

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIL-SPEC MONKEY, INC.,
Plaintiff,
v.
ACTIVISION BLIZZARD, INC., et al.,
Defendants.

Case No. [14-cv-02361-RS](#)

**ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

In this action arising from claims of copyright and trademark infringement, plaintiff Mil-Spec Monkey, Inc. (“MSM”) avers that the video game *Call of Duty: Ghosts*, created and published by defendant Activision Publishing, Inc. and Activision Blizzard, Inc. (collectively, “Activision”)¹ makes illicit use of MSM’s “angry monkey” trademark, among the most popular morale patch designs the company promotes and sells online and through third parties. Activision, which bears no relationship to MSM, includes in *Ghosts* an image visually similar to MSM’s “angry monkey” mark as a patch players may select to place on their avatars’ uniforms in its multi-player game mode. When selected by players, the *Ghosts* “angry monkey” patch appears at various points during game play. It moreover appears in Activision’s pre-release promotional trailer for *Ghosts*’ multi-player edition.

¹ Defendants contend that Activision Publishing, Inc., and not its parent company Activision Blizzard, Inc., bears responsibility for publishing and marketing *Ghosts*.

1 MSM brings five claims against Activision, alleging (1) copyright infringement; (2)
2 trademark infringement under the Lanham Act; (3) false designation of origin; (4) California
3 statutory unfair competition; and (5) common law trademark infringement. The last four claims,
4 MSM avers, arise from consumer confusion as to the source, affiliation, and sponsorship of the
5 “angry monkey” patch in the *Ghosts* video game. According to MSM, Activision’s sole purpose
6 for including such a patch in its game is deceitfully to play upon MSM’s renown and goodwill in
7 the marketplace and thereby earn unjust riches. Activision’s present motion for partial summary
8 judgment seeks a ruling in its favor on all of MSM’s claims save its copyright infringement claim,
9 on the sole contention that its use of MSM’s “angry monkey” mark is protected by the First
10 Amendment. Because *Ghosts* is an expressive work, and its disputed design bears some level of
11 artistic relevance to the game and is not explicitly misleading—meeting both prongs of the test set
12 forth originally in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), and adopted by the Ninth
13 Circuit—Activision’s motion must be granted.

14 II. BACKGROUND

15 A. MSM and the “Angry Monkey” Morale Patch Design.²

16 MSM is a military supply and outfitting company that specializes in the design and
17 creation of unofficial military morale patches. A morale patch, as MSM defines it, is any
18 wearable patch that military personnel are not authorized to wear or are strictly prohibited from
19 wearing. According to MSM, members of the military frequently wear morale patches in
20 unofficial contexts to express a sense of personal identity. Its morale patch bearing the disputed
21 “angry monkey” mark is one of MSM’s most well-known and popular patch designs.

22 MSM has since at least 2007 been selling a variety of “angry monkey” patches through its

23
24 ² MSM objects to the introduction of evidence from webpages and book excerpts lodged in
25 support of Activision’s motion as exhibits to the Declaration of Mark E. Mayer as lacking proper
26 authentication under Federal Rule of Evidence 901. (Opposition, p. 2 n.1; p. 8 n.7.) Activision’s
27 motion refers to these sources to define morale patches; describe their usage and purpose;
28 demonstrate that a variety are for sale across a range of Internet websites; and to offer the Court
depictions of soldiers wearing such patches. (Mayer Decl., Exhibits 7-18.) Activision having
offered no reply to these objections, they are sustained and the exhibits disregarded.

1 website and online store, in addition to promoting it online, at tradeshow, and via broad
 2 distribution of printed and electronic promotional materials. The Complaint depicts eleven “angry
 3 monkey” patches, in different color schemes, currently advertised for sale on MSM’s website.
 4 MSM has registered its the mark with the United States Patent and Trademark Office for use in
 5 connection with its online store including clothing, patches, t-shirts, hats, bags and pouches and
 6 tactical gear. From MSM’s “extensive use and promotion of its Angry Monkey Mark,” the
 7 company avers, “such mark enjoys considerable goodwill, widespread recognition, and secondary
 8 meaning in commerce, and has become associated with MSM as its single source of origin.”
 9 (Compl. ¶ 63.)

10 B. Activision and *Call of Duty: Ghosts*.

11 Activision designs, publishes, and distributes video games, including the highly successful
 12 *Call of Duty* series. *Call of Duty*’s military action fantasy games allow each player to assume the
 13 role of a military soldier and battle other players or a computer-controlled opponent to complete
 14 different missions on the game’s digital battlefields. *Novalogic, Inc. v. Activision Blizzard*, 2013
 15 WL 8845232, *2 (C.D. Cal. June 18, 2013). The original *Call of Duty* was released in 2003,
 16 followed by *Call of Duty 2*, *Call of Duty 3*, *Call of Duty 4: Modern Warfare*, *Call of Duty: World*
 17 *at War*, *Call of Duty: Modern Warfare 2*, *Call of Duty: Black Ops*, *Call of Duty: Modern Warfare*
 18 *3*, and *Call of Duty: Black Ops 2*.

19 *Ghosts*, released in November 2013, is Activision’s tenth installment in the series.³ Like
 20 its predecessors, *Ghosts* depicts highly realistic combat in a near-future, war-torn setting, featuring
 21 numerous characters, complex narratives, and advanced graphics. Its main protagonists are the
 22 Ghosts—a force of U.S. Special Operations personnel trained to conduct secret missions behind
 23 enemy lines. The game’s premise is that, following the nuclear destruction of the Middle East,

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 25 ³ The Court had the opportunity to review the retail copy of *Ghosts* Activision lodged as Exhibit A
 26 to the Miller Declaration. In addition, Exhibits 3, 4, 5, and 6 depict footage of game play and
 27 trailers advertising the game. Those showing multi-player mode contain clips that capture use of a
 design similar to MSM’s “angry monkey” mark. As parties have pleaded, it appears as a patch
 players in multi-player mode can select to customize their characters, and pops up onscreen for
 various purposes throughout game play.

1 oil-producing nations in the Americas have formed an alliance known as “The Federation” that
2 now poses a global threat against whom players must complete various missions. It incorporates
3 dozens of contemporary weapons and vehicles that players can customize with modifications or
4 attachments, and a variety of military equipment based on real-life counterparts or portrayals of
5 future designs. The game also incorporates names and insignia of contemporary forces such as the
6 National Security Agency, the United States Marine Corps, and the United States Air Force.

7 *Ghosts* features several game modes, including a single-player campaign with a
8 predetermined plot, and various online multi-player modes in which participants can both
9 collaborate as “squads” and compete against one another. Participants in multi-player mode can
10 engage in combat on a number of different “maps” including geographic locations like the Gulf of
11 Mexico, San Diego, the Caribbean, Antarctica, Venezuela, Brazil, and outer space; downloadable
12 content offers players even more maps from which to choose. A new feature introduced by
13 Activision is the option for gamers in multi-player mode to customize their soldier avatars by
14 making selections from an extensive menu of options, including gender, uniform style, gear,
15 accessories, and patches that may be worn on players’ uniforms. Players are not, however,
16 required to view or use any of these customization options to set up an avatar for a multi-player
17 game.

18 C. The “Angry Monkey” Morale Patch in *Ghosts*.

19 Players using the customization menus in multi-player mode may select from a total of
20 over six hundred patches to place on their avatars’ uniforms. Thirty-two “standard-issue” patches
21 are available at the start of the game; more become “unlocked” as rewards for players who
22 complete objectives and missions. Additional patches are also available as downloadable content.
23 (Miller Decl. ¶ 10.) The patches depict small cartoon images or icons inside a geometric shape,
24 often with a customizable background. They appear onscreen at various points during multi-
25 player matches, when a player may glimpse a patch on the uniform of another player, or alongside
26 a flash of the name of an avatar wearing a patch who just performed a particular objective in the
27 ongoing mission. The patches also appear alongside other player information in match

1 “summaries,” displayed onscreen at the conclusion of a match to detail each player’s performance.
 2 (Miller Decl., Exhibit 5.) Patches players select to place on their avatars thus serve to identify
 3 these characters throughout game play.

4 The *Ghosts* “angry monkey” patch appears to players in the in-game menu of avatar-
 5 customizing options as one of the “standard-issue” thirty-two patches available to all players in
 6 multi-player mode at the start of the game; it does not appear at all in the game’s single-player
 7 mode. Because no player must use the customization tools or choose the “angry monkey”
 8 patch—and patches only appear onscreen as described above—it is possible for the disputed mark
 9 never to appear during game play, or not for many matches or hours.

10 Outside in-game menus and game play itself, *Ghosts*’ “angry monkey” patch appears in
 11 Activision’s official pre-release trailer for the multi-player version of the game. The design is
 12 visible for about 2 seconds as a small image at the bottom of the screen, associated with an avatar.
 13 Several other patches simultaneously appear below other avatars, to illustrate the game’s avatar-
 14 customizing features and “squad”-based collaborative game play option. (Miller Decl., Exhibit 6.)
 15 Neither any version of the patch nor any logo or script that indicates an association with MSM
 16 appears in this trailer or on the retail game cover. (Miller Decl., Exhibits 2, 6.)

17 MSM alleges that Activision “willfully” makes use of the “angry monkey” mark “so as to
 18 cause confusion or mistake or to deceive consumers” “as to the source, affiliation, or sponsorship
 19 of the . . . design” and thereby take advantage of MSM’s brand and relationship with consumers.
 20 (Compl. ¶¶ 33-34.) Activision now moves for partial summary judgment against MSM on its four
 21 claims grounded in trademark protection, solely on the theory that *Ghosts*’ avail of the disputed
 22 “angry monkey” design is protected by the First Amendment.

23 III. LEGAL STANDARD

24 Summary judgment is proper where the pleadings, discovery and affidavits show that there
 25 is “no genuine issue as to any material fact and [that] the moving party is entitled to judgment as a
 26 matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of
 27 the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a
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1 material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for
2 the nonmoving party. *Id.* “This requires evidence, not speculation.” *Meade v. Cedarapids, Inc.*,
3 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth
4 by the party opposing the motion. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir.
5 1992). Where circumstantial evidence is presented, however, the Court may consider the
6 plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-
7 50. While the party opposing summary judgment is entitled to the benefit of all reasonable
8 inferences, “inferences cannot be drawn from thin air; they must be based on evidence which, if
9 believed, would be sufficient to support a judgment for the nonmoving party.” *American*
10 *International Group v. American International Bank*, 926 F.2d 829, 836-37 (9th Cir. 1991). In
11 that regard, “a mere ‘scintilla’ of evidence will not be sufficient to defeat a properly supported
12 motion for summary judgment; rather, the nonmoving party must introduce some ‘significant
13 probative evidence tending to support the complaint.’” *Summers v. Teichert & Son, Inc.*, 127 F.3d
14 1150, 1152 (9th Cir. 1997).

15 The moving party for summary judgment bears the initial burden of identifying those
16 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine
17 issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving
18 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no
19 reasonable trier of fact could find other than for the moving party. On an issue for which the
20 opposing party will have the burden of proof at trial, however, the moving party need only point
21 out “that there is an absence of evidence to support the nonmoving party’s case.” *Id.* 325.

22 Once the moving party meets its initial burden, the nonmoving party must go beyond the
23 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
24 genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over
25 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”
26 *Anderson*, 477 U.S. at 248. It is not the task of the district court to scour the record in search of a
27 genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.1996). The nonmoving
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1 party has the burden of identifying with reasonable particularity the evidence that precludes
2 summary judgment. *Id.* If the nonmoving party fails to make this showing, “the moving party is
3 entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. at 323.

4 **IV. DISCUSSION**

5 A. *Ghosts* Is An Expressive Work Entitled to First Amendment Protection.

6 As explained in *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2733
7 (2011), video games are core speech entitled to First Amendment safeguards:

8 Like the protected books, plays, and movies that preceded them, video
9 games communicate ideas—and even social messages—through many
10 familiar literary devices (such as characters, dialogue, plot, and music) and
11 through features distinctive to the medium (such as the player’s interaction
12 with the virtual world). That suffices to confer First Amendment
13 protection [W]hatever the challenges of applying the Constitution to
14 ever-advancing technology, “the basic principles of freedom of speech and
15 the press, like the First Amendment’s command, do not vary” when a new
16 and different medium for communication appears.

17 *See also Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (2006) (“Video games are
18 expressive works entitled to as much First Amendment protection as the most profound
19 literature.”)

20 In *Novalogic*, where Activision confronted allegations of trademark infringement similar to
21 the claims raised here for use of a different disputed mark in its *Call of Duty: Modern Warfare 3*
22 game, the district court concluded that the game’s “compelling narrative and music, distinctive
23 characters, how the players interact with the virtual environment as they complete a series of
24 combat missions, how players can interact with other players, and how players control the fate of
25 the characters and the world that they inhabit,” rendered it worthy of “as much First Amendment
26 protection as any motion picture or any other expressive work.” *Novalogic, Inc. v. Activision*
27 *Blizzard*, 2013 WL 8845232, *9 (C.D. Cal. June 18, 2013).

28 Its highly realistic visual graphics, complex narratives, distinctive use of music and sound,
and multitude of dimensions on which players may interact with the game and one another, earn
Ghosts the same status. Review of the filed copy of *Ghosts* and videos of game play reflects that

1 the game’s multi-player mode—in which the “angry monkey” patch appears—exhibits all of the
 2 characteristics *Novalogic* recognized in *Modern Warfare 3* and deserves safe haven under the
 3 mantle of First Amendment protection for video games set forth in *Brown*. That multi-player
 4 mode allows gamers to customize characters, select “maps” for play, and drive the outcome—
 5 rather than follow the predetermined plot available in single-player mode—does little to
 6 undermine this point. *See Brown*, 131 S.Ct. at 2738 (Video games do not present “special
 7 problems” merely because they are “interactive”; such a “feature is nothing new: Since at least the
 8 publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-
 9 own-adventure stories have been able to make decisions that determine the plot by following
 10 instructions about which page to turn to.”).

11 MSM, however, contends that this step of the Ninth Circuit’s framework includes a
 12 threshold requirement that a mark must be a “cultural icon” in order for the *Rogers* two-pronged
 13 test, discussed further below, even to apply to its use in the underlying work. (*See Opposition*, p.
 14 16.) It bases this argument on a misreading of *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894,
 15 900-02 (9th Cir. 2002) (finding against the “Barbie” trademark holder in favor of the creators of
 16 the song “Barbie Girl” to deem the song, which pokes fun at the values its creators felt were
 17 represented by the Barbie brand, an expressive work), and cites for support an outlier decision
 18 from this district, *Rebellion, LLC v. Perez*, 732 F.Supp.2d 883 (N.D. Cal. 2012).⁴ While *Mattel*
 19 indeed opined that “with fame comes unwanted attention,” and that a trademark owner certainly
 20 may not prohibit all reference to his or her mark once it “becomes an integral part of our
 21 vocabulary,”—as Barbie has—the fact that Barbie made its way into the global lexicon does not
 22 mean every mark must do so in order for its use to be protected by the First Amendment.

23 _____
 24 ⁴ *Rebellion* ruled in favor of the plaintiff reggae band by the trademarked name Rebellion in a
 25 Lanham Act claim against the artist Pitbull, who released an album with the same name. Whether
 26 or not *Rebellion* comports with Ninth Circuit law, the case is inapposite here because in that
 27 instance, Pitbull’s use of the mark bore no connection or reference whatsoever to the reggae band.
 Here, by contrast, *Ghosts*’ incorporation of an “angry monkey” patch that draws upon a trademark
 patch design extremely popular in the military world is precisely what imbues the game’s use of
 the mark with artistic relevance.

1 *Mattel*, rather, stands for the proposition that a trademark owner may not control public
 2 discourse whenever the public “imbues his mark with a meaning beyond its source-identifying
 3 function”—a far more inclusive standard than the “cultural icon” one MSM advocates. 296 F.3d
 4 at 900. Moreover, *Mattel* applies this rule not as a threshold limitation to reaching *Rogers*, but
 5 rather as part of the analysis under *Rogers*’ first prong. Subsequent Ninth Circuit authority affirms
 6 this reading. MSM points out that *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.* does
 7 not contain a discussion of the threshold to applying *Rogers* because in that case, the plaintiff
 8 E.S.S. conceded that the video game at issue was entitled to First Amendment protection. E.S.S.
 9 did so, however, *not* on the premise that the mark at issue was a “cultural icon,” but rather because
 10 the game was an expressive work. 547 F.3d 1095, 1100 (9th Cir. 2008) (finding First Amendment
 11 protection for the *Grand Theft Auto* video game creator’s depiction of the real-life Los Angeles
 12 strip club Play Pen in the game as “Pig Pen” despite noting that “the Play Pen is not a cultural
 13 icon”). The court clearly states as much: “E.S.S. concedes that the game is artistic and that
 14 therefore the *Rogers* test applies.” *Id.* at 1099-1100.

15 As addressed further below, because of its popularity among military personnel and the
 16 significance of patches in the military world, MSM’s “angry monkey” mark has taken on a
 17 meaning beyond purely denoting a link to MSM. *Ghosts*’ multi-player mode makes protectable
 18 use of this meaning under the *Rogers* test.

19 B. *Ghosts*’ Use of the “Angry Monkey” Design Is Protected By the First Amendment.

20 Trademark law is concerned with protecting the symbols, elements and devices used to
 21 identify a particular product in the marketplace, and to prevent confusion as to its source. *New*
 22 *Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 305 (9th Cir.1992); *Whitehead*
 23 *v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 13 (D.D.C. 2004). It offers mark owners a means to
 24 prevent others from duping consumers into buying a product they mistakenly believe is sponsored
 25 by or affiliated with the trademark owner. Accordingly, “[t]rademark rights do not entitle the
 26 owner to quash an unauthorized use of the mark by another who is communicating ideas or
 27 expressing points of view.” *Mattel*, 296 F.3d at 900 (internal quotation marks and citations
 28

1 omitted).

2 As *Ghosts* constitutes an expressive work, the question becomes whether Activision's
3 particular use of MSM's "angry monkey" mark within the game merits First Amendment
4 protection. To decide whether the First Amendment precludes Lanham Act and related claims, the
5 Ninth Circuit has adopted the test developed by the Second Circuit in *Rogers v. Grimaldi*, 875
6 F.2d 994 (2d Cir. 1989). As *Rogers* declared, "in general, the [Lanham] Act should be construed
7 to apply to artistic works only where the public interest in avoiding consumer confusion outweighs
8 the public interest in free expression." *Rogers*, 875 F.2d at 999. The Ninth Circuit expressly
9 adopted this test in *Mattel*, as discussed above, and later extended it to apply not only to titles of
10 works, but furthermore to registered marks used in the bodies of other works. See *E.S.S.*, 547 F.3d
11 1095.

12 The Ninth Circuit's two-pronged analysis based on *Rogers* finds an artistic work's use of a
13 trademark that would otherwise violate the Lanham Act not actionable unless (1) the use of the
14 mark has "no artistic relevance to the underlying work whatsoever," or (2) it has some artistic
15 relevance, but "explicitly misleads as to the source or the content of the work." *E.S.S.*, 547 F.3d at
16 1100.

17 *I. "Artistic Relevance"*

18 *Mattel* and its Ninth Circuit progeny are highly protective of speech. "[O]nly the use of a
19 trademark with 'no artistic relevance to the underlying work whatsoever' would not merit First
20 Amendment protection. In other words, the level of relevance merely must be above zero."
21 *E.S.S.*, 547 F.3d at 1100. While *E.S.S.* readily acknowledged that Los Angeles's Play Pen strip
22 club was by no means a "cultural icon," the court held that a reasonable way for the video game
23 creators to achieve their artistic vision—a "cartoon-style parody of East Los Angeles"—was to
24 recreate a "critical mass" of the buildings and businesses that constitute it. It was, therefore, of
25 "some artistic relevance" to include a strip club "similar in look and feel to the Play Pen," even if
26 the club had little to do with the premise of the game. 547 F.3d at 1100.

27 The creators of *Ghosts*' multi-player mode likewise aimed to design a realistic combat
28 experience, the intensity of which is heightened by sophisticated features permitting players to

1 customize their avatars' identities and engage with other players in the virtual environment. The
2 incorporation of combat force names, military gear, geographic locations, and myriad other real-
3 world references coalesce into a "critical mass," not unlike that in *E.S.S.*, to achieve a "look and
4 feel" consistent with the game creators' vision. One small part of this vision is the "angry
5 monkey" patch, which when placed alongside many other patches used in *Ghosts*, represents part
6 of an authentic universe of morale patches, like those available in the real world. The parties
7 agree that "morale patches are popular among military personnel and are often worn in unofficial
8 contexts to allow the wearer to express a sense of personal of identity," and that the "angry
9 monkey" is "among MSM's most well-known designs." (Compl., ¶¶ 14,15.) Its inclusion in the
10 game therefore bears "some artistic relevance" to the creators' goal of offering players a feeling of
11 personal identity and authenticity during game play.

12 MSM offers no support for its conclusory allegation that Activision's use of MSM's mark
13 has no expressive purpose, and only incorporates the "angry monkey" design into *Ghosts*' menu of
14 available patches to gain a misleading endorsement from MSM. It argues that Activision's use of
15 the "angry monkey" design bears no artistic relevance to *Ghosts* because the armed forces prohibit
16 soldiers from choosing to wear unofficial morale patches on their uniforms out in the field. But
17 MSM invokes no authority, nor is there any, for the proposition that use of a mark must
18 sufficiently mimic reality to fall within the First Amendment's safe haven. *See Brown v.*
19 *Electronic Arts, Inc.*, 724 F.3d 1235, 1246 (9th Cir. 2013) (noting the use of football player Jim
20 Brown's name and likeness to represent players on teams which no longer exist and with jersey
21 numbers other than his own in the video game *Madden NFL* did not detract from the game's First
22 Amendment protection). Nor does the fact that the "angry monkey" design only appears in multi-
23 player mode, may not be selected by any player, and may not appear for many hours or sessions of
24 game play, diminish that its artistic relevance to *Ghosts* is "above zero." *See E.S.S.*, 547 F.3d at
25 1100 (noting that the "Pig Pen" in *Grand Theft Auto* is in no way central to the game's narrative).

26 MSM's allegation that *Ghosts*' use of the "angry monkey" mark constitutes purely
27 commercial speech, precluding it from broad First Amendment protection, is similarly without
28 merit. MSM itself defines commercial speech as that which "does no more than propose a

1 commercial transaction.” (Opposition, p. 6, citing *Hunt v. City of Los Angeles*, 638 F.3d 703, 715
 2 (9th Cir. 2011).) That the *Ghosts* “angry monkey” design briefly appears in the pre-release trailer
 3 for the game’s multi-player mode and (for free to all players) in a menu that also allows players to
 4 access additional patches for purchase, does not diminish its artistic relevance within the game.⁵
 5 MSM, therefore, puts forward no genuine issue of material fact as to whether the use of the “angry
 6 monkey” design in *Ghosts* meets this prong of the *Rogers* test.

7 2. “Explicitly Misleading”

8 “Explicitly misleading” use of a mark requires that the defendant make an affirmative and
 9 overt statement that indicates a relationship with or endorsement by the plaintiff. *Rogers*, 875
 10 F.2d at 999 (offering the phrases “an authorized biography” and “Jane Fonda’s Workout Book” as
 11 examples); *Dillinger, LLC v. Electronic Arts Inc.*, 2011 WL 2457678, *6 (S.D. Ind. June 16,
 12 2011). An instance where the sole indication that the plaintiff might be affiliated with the
 13 defendant’s work is the use of the mark itself is not “explicitly misleading.” *Mattel*, 296 F.3d at
 14 902; *see also Brown*, 724 F.3d at 1245-46 (mere use of the player’s likeness was insufficient to
 15 meet this standard).

16 MSM fails to demonstrate a genuine issue of material fact as to whether Activision has
 17 behaved in an “explicitly misleading” manner. Indeed, MSM has not put forth a single argument
 18 that Activision has affirmatively purported in any way to share a relationship with MSM. As
 19 noted in *Novalogic*, “given the huge success of its *Call of Duty* franchise, Activision
 20 understandably has made every effort to affirmatively negate any possible confusion regarding the

21 ⁵ Specifically, MSM avers that Activision “assigned particular prominence and importance to the
 22 [disputed mark], in that it is one of fewer than five patch designs featured in [the promotional
 23 trailer].” (Compl. ¶ 31.) Additionally, the Declaration of Richard Graves MSM submitted refers
 24 to promotional videos Graves viewed on the Internet that contain multiple appearances of the
 25 mark, copies of which were not lodged with the Court. (Graves Decl. ¶¶ 14-16.) Yet even if
 26 Activision has included the “angry monkey” patch in its trailer and other videos for promotional
 27 purposes, this would not strip it of its “artistic relevance” and First Amendment protection. For
 28 example, in *Mattel*, the court ruled for the defendant “Barbie Girl” song creators, even though they
 undisputedly used the “Barbie” trademark to “create[] and s[ell] to consumers in the marketplace
 commercial products . . . that bear the Barbie mark.” 296 F.3d at 903; *see also Winchester
 Mystery House, LLC v. Global Asylum, Inc.*, 210 Cal. App. 4th 579, 591 (2012) (holding that there
 was no “triable issue of material fact,” even though the use of the defendant’s trademark may well
 have been “merely a crass marketing tool” rather than an artistic choice).

1 source of [*Modern Warfare 3*].” *Novalogic*, 2013 WL 8845232 at *12. The same is true here:
 2 Activision’s *Ghosts* packaging is very clear as to its origin and source, prominently bearing the
 3 title *Call of Duty*, identifying its creator as Activision, and boasting to be “the best selling first
 4 person action franchise of all time.” (Miller Decl., Exhibit 2.) MSM’s sole contention to address
 5 this prong of *Rogers*—that Activision has included its version of the “angry monkey” design in
 6 promotional materials and thereby “actually mis[led] consumers”—therefore falls short.
 7 (Opposition, p. 23.)⁶

8 V. CONCLUSION

9 For all of the foregoing reasons, MSM has failed to present a genuine issue of triable fact
 10 to overcome Activision’s contention that its use of the “angry monkey” mark in *Ghosts* is
 11 protected by the First Amendment. Accordingly, Activision’s motion for partial summary
 12 judgment on MSM’s claims for trademark infringement under the Lanham Act; false designation
 13 of origin; unfair competition under California statute; and common law trademark infringement, is
 14 granted.

15 **IT IS SO ORDERED.**

16 Dated: November 24, 2014



17
 18 RICHARD SEEBORG
 19 United States District Judge

20
 21
 22 _____
 23 ⁶ MSM’s anecdotal evidence of “actual confusion” caused by Activision’s use of the mark—that
 24 of blogger Richard Graves as attested to in the Graves Declaration (*see* ¶ 18)—also does little to
 25 tip the scales on this prong. *See Brown*, 724 F.3d at 1245-46 (adding “survey evidence” to the
 26 “mere use of a trademark alone” “changes nothing To be relevant, evidence must relate to the
 27 nature of the behavior of the identifying material’s user, not the impact of the use.”); *see also*
 28 *Rogers*, 875 F.2d at 1001 (disregarding a survey showing that 38% of 201 respondents believed
 Ginger Rogers was affiliated with the film, the court held, “to the extent that there is a risk that the
 title will mislead consumers as to what the work is about, that risk is outweighed by the danger
 that suppressing an artistically relevant though ambiguous title will unduly restrict expression.”).
 MSM offers no contrary authority to demonstrate the legal relevance of its submitted evidence.