

Firm Client Global VR Wins Appeals Victory in Video-Golf Copyright Wars



CLIENT HIGHLIGHTS

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If you've spent any time at a sports bar or video arcade, you've probably noticed other patrons vigorously slamming their hands against the trackball of a video-golf game. The genre has revolutionized the coin-operated video-game market, generating enormous revenues for manufacturers and owner/operators in machine sales and game play. It even has spawned the emergence of professional video-golf players who travel around the country competing in tournaments.

Firm client Global VR manufactures and sells one of the two leading games, EA Sports™ PGA Tour® Golf, which is based on the popular Electronic Arts home video-golf game, Tiger Woods PGA Tour® Golf. The PGA Tour game, which includes realistic depictions of actual golf courses such as Pebble Beach and Spyglass Hill and allows one to play as PGA Tour golfers, competes against the popular Golden Tee Fore! Shortly after Global VR introduced its game, Golden Tee's manufacturer, Incredible Technologies, based in Chicago, Illinois, brought suit against Global VR, claiming that the PGA Tour game infringes Golden Tee copyrights and trade dress.

Request for Preliminary Injunction Denied

Prior to trial, Incredible Technologies filed a motion for preliminary injunction, to stop sales and operation of PGA Tour games. After a six-day evidentiary hearing in the United States District Court for the Northern District of Illinois, the court issued a 27-page published decision in October 2003 denying the motion, holding that most of the claimed features of Golden Tee were not protected for a variety of reasons: that the features in question were functional in nature, constituted basic "modes of operation," or were intrinsic to the depiction of golf or to video-arcade games in general. The court also found that the PGA Tour game was sufficiently different from Golden Tee as to not infringe any copyright-protected rights.

Incredible Technologies appealed, but on March 15, 2005, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision in favor of Global VR, denying Incredible Technologies' request for a preliminary injunction. The case breaks some new ground in the copyright arena by clarifying that designs dictated by functional concerns are entitled to lower protections than those that incorporate creative elements.

Incredible Technologies argued that the controls used in the Global VR game, as well as how those controls are described, infringed on Incredible Technologies' copyright. In both games, players use a trackball along with several buttons to play. The layout of the trackball and buttons is almost identical in the two games, and both games issue similar instructions to explain how to use the controls. In evaluating whether Incredible Technologies was likely to succeed on its copyright infringement claim, the Seventh Circuit found that the trackball system was a functional feature and not entitled to copyright protection. This then left only descriptive elements of the games' features, such as arrows explaining how to operate the trackball system. The court looked at whether functional or creative concerns governed the design of

the instruction. Finding functional concerns were paramount, the court ruled that the instructional graphics are merely utilitarian explanations of how to operate the game and that the element of creativity in the instructions is less than minimal. Accordingly, only virtually identical copies are prohibited, and Global VR's instructions are sufficiently different so as not to infringe.

A Notable Decision

The court's decision is also notable in that it found that, to create a realistic video golf game, one has to include certain elements like golf clubs, golf courses, and wind meters. The inclusion of such necessary features is protected by the *scenes à faire* doctrine, and only virtually identical copying is prohibited. Global VR's uses real golf courses and players, as opposed to the imaginary courses and players in the rival game, rendering them sufficiently different so as to not infringe.

The case now will return to the district court for further proceedings. With this decision in hand, Global VR expects to move for summary judgment as to all of Incredible Technologies' copyright and trade dress claims.