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Intellectual Property Plaintiff Admits to Being Ignorant?

July 25, 2011 by Steve Baird

About a week ago another interesting federal intellectual property case was filed in the District of Minnesota: Fantasy Flight Publishing, Inc. v. Puffin Software et al.

Although the four count complaint includes a federal unfair competition claim, a Minnesota deceptive trade practices claim, and a common law unjust enrichment claim, the case really appears to be centered around the copyright infringement claim.

Plaintiff Fantasy Flight asserts that its copyright in the Battlelore® board game has been infringed by the "substantially similar" iPad game called Viking Lords:

"The Viking Lords game is simply an iPad version of the BattleLore® game under a different name. Defendant Päivinen has publicly acknowledged that he and some friends initially developed Viking Lords as a computer version of the BattleLore® game. Päivinen first approached Plaintiff with a prototype. However, after Plaintiff was slow to respond to his approach, and seeing the explosive growth of the iPad devices and platform, Defendant Päivinen and his friends decided that they had a great opportunity to capitalize on their computer version of the BattleLore® game by distributing and selling it through the Apple App Store."

While the complaint includes some language that you would expect to see in an unfair competition claim under Section 43(a) of the Lanham Act, references such as "likely to cause confusion," "business goodwill" and "exclusive rights," there is no claim that the Battlelore trademark has been infringed nor any allegation that any non-traditional trademark or trade dress rights exist or have been infringed, so it is unclear exactly what "exclusive rights" have been violated under Section 43(a) of the Lanham Act.

To prevail on its federal Lanham Act unfair competition claim, Fantasy Flight will need to prove that it owns distinctive common law trademark rights that have been infringed. Since Fantasy Flight has not alleged infringement of the Battlelore trademark, perhaps it intends to rely on non-traditional trademark rights, such as trade dress or the look and feel of the BattleLore® game.

If so, it needs to say so, but, to date, the initial complaint fails to specifically identify any traditional or non-traditional common law trademark rights that have been violated, and it has failed to articulate the elements of a non-functional and protectable common law trade dress right.

Perhaps the most intriguing line in the complaint is the assertion and admission that "Plaintiff is currently ignorant of the true business form of Puffin Software." Personally, I'd choose a different word to explain when I don't know and can't figure out something. Ignorant is too easily confused with stupid.

Although it is undoubtedly true for me, instead of saying, "I'm ignorant when it comes to board games involving war strategy, adventure, and fantasy," I'd probably say something more like "I'm unaware or that I have no particular knowledge or experience with those kinds of games."

In any event, given the apparent pleading failures in the complaint, only time will tell whether a motion to dismiss the Lanham Act claim might reveal one more point of ignorance for Plaintiff.