-press-release.

[31] Stanford Law School, "'Video Game Law' Past Offerings," https://law.stanford.edu/courses/video-game-law/; Georgetown Law, "Law 1477 v00 Video Games in the 21st Century: Creativity and Innovation in Action," https://curriculum.law.georgetown.edu/search/?search=video+game (last visited June 5, 2019).

[32] *See* Arielle Dollinger, *Video Games Are a Waste of Time? Not for Those With E-Sports Scholarships*, The N.Y. Times (Nov. 2, 2018), https://www.nytimes.com/2018/11/02/education/learning/video-games-esports-scholarships.html?login=email&auth=login-email.

[33] *See* Emily Protalinski, *The US legally recognizes video games as an art form*, Tech Spot (May 9, 2011), https://www.techspot.com/news/43696-the-us-legally-recognizes-video-games-as-an-art-form.html.

which recognized forty years of video games and featured eighty games.[34] That same year, the Museum of Modern Art added fourteen video games to its permanent collection.[35] Other museums have curated exhibits dedicated to video-game designers, such as Wellesley College's Davis Museum, which opened a retrospective for video-game creator Jason Rohrer in 2016.[36] And the Library of Congress recently expanded its video-game collection in recognition of the medium's status as "one of the biggest parts of American and global culture."[37]

## II. COURTS HAVE RECOGNIZED THAT VIDEO GAMES ARE PROTECTED UNDER THE FIRST AMENDMENT

The expressive nature of video games has been recognized not only by cultural commentators but also by the U.S. Supreme Court. In *Brown v. EMA*, the Court made clear that video games enjoy the same First Amendment protections as other more traditional forms of expression because "'the First Amendment's command [does] not vary' when a new and different medium for communication appears." 564 U.S. at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). The Court explained:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas – and even social messages – through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

*Id.*; *see also Novalogic, Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 897-98 (C.D. Cal. 2013)

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[34] *See* Abigail Tucker, *The Art of Video Games*, Smithsonian Magazine (Mar. 2012), https://www.smithsonianmag.com/arts-culture/the-art-of-video-games-101131359/.

[35] *See* Rose Eveleth, *Video Games Are Officially Art, According to the MoMA*, Smithsonian.com (Dec. 3, 2012), https://www.smithsonianmag.com/smart-news/video-games-are-officially-art-according-to-the-moma-150115811/.

[36] *See* Nathan Reese, *An Exhibition That Proves Video Games Can Be Art*, The N.Y. Times Magazine (Feb. 10, 2016), https://www.nytimes.com/2016/02/10/t-magazine/art/jason-rohrer-video-games-exhibit-davis-museum.html.

[37] Trevor Owens, *Yes the Library of Congress Has Video Games: An Interview with David Gibson*, Library of Congress (Sept. 26, 2012), https://blogs.loc.gov/thesignal/2012/09/yes-the-library-of-congress-has-video-games-an-interview-with-david-gibson/.

("[I]t is clear that video games … are core speech that are entitled to full protection of the First Amendment."); *Dillinger, LLC v. Electronic Arts Inc.*, No. 1:09-cv-1236-JMS-DKL, 2011 WL 2457678, at *4 (S.D. Ind. June 6, 2011).

Since *Brown v. EMA*, there is no doubt that video games enjoy the full panoply of First Amendment protections. *First*, the First Amendment protects video games regardless of whether their primary purpose is to inform or to entertain, since "it is difficult to distinguish politics from entertainment, and dangerous to try." 564 U.S. at 790. Indeed, "[w]hat is one man's amusement teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948). *Second*, video games are protected by the First Amendment even when they depict violent conduct. As the Court pointed out, "the *books* we give children to read – or read to them when they are younger – contain no shortage of gore." *Brown*, 564 U.S. at 795-96 (emphasis in original). The Court cited *Grimms' Fairy Tales*, *The Odyssey*, Dante's *Inferno*, and *Lord of the Flies* as examples of classic literary works that contain violent imagery, yet still unquestionably receive First Amendment protection. *Id.* at 796. *Third*, these First Amendment protections are unaffected by the fact that video games are sold for a profit. *See Burstyn*, 343 U.S. at 501-02 ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.").

In sum, video games enjoy the same First Amendment protections as books, films, television shows, and other expressive works. *See, e.g.*, *VIRAG, S.R.L. v. Sony Computer Entm't Am. LLC*, No. 3:15-cv-01729-LB, 2015 WL 5000102 (N.D. Cal. Aug. 21, 2015), *aff'd* 699 F. App'x 667 (9th Cir. 2017); *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013).

## III. VIDEO-GAME DESIGNERS AND OTHER CONTENT CREATORS REGULARLY USE REAL PRODUCTS IN THEIR EXPRESSIVE WORKS

This case requires the Court to weigh trademark owners' Lanham Act interests against content creators' First Amendment rights. In that process, the Court should bear in mind that the purpose of trademark law is ***not*** to prevent all unauthorized uses of real products, and the trademarks, trade dress, and other distinctive elements used to accurately identify and depict those products, but instead to prevent consumer confusion about the ***source*** or ***origin*** of goods and services. *See, e.g., Utah Lighthouse Ministry v. Foundation for Apologetic Info.*, 527 F.3d 1045, 1052 (10th Cir. 2008) ("The Lanham Act is intended to protect the ability of consumers to distinguish among competing producers, not to prevent all unauthorized uses [of a trademark].") (internal quotes and citations omitted); *Phoenix Entertainment Partners, LLC v. J-V Successors, Inc.*, 305 F. Supp. 3d 540, 546 (S.D.N.Y. 2018) (noting that the goal of the Lanham Act is to "make actionable the deceptive and misleading use of marks and to protect persons engaged in commerce against unfair competition").

Lanham Act claims that target the use of real products, and the trademarks, trade dress, and other distinctive elements used to accurately identify and depict those products, in expressive works are particularly pernicious because they undermine free speech. Authors, filmmakers, television producers, visual artists, musicians, journalists, and video-game developers regularly incorporate real products into their expressive works, both visually and in dialogue, without securing permission from or paying a license fee to the owners. For example, in the hit AMC television series *Mad Men*, advertising executive Don Draper and his colleagues created 1960s-era advertisements for real brands, including Kodak, Playtex, and Lucky Strike, most of which

had not consented to their use in the series.[38] The use of real brands in *Mad Men* allowed the show not just to immerse viewers in another era but evoke the history of these brands to illustrate society's changing attitudes toward the brands themselves and users of the products. In her 1970 song *Mercedes Benz*, Janis Joplin used the "Mercedes Benz" mark, as well as the "Porsche" mark, without the owners' consent in her memorable critique of consumerism and materialism. In his epic 1996 novel *Infinite Jest*, David Foster Wallace referred to each year using the name of its supposed corporate sponsor, including the "Year of the Depend Undergarment," the "Year of the Perdue Wonderchicken," and the "Year of the Dove Travel Sized Bar." And in his 1991 novel about a Manhattan serial killer, Bret Easton Ellis conspicuously invoked the names of exclusive fashion labels like Armani, Hermes, and Ralph Lauren, without those trademark owners' permission. Nor is this practice a contemporary development. In *To Kill a Mockingbird*, Scout realizes that the bottle in Dolphus Raymond's brown paper bag contains Coca-Cola, and her brother gives her a Tootsie Roll to stay quiet. Harper Lee did not have to obtain permission from Coca-Cola or Tootsie Roll for those uses.

These creators incorporate real products into their works for a variety of artistic and expressive reasons that do not implicate the purpose of trademark law. For example, content creators may use real products to make fictional worlds seem more realistic. In other instances, the way a character interacts with a particular real product (say, an apparel or automotive brand) may shed light on her personality or provide the impetus for an important plot point. Still other times, real products provide the basis for satire, parody, or commentary. Like Activision, the creators of expressive works use real products because companies and products are part of the

[38] *See* Lenika Cruz, *With Brands, What Exactly Is* Mad Men *Selling?*, The Atlantic (May 5, 2015), https://www.theatlantic.com/entertainment/archive/2015/05/mad-men-advertising-boost/392330/.

fabric of modern society and of our shared cultural vocabulary, not to freeload off the owner's consumer goodwill. As the California Supreme Court recognized:

> Contemporary events, symbols and people are regularly used in fictional works. Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality.

*Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring).[39]

The stakes here are high. If AM General's arguments are accepted, product owners may interfere with the work of creators of all stripes, not just video-game developers. Novelists, film and television producers, and artists would be forced either to seek permission (and likely pay a fee) each time they refer to or depict a real product in their works, or to self-censor their expression and remove all references to real companies and products.

Fortunately, the law does not force content creators into such a dilemma. In *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913, 916 (C.D. Ill. 2003), a case involving the unauthorized use of the plaintiff's vehicles in a motion picture, the court highlighted the dangers of the overbroad interpretation of trademark law that AM General advances. In that case, Caterpillar sued Disney to enjoin the release of the motion picture *George of the Jungle 2*, which featured villains driving Caterpillar bulldozers through the jungle. Caterpillar alleged that the use of the bulldozers constituted trademark infringement, unfair competition, and deceptive trade practices in violation of the Lanham Act. *Id.* at 917. The court disagreed, noting that:

> the appearance of products bearing well known trademarks in cinema and television is a common phenomenon. For example, action movies frequently feature automobiles in a variety of

[39] Although written as a concurrence, the California Supreme Court subsequently noted that Chief Justice Bird's opinion "commanded the support of the majority of the court" because her opinion was joined or endorsed by three other justices on the seven-member court. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 803 n.7 (Cal. 2001).

> situations. Is the mere appearance of a Ford Taurus in a garden variety car chase scene sufficient by itself to constitute unfair competition?

*Id.* at 919-20. Looking to the purpose of trademark law – to help consumers identify the source of goods – the court found it implausible "that any consumer would be more likely to buy or watch *George 2* because of any mistaken belief that Caterpillar sponsored this movie," and thus denied Caterpillar's motion for a temporary restraining order. *Id.* at 920, 923-24.

Likewise, in *Wham-O, Inc. v. Paramount Pictures Corp.*, 286 F. Supp. 2d 1254, 1258 (N.D. Cal. 2003), the court stated that "as a matter of custom, [filmmakers] do not seek the permission of manufacturers of name-brand products to use those products in [their] films." *Wham-O* involved the alleged misuse of a SLIP 'N SLIDE toy by the lead character in the 2003 live-action comedy film *Dickie Roberts: Former Child Star*. The character, played by David Spade, first improperly uses the slide dry, then spreads it with cooking oil. The scene involving the SLIP 'N SLIDE was featured prominently in movie trailers and ads and was the subject of an interactive game called "Dickie Slide" on the film's website, which asked players to steer an animated character through obstacles. Denying Wham-O's motion for a preliminary injunction, the court found that Paramount's use of the SLIP 'N SLIDE mark was not likely to result in trademark infringement because Paramount's use of the mark was not competitive with Wham-O's: "[c]onsumers and viewers will not mistake defendants for a movie production house, and consumers and viewers will not mistake defendants for the purveyor of toys." *Id.* at 1262.

Similarly, in *Gottlieb Development v. Paramount Pictures*, 590 F. Supp. 2d 625, 635 (S.D.N.Y. 2008), a pinball-machine manufacturer asserted trademark and other claims against Paramount Pictures based on the use of the manufacturer's mark in the film *What Women Want*. The court dismissed the case at the outset, explaining:

> [The trademark owner's] assertion that the appearance of its

> trademark in the Film would confuse ordinarily prudent consumers as to the sponsorship or affiliation of its pinball machines is simply not plausible. Courts are not concerned with "mere theoretical possibilities of confusion" … in trademark cases. Other courts that have considered the appearance of consumer products in motion pictures routinely fail to find any likelihood of confusion. Here, no viewer of the Film would consider whether Paramount sponsored the pinball machine or [the plaintiff] sponsored the Film.

*Id.* (citations omitted).

## IV. WHEN TRADEMARK LAW AND THE FIRST AMENDMENT COLLIDE, COURTS APPLY THE *ROGERS* TEST TO PROTECT FREE EXPRESSION

The case law at the intersection of the Lanham Act and the First Amendment has evolved substantially over the last thirty years, and now strongly favors free expression. In its seminal 1989 opinion, *Rogers v. Grimaldi*, the Second Circuit introduced a two-part test designed to ensure that trademark law does not chill free expression. 875 F.2d at 998-99. Ginger Rogers had sued the producers of the film *Ginger and Fred*, alleging that the use of her name in the title violated the Lanham Act. *Id.* at 996-97. Despite the title, the film was not about Rogers and Fred Astaire, but about two fictional Italian singers who once imitated the iconic duo. *Id.* The court warned that the "overextension of Lanham Act restrictions in the area of titles might intrude on First Amendment values, and thus held that the Lanham Act "should be construed to apply to artistic works only when the public interest in avoiding consumer confusion outweighs the public interest in free expression." *Id.* at 998-99. Specifically, the court instructed that a trademark claim targeting an expressive work must be dismissed unless the use of the mark "has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." *Id.* at 999.

The *Rogers* test has become the threshold for Lanham Act claims like AM General's, as every circuit to consider the issue has adopted the test to evaluate trademark claims targeting the

use of marks in expressive works.[40] The Second Circuit and other appellate courts have extended the test to protect not only the title of an expressive work, as in *Rogers*, but also the content of the work. *See Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc.*, 886 F.2d 490, 495 (2d Cir. 1989) ("[T]he *Rogers* balancing approach is generally applicable to Lanham claims against *works* of artistic expression.") (emphasis added).

Another court in this District reaffirmed this rule in *Louis Vuitton Malletier S.A. v. Warner Brothers Entertainment*, 868 F. Supp. 2d 172 (S.D.N.Y. 2012). There, the luxury-goods manufacturer Louis Vuitton alleged a violation of the Lanham Act based on the use of a knock-off bag and a verbal reference to the brand in the movie *The Hangover Part II*. *Id.* at 174-75. The court granted Warner Brothers' motion to dismiss, reiterating that the threshold for artistic relevance was "purposely low," and was satisfied because the reference to Louis Vuitton helped to develop a character as "socially inept and comically misinformed" when he could not properly pronounce the brand's name. *Id.* at 178. The court further held that viewers would not be misled as to the source of the film, explaining that "*Rogers* and the cases adopting its holding have consistently framed the applicable standard in terms of confusion as to the *defendant's artistic work*." *Id.* at 179 (emphasis added). Here, the court found that it was "hardly conceivable" that a movie viewer would "take seriously enough [a character's] statements about designer handbags … that they would attribute his views to the company that produced the Film." *Id.* at 182.

In the last three decades, courts have applied the *Rogers* test to dismiss lawsuits targeting a variety of expressive works, including films, *see, e.g.*, *DeClemente v. Columbia Pictures Indus., Inc.*, 860 F. Supp. 30, 51-52 (E.D.N.Y. 1994) (dismissing trademark claims based on use

[40] *See, e.g., Univ. Alabama Bd. Of Trustees v. New Life Art*, 683 F.3d 1266, 1275 (11th Cir. 2012); *ETW Corp. v. Jireh Publ'g*, 332 F.3d 915, 928 n.11 (6th Cir. 2003); *Mattel v. MCA Records*, 296 F.3d 894, 901-02 (9th Cir. 2002); *Westchester Media v. PRL USA Holdings*, 214 F.3d 658, 664-65 (5th Cir. 2000).

of "Karate Kid" mark in *The Karate Kid* film); plays, *see, e.g., Lombardo v. Dr. Seuss Enterprises, L.P.*, 729 F. App'x 131, 133 (2d Cir. 2018) (dismissing trademark claims based on use of Dr. Seuss characters in parody play); television shows, *see, e.g., Twentieth Century Fox Television v. Empire Distrib. Inc.*, 875 F.3d 1192, 1200 (9th Cir. 2017) (dismissing trademark claims based on use of "Empire" mark in Fox's television show *Empire*); songs, *see, e.g., Mattel*, 296 F.3d at 902 (dismissing trademark claims based on use of "Barbie" mark in song titled *Barbie Girl*); books, *see Stewart Surfboards, Inc. v. Disney Book Grp.*, No. CV 10-2982 GAF (SSx), 2011 WL 12877019, at *4 (C.D. Cal. May 11, 2011) (dismissing trademark claims based on depiction of surfboard on back cover of *Hannah Montana* book); and – both before and after the Supreme Court's holding in *Brown v. EMA* – video games. These video game cases include:

- *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos*, 547 F.3d 1095 (9th Cir. 2008), where the owner of a strip club called the Play Pen filed a trademark lawsuit against the creators of *Grand Theft Auto: San Andreas* for including a virtual strip club modeled on plaintiff's club. Recognizing that the intersection of trademark law and the First Amendment is "well traveled," *id.* at 1099, the court applied the *Rogers* test and dismissed the owner's claims, holding that the club was "relevant to Rockstar's artistic goal … to develop a cartoon-style parody of East Los Angeles," and would not confuse players into thinking the club sponsored Rockstar's product, *id.* at 1100.
- *Brown v. Electronic Arts*, 724 F.3d 1235, where NFL legend Jim Brown sued EA, alleging that it violated the Lanham Act by using his persona in *Madden NFL*. Affirming the district court's order granting EA's motion to dismiss, the Ninth Circuit held that Brown's persona was artistically relevant to the game given the "centrality of realism to EA's expressive goal, and the importance of including Brown's likeness

to realistically recreate one of the teams in the game." *Id.* at 1243. It also held that EA had not explicitly misled consumers about Brown's alleged sponsorship or endorsement of the game, emphasizing that the mere use of his likeness, without an explicit misstatement from EA, did not – and could not – confuse the public into thinking that Brown was behind or sponsored the games. *Id.* at 1245-47.

- *VIRAG*, 2015 WL 5000102699, where an Italian flooring company sued Sony for the use of a VIRAG mark on a virtual bridge in the racing game *Grand Turismo*. The court held that the inclusion of the mark helped to provide a "realistic simulation of European car racing, including by allowing players to drive on realistic simulations of European race tracks." *Id.* at *11. It also held that VIRAG did "not allege any explicit indication, overt claim, or explicit misstatement that would cause consumer confusion," and the use of the mark alone was not misleading. *Id.* at *12.
- *Novalogic*, 41 F. Supp. 3d 885, where the defendant used the plaintiff's "Delta Force" mark in its video game, *Call of Duty: Modern Warfare 3*, and in related guidebooks. The court held that these uses did not violate the Lanham Act, noting that the game's inclusion of the logo gave players a "particularized reality of being part of an actual elite special forces operation and serve[d] as a means to increase specific realism of the game." *Id.* at 900. As a result, the inclusion of the logo "add[ed] immensely to the enjoyment users receive[d]" from playing the game. *Id.* at 900-01. Furthermore, no consumer would be confused by the inclusion of the Delta Force logo, since the creator of *Call of Duty* "made every effort to affirmatively negate any possible confusion regarding the source of [the game]," including clear packaging that identified defendant and its affiliated studios as the game makers. *Id.* at 901.

- *Dillinger*, 2011 WL 2457678, where the plaintiff owned trademark rights in the words "John Dillinger," the 1930s criminal closely associated with Thompson machine guns, sometimes referred to as "Tommy Guns." Plaintiff sued EA based on its inclusion of a "Dillinger Tommy Gun" in the *Godfather* video games. Applying the *Rogers* test, the court granted EA's motion for summary judgment. *Id.* at *5-7.

## V. THE *ROGERS* TEST COMPELS DISMISSAL OF AM GENERAL'S CLAIMS

As Activision persuasively argues in its motion, the First Amendment defeats AM General's claims arising from the alleged use of the Humvee marks in *Call of Duty*. Mot. at 13-32. *First*, the Humvee vehicles have artistic relevance to *Call of Duty*. As the court explained in *Louis Vuitton*, the defendant satisfies this prong "unless the use 'has no artistic relevance to the underlying work whatsoever.'" 868 F. Supp. 2d at 178 (quoting *Rogers*, 875 F.2d at 999). Just as the inclusion of the Pig Pen strip club helped to create a realistic depiction of East L.A. in *E.S.S.*, the inclusion of the "Delta Force" logo "increase[d] specific realism of the game" in *Novalogic*, and the inclusion of the VIRAG banner helped developers depict a realistic European racing track in *VIRAG*, the inclusion of Humvee vehicles allows the creators of *Call of Duty* to depict a realistic, interactive war zone. Indeed, as AM General admits in its complaint, "HUMVEE-branded vehicles have been in service for more than 30 years with the United States Armed Forces and with over 50 foreign countries." Compl. at ¶ 15. Requiring Activision to conjure up cars that do not resemble those used by actual American troops would strip the game of its authenticity, would interfere with the game developers' right to create a historically accurate military environment, and would deprive consumers of the benefits of a realistic setting for their game. Activision's use of Humvee vehicles clearly has a "level of relevance … above zero," which is all that is required under *Rogers*. *E.S.S.*, 547 F.3d at 1100.

*Second*, the appearance of Humvee vehicles in *Call of Duty* does not mislead consumers

as to the source or content of the game. As a preliminary matter, "the mere use of a trademark alone cannot suffice to make such use explicitly misleading." *E.S.S.*, 547 F.3d at 1100. Rather, plaintiff must show that the defendant expressly communicated that the mark owner "prepared or otherwise authorized" the work. *Twin Peaks Prods. v. Pub. Intern., Ltd.*, 996 F.2d 1366, 1379 (2d Cir. 1993). Incidental consumer confusion does not meet this standard. *See Cliffs Notes*, 886 F.2d at 496 ("There may be a few purchasers who have been assigned to read the novels who would buy the parody thinking it is a serious work and is produced by Cliffs Notes. In view of the public interest in free expression, that slight risk should be taken."). Here, nothing about the appearance of the Humvee vehicles in the games creates the impression that Humvee "prepared or otherwise authorized" the *Call of Duty* games, especially because the Humvee is only one of dozens of vehicles that appear in the game. *See* Mot. at 5. To the contrary, as the *Novalogic* court already held with respect to this same *Call of Duty* series:

> Activision understandably has made every effort to affirmatively negate any possible confusion regarding the source of MW3. For example, MW3's packaging is very clear as to its origin and source. It prominently displays the title "CALL OF DUTY—MW3," and identifies its makers as "Activision" and its affiliated studios, "Infinity Ward" and "Sledgehammer Games. MW3's packaging also explicitly references the earlier "Call of Duty—Modern Warfare Games," touting that "The Best–Selling Franchise in XBox 360 History Is Back."

41 F. Supp. 3d at 901-02 (internal citations omitted). There is no reason for this Court to treat the appearance of Humvees in *Call of Duty* any differently than the appearance of the "Delta Force" logos in the same games. Players' abilities to interact with the vehicles, including climbing them, riding them, or controlling a weapon in them, *see* Compl. ¶ 35, does not change this calculus. In *E.S.S.*, the court explained that even though gamers "are free to ignore the storyline and spend as much time as they want at the Pig Pen … the chance to attend a virtual strip club is unambiguously *not* the main selling point of the Game." 547 F.3d at 1101

(emphasis in original). Here too, although players are free to interact with the Humvee vehicles, the opportunity to do so is not the reason that millions of gamers have purchased *Call of Duty*.

To protect Activision's – and ESA's other members' – First Amendment rights, the Court should dismiss AM General's claims.

## VI. THE *ROGERS* TEST ALSO PROTECTS ACTIVISION'S USE OF HUMVEE VEHICLES IN PROMOTIONS FOR THE GAME

Just as courts extend the application of the *Rogers* test beyond the titles of expressive works and into the content of the works, they also increasingly apply the test to the use of marks in promotional materials for those works. As the Ninth Circuit explained in *Twentieth Century Fox*, "it requires only a minor logical extension of the reasoning of *Rogers* to hold that works protected under its test may be advertised and marketed by name," even when that name contains another's mark. 875 F.3d at 1196-97. Other courts have applied similar reasoning. In *Mil-Spec Monkey v. Activision Blizzard*, 74 F. Supp. 3d 1134, 1143 (N.D. Cal. 2014), for example, the plaintiff argued that Activision's use of its mark – an angry monkey design – was explicitly misleading under the second prong of *Rogers* because the mark "briefly appear[ed] in a pre-release trailer" for the video game *Call of Duty*. The court disagreed, holding that the use of the mark in the game's trailer did not indicate that plaintiff had a relationship with or endorsed the game. *Id.* To the contrary, defendant was "very clear as to its origin and source [of the game], prominently bearing the title Call of Duty, identifying its creator as Activision, and boasting it to be 'the best selling first person action franchise of all time.'" *Id.* at 1143-44; *see also The Romantics v. Activision Publ'g*, 574 F. Supp. 2d 758, 769 (E.D. Mich. 2008) ("Neither the [defendant's video game] nor any of its promotional materials contains [any] explicit indication that [Plaintiffs] endorsed the [Game] or had a role in producing it"). Similarly, in *Cummings v. Soul Train Holdings LLC*, another court in this District dismissed a claim concerning the use of

plaintiff's mark, "Soul Train," in both a DVD set and in materials marketing the set, holding that plaintiff could not plead that the use of his mark on the sets or the promotional materials misled consumers as to the source or content of the materials. 67 F. Supp. 3d 599, 606 (S.D.N.Y. 2014).

Because this Court should dismiss AM General's claims targeting the use of Humvee vehicles in *Call of Duty*, it also should dismiss the claims relating to the inclusion of the same vehicles in trailers and advertisements featuring scenes from the game.

## VII. ALLOWING THIS CASE TO PROCEED TO TRIAL WOULD CHILL VIDEO-GAME DEVELOPERS' CREATIVE EXPRESSION

Courts have instructed that claims targeting speech should be resolved as expeditiously as possible, because "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Consequently, courts have not hesitated to apply the *Rogers* test at the pleading stage. *See, e.g.*, *Louis Vuitton*, 868 F. Supp. 2d at 184 ("In a case such as this one, no amount of discovery will tilt the scales in favor of the mark holder at the expense of the public's right to free expression."); *Brown v. EA*, 724 F.3d at 1247-48 (affirming dismissal of trademark claim). Given this willingness to apply the test at the pleading stage, courts do not hesitate to apply it on a motion for summary judgment. *See, e.g.*, *Rogers*, 875 F. 2d at 1001-02; *Dillinger*, 2011 WL 2457678, at *1.

## CONCLUSION

If AM General's view of trademark law were accepted, then Morgan Spurlock could not have referred to McDonald's or showed its products in the documentary *Super Size Me* without the hamburger chain's permission, Don McLean could not have taken his "Chevy to the levee" in his song *American Pie* without General Motors' approval, Tom Hanks could not have safely landed an Airbus A320 in the Hudson River in the movie *Sully* without the aircraft

manufacturer's consent, and Matt Stone and Trey Parker could not have transformed a humble Taco Bell into the setting for an intergalactic conspiracy in their video game *South Park: The Stick of Truth*. Elevating trademark owners' interests over artists' First Amendment rights would not advance the purpose of trademark law; no reasonable consumer would believe that McDonald's sponsored *Super Size Me*, that Chevrolet produced *American Pie*, that Airbus financed *Sully*, or that Taco Bell endorsed *Stick of Truth*. But permitting such claims to proceed to trial would chill content creators' exercise of their free-speech rights and circumscribe their ability to tell stories about the worlds that we inhabit and the worlds that they create, ultimately depriving gamers of the benefits of authentic works. To avoid this result, and to protect the free-speech rights of ESA's members and other content creators, ESA respectfully urges this Court to grant Activision's motion for summary judgment.

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Respectfully submitted,
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