

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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BIG DADDY GAMES, LLC,

Plaintiff,

v.

OPINION AND ORDER

12-cv-449-bbc

REEL SPIN STUDIOS, LLC;  
GAME MANAGEMENT CORP.;  
JAMES L. DONKER; DAVID E. GROND;  
PATRICK YOUNG; WILLIAM STIMAC;  
MICHAEL LINDEMAN; RHODY R. MALLICK;  
DALE CEBULA; KATHLEEN MALONEY;  
MATTHEW BARRETT; ROBERT L. DIENER;  
THE LYONS DEN DL, LLC; NIGL'S, INC.;  
GAMEDAY SPORTS BAR, INC.;  
ANTLERS SPORTS BAR & GRILL, LLC;  
OSHKOSH LANES LLC; BACK AGAIN  
STADIUM BAR, INC.; MR. D'S TWO, LLC;  
SUSIE'S TRACKSIDE LLC; LAST HURRAH LLC;  
HOTEL PUB, L.L.P.; WOOD SHED, INC.;  
GEORGE SIMONIS; Q GAME TECHNOLOGIES  
PTY LTD; and NICK MCLEOD,

Defendants.

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This case is scheduled for trial on June 3, 2013. The parties have filed several motions in limine which I will address in this order. Any reference to "defendants" in this order includes all defendants with the exception of defendant George Simonis, who is proceeding pro se and who I identify separately.

A. Plaintiff's Motions in Limine

I. Motion to exclude certain testimony of Michael Lindeman, James Donker and Robert Diener, dkt. #256

Plaintiff has moved to exclude opinion testimony from Lindeman, Donker and Diener regarding why customers purchase or play video amusement games. Plaintiff contends that this testimony is expert testimony because Lindeman, Donker and Diener offer opinions about customers “as a whole” on the basis of their experience in the video game industry and that lay persons could not offer such opinions based merely on their perceptions. Plaintiff contends that these opinions should be excluded because (1) defendants did not disclose Lindeman, Donker and Diener as experts and did not provide a complete statement of their opinions and the basis or reasons for them; (2) these individuals are not qualified to testify as experts on this issue; and (3) their testimony on this issue is not reliable.

I am granting this motion in part and denying it in part. Defendants may present the opinions of Donker and Diener regarding why customers purchase and play certain video games because the opinions they offer in their declaration are not expert opinions. Under Rule 701 of the Federal Rules of Evidence, lay witnesses may offer opinion testimony that is “(a) rationally based on the witness’s perception; (b) helpful . . . to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Donker and Diener’s testimony is helpful to a fact in issue (damages attributable to infringement), is based on their personal perceptions and is not based on scientific, technical or other specialized knowledge.

Donker states that “in [his] experience, patrons play amusement video-game machines based on the game play and not the graphics included in such video-game machines” and that

“Game Management’s customers pay very little, if any, attention to what specific amusement video-game machines are placed in their establishments and instead, they simply permit Game Management to decide which specific amusement video-game machines to place in their establishments. Donker Dec., dkt. #275, ¶¶ 13-14. Similarly, Diener states that “[i]n [his] 31 years of experience in running [his] establishment, patrons that play amusement video-game machines play whatever video amusement game machines are available at my establishment,” and that he “pay[s] little to no attention to what specific amusement video-game machines are placed in my establishment and instead let[s] JBM Amusement decide which specific amusement video-game machines are kept in [his] establishment.” Diener Dec., dkt. #276, at ¶¶ 7-8. These opinions are based on Diener and Donker’s personal knowledge and experience as customers or observers in a tavern. They are the sorts of opinions that a lay person spending time in a tavern could develop after watching and speaking with patrons about the play of amusement video-game machines. The person could testify as to what he or she observed while at the tavern without any specialized or technical knowledge. Plaintiff is free to cross-examine Diener and Donker regarding the basis for their opinions, including questions about how closely they watched tavern patrons, how often they engaged in conversation about the reason for game play and whether they asked any patron specifically whether the graphics mattered to them. Plaintiff can make arguments about the weight that should be given Diener and Donker’s opinions based on their answers to such questions, but I will not preclude them from testifying on this issue.

Defendants may also introduce Lindeman’s opinions on this issue, to the extent his opinions are based either on Lindeman’s personal knowledge and experience. This includes Lindeman’s opinions about what he has observed in taverns. However, some of the opinions Lindeman provides in his declaration go beyond what is admissible as lay testimony. In

particular, Lindeman states that “the graphics and arrangement of the graphics” in an amusement video-game machine “accounts for, at most, 10% of the reason why a patron plays such a video game.” Lindeman Dec., dkt. #274, at ¶ 20. He also states that “the game play is at least 40% of the reason why a patron plays an amusement video-game machine and the simple thrill of winning and being able to continue to play without the patron having to insert more money is 50% of the reason why a patron plays such a video-game.” Id. at ¶ 21. Lindeman goes on to give an opinion about the amount of damages to which plaintiff could be entitled on the basis of these percentages.

Lindeman’s opinions about specific percentages related to “why a patron plays” a game, and the related damages, are not opinions that a lay person could form simply from operating a tavern or observing tavern patrons. To form these opinions, a lay person would need to engage in specific data collection and be able to provide a detailed explanation of how he reached such numbers. Lindeman provides no facts or data in his declaration to explain how he reached these specific percentages, stating only that his opinions are based on his “experience.” However, Lindeman does not explain how his “experience” in the industry helped him come up with specific percentages regarding why patrons in general play games. Therefore, these opinions will be excluded.

In sum, defendants may present the opinions of Diener, Donker and Lindeman regarding why customers purchase or play video amusement games, so long as the opinions are based on their specific personal knowledge, observations and experience in the video amusement game industry. Defendants may not present Lindeman’s opinions in which he breaks down by percentage the reasons why customers play video amusement games.

2. Motion to permit lay testimony of Steven Haenchen, dkt. #259

In the April 10, 2013 summary judgment opinion and order, I excluded Steven Haenchen's expert report on the ground that his conclusions regarding the similarity between plaintiff's and defendants' games were not relevant to determining whether an "ordinary observer" would find plaintiff's and defendants' games to be "substantially similar." Dkt. #238 at 49-50. Plaintiff has requested permission to call Haenchen as a lay witness at trial for the sole purpose of introducing pages from his expert report that include screen shots of plaintiff's and defendants' versions of Spooky Spins, Reef Reels and Egyptian Treasure. Haenchen would not offer any opinion about the similarity of the screen shots; instead, his testimony would be limited to introducing and authenticating the screen shots.

I am granting this motion. The screen shots from Haenchen's report are relevant to whether defendants copied plaintiff's games. So long as Haenchen does not offer any opinion about whether he thinks the games are substantially similar, allowing him to introduce the screen shots would not be contrary to my previous ruling. Further, I am not persuaded by defendants' argument that they would be prejudiced by Haenchen's testimony. Although plaintiff did not disclose Haenchen as a lay witness, defendants long have been aware that plaintiff intended to introduce Haenchen's report and the screen shots. There is no surprise or prejudice.

That being said, it would be a far better use of trial time if the parties simply would stipulate before trial to the authenticity of these screen shots and other similar documents. Particularly because this is a court trial, there is no need to call witnesses solely for the purpose of authenticating documents over which there is no dispute.

3. Motion to exclude evidence of the claimed illegality of the games, dkt. #262

In the summary judgment opinion, I concluded that defendants could not rely on the doctrine of unclean hands to bar plaintiff's infringement claim because defendants cited no authority suggesting that a copyright holder's illegal use of otherwise valid copyrights should be a bar to enforcement of those copyrights. Dkt. #238 at 38-40. I did not address whether plaintiff's alleged illegal activities (using its copyrights in "gambling machines") would be relevant to the damages it could recover at trial because none of the parties raised that issue in their summary judgment motions.

Plaintiff has moved to exclude any reference, argument or evidence regarding the claimed illegality of plaintiff's video amusement games, including the relation of such evidence to the computation of damages. In their brief in opposition, defendants do not argue that evidence regarding illegality is relevant to the computation of damages. Thus, they have waived that issue and I will grant plaintiff's request to preclude such evidence as it relates to damages. However, defendants contend that plaintiff's alleged illegal use of its games is relevant to plaintiff's request for injunctive relief. In particular, defendants contend that plaintiff cannot seek the equitable relief of a permanent injunction because of plaintiff's alleged illegal use of its copyrights.

I am not persuaded by defendants' arguments. Defendants cite several cases discussing or applying the general doctrine of unclean hands, but cite no cases with facts similar to those in this case. For example, in Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 816-17 (1945), the Supreme Court held it was proper to refuse enforcement of a patent that the patent owner had acquired by failing to disclose false data and testimony to the patent office. This makes sense because the patent owner should not have obtained protection for a patent on the basis of false information. See

also Shondel v. McDermott, 775 F.2d 859, 868 (7th Cir. 1985) (explaining that patent owner should not be permitted to enforce patent that was acquired “in violation of antitrust limitations on patent pooling” and that trademark owner should not be permitted to enforce “misleading” trademark). However, in this case, plaintiff’s copyright is not illegal, invalid or unenforceable because of actions plaintiff took in obtaining the copyright or because of the nature of the copyright itself. As I explained in the summary judgment opinion, “illegality is not a bar to copyrightability.” Dkt. #238 at 39 (quoting Flava Works, Inc. v. Gunter, 689 F.3d 754, 756 (7th Cir. 2012)).

In addition, plaintiff’s alleged illegal use of its copyrighted games as gambling machines is not related directly to its claims against defendants. As is explained in Nimmer on Copyright, an unclean hands defense may apply if “the plaintiff’s transgressions is of serious proportions and relates directly to the subject matter of the infringement action. For instance, the defense has been recognized when the plaintiff misused the process of the courts by falsifying a court order or evidence, or by misrepresenting the scope of his copyright to the court and opposing party.” 4 Nimmer on Copyright § 13.09[B]. Thus, in Mantek Division of NCH Corp. v. Share Corp., 780 F.2d 702, 704-08 (7th Cir. 1986), the court of appeals held that the district court should have considered the defendants’ unclean hands defense related to plaintiff’s alleged involvement in commercial bribery because the defendants’ defense was intertwined closely with plaintiff’s claims. In particular, the plaintiff was attempting to enforce a non-compete agreement against defendants who were former employees that left the plaintiff’s employment to avoid participating in commercial bribery. Id.

In this case, there is no allegation that plaintiff’s alleged illegal activity has been directed toward this litigation or has injured defendants. Defendants make no other argument about why

plaintiff's alleged illegal use of its own games means that defendants should be permitted to sell and distribute the games freely without authorization. Therefore, I am granting plaintiff's motion to exclude evidence and argument regarding whether plaintiff's games qualify as gambling machines under Wisconsin law. (I note that defendant George Simonis, who is proceeding pro se, also filed a brief in opposition to this motion, dkt. #283, which was docketed as a "counter motion." That "motion" raises no persuasive arguments and will be denied.)

#### B. Defendants' Motions in Limine

##### 1. The scope of plaintiff's copyright protection, dkt. #255

Defendants seek an order from the court regarding "the scope of [plaintiff's] copyright protection," arguing that this is an open issue for trial. In particular, they ask for a ruling that the selection and arrangement of the symbols and background graphics in the regular and bonus screens are the only protected expression in the games. Defendants identify several aspects of the games that they contend are not protected because they qualify as titles, names, slogans, coloring, typeface, functional or useful articles or scènes à faire.

I am denying defendants' motion. As an initial matter, I rejected several of defendants' arguments previously, at the summary judgment stage, explaining that it was the combination of the various elements that was original and protected by copyright. Dkt. #238 at 34 ("[E]ven if elements of a work are not capable of protection individually, "it is the unique combination of these common elements which form the copyrighted material.") (quoting Roulo v. Russ Berrie & Co., 886 F.2d 931, 939 (7th Cir. 1989)). Defendants provide no persuasive reason why that decision should be reconsidered.

Additionally, for the purpose of establishing copyright infringement, it is not necessary



for courts to dissect the elements of a copyrighted work to determine which elements are protected and original and which are not. Roulo, 886 F.2d at 939 (“dissection of the subject matter into copyrighted and unprotected elements is generally rejected in favor of examining the ‘total concept and feel’ of the copyrighted work”) (citing Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir. 1982)). Thus, in JCW Investments, Inc. v. Novelty, Inc., 482 F.3d 910, 917 (7th Cir. 2007), involving the copyright for a doll, the court rejected the defendant’s argument that the court “take the entity that is [the doll], subtract each element that it contends is common, and then consider whether [defendant] copied whatever leftover components are creative.” The court stated that

The problem with this argument is that the very combination of these elements as well as the expression that is [the doll] himself are creative . . . [It] ignores the fact that the details—such as the appearance of [the doll’s] face or even his chair—represent creative expression.

Id. Thus, in deciding whether defendants copied plaintiff’s games, I will consider the “total concept and feel” of the games using the “ordinary observer” test, rather than dissect each element.

It appears that defendants’ motivation for bringing this motion in limine relates more to the calculation of damages than liability. Under 17 U.S.C. § 504(b), plaintiff is entitled to recover “the actual damages suffered by him or her as a result of the infringement.” Proving actual damages in a copyright infringement case involves burden shifting. First, the copyright owner “is required to present proof only of the infringer’s gross revenue.” Id. Then the burden shifts to the defendant to “prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” Id. Defendants intend to argue that plaintiff may recover damages that are attributable only to the protected aspects of the games,

namely, the arrangement of the graphics and symbols, and nothing else. Thus, defendants will argue at trial that they sold and made money from the games for reasons other than the particular graphics and symbols included in the games.

Defendants are free to make these arguments at trial. Nonetheless, I will not dissect the various elements of plaintiff's games. Plaintiff's games are protected as compilations of various original and non-original elements. If defendants can prove that their earnings are attributable solely to elements that are not protected as compilation, they will have met their burden. However, defendants have not shown that a detailed dissection of the games would be necessary to the evidence and arguments they intend to make. As the Supreme Court has explained, when a defendant has commingled infringing elements with noninfringing elements, it is defendants' burden to prove that their profits were attributable to noninfringing elements. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 567 (1985) ("[A]n infringer who commingles infringing and noninfringing elements 'must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him.'"). It is also defendants' burden to show why its motion in limine should be granted. Because defendants have not done so, their motion will be denied.

## 2. Motion to exclude Curtis Reynolds from testifying at trial, dkt. #270

Defendants have moved to exclude plaintiff's damages expert, Curtis Reynolds, from testifying at trial on the grounds that he is not qualified as an expert on copyright damages and his methods are not reliable. Specifically, defendants argue that Reynolds (1) has not provided an expert opinion in a copyright case before; (2) never saw the games or the copyrights covering the games; (3) has no knowledge, skill, experience, education or training related to determining

copyright damages or gross revenue related to games; and (4) used an unreliable method by assuming, without explanation, that there is a relationship between defendants' earnings from the games and infringement of the copyrights of the games.

I am denying defendants' motion. With respect to Reynolds's expertise, defendants do not explain why Reynolds would need expertise or experience in copyright, gaming or calculating copyright damages or why Reynolds would need to study the games at issue to provide an expert opinion in this case. Reynolds's expertise is in accounting and he has testified as a damages expert in accounting in 29 cases in the last four years. He has the necessary expertise to testify about defendants' gross revenue from their use of the games. Although there may be good arguments why Reynolds should have copyright experience to testify in this case, defendants do not identify what those reasons are and I will not make up arguments for them.

Second, defendants have not shown that Reynolds's methods are unreliable. Under 17 U.S.C. § 504(b), plaintiff is required to "present proof only of the infringer's gross revenue." It is up to defendants to prove that its revenues are attributable to factors other than the copyrighted work. *Id.* It is true that plaintiff must show some nexus between the gross revenues and the infringement, O'Connor v. Cindy Gerke & Associates, Inc., 300 F. Supp. 2d 759, 773 (W.D. Wis. 2002), but Reynolds's report satisfies this requirement. In determining defendants' gross revenues, Reynolds used defendants' invoices relating specifically to the games at issue. This is sufficient. Defendants are free to cross-examine Reynolds at trial regarding his conclusions to the extent they disagree with them.

Finally, defendants make vague arguments about prejudicial or improper statements in Reynolds's report, but fail to develop their arguments. Defendants are free to object at trial to any testimony by Reynolds that they think is inadmissible, but I will not strike any particular

testimony without clear justification for doing so.

3. Motion to preclude plaintiff from seeking to disgorge profits from defendants Game Management, Q Game, Donker, Grond, Young, Stimac, Lindeman, McLeod or the tavern defendants, dkt. #272

In their final motion in limine, defendants contend that plaintiff cannot prove damages with respect to defendants Game Management, Q Game, Donker, Grond, Young, Stimac, Lindeman, McLeod or the tavern defendants because plaintiff has no evidence that any profits earned by these defendants are attributable to copyright infringement. Defendants contend that plaintiff cannot prove that the revenue Game Management and the tavern defendants earned from patrons playing the alleged infringing games was related to infringement of the protected elements of the games, rather than unprotected elements such as the “source code-induced game play.” Additionally, defendants contend that plaintiff cannot prove that Q Game, Donker, Grond, Young, Stimac, Lindeman or McLeod generated revenue by infringing plaintiff’s copyrights.

Defendants’ arguments in support of this motion are similar to those it made in support of its motion to exclude the testimony of plaintiff’s damages expert, and I am denying the motion for the same reason. It is plaintiff’s burden to show only that defendants’ profits from selling games to customers or from offering the games for use in their bars and taverns have some nexus to defendants’ alleged copyright infringement. Plaintiff intends to introduce expert testimony, invoices and receipts at trial to satisfy this burden. At trial, defendants can challenge plaintiff’s evidence as well as put in its own evidence about why their revenues are attributable to something other than plaintiff’s protected copyrights. Although I may conclude after hearing

the evidence that plaintiff has failed to meet its burden or that defendants successfully rebutted plaintiff's evidence, I will not decide before trial whether plaintiff's evidence is sufficient.

C. Defendant George Simonis's Motion Asking Plaintiff to Explain What Games It Is Asserting and How Simonis Has Infringed Them, dkt. #282

Defendant Simonis, who is proceeding pro se, has filed a motion in limine asking that plaintiff be required to identify what games they are asserting and how he has infringed them. This motion does not make sense. Plaintiff's complaint identifies the basis for its copyright claim against Simonis by stating that Simonis sold Spooky Spins, Egyptian Treasure and Reef Reels on his website without authorization. Am. Cpt., dkt. #82, ¶ 80. To the extent Simonis is contending that plaintiff failed to provide certain discovery to him, such as pictures or copies of the games, Simonis should have filed a motion to compel discovery at the appropriate time. This is not an issue that can be resolved before trial. Therefore, I am denying the motion.

ORDER

IT IS ORDERED that

1. Plaintiff Big Daddy Games, LLC's motions in limine are resolved as follows:

a. Plaintiff's motion to exclude certain testimony of Michael Lindeman, James Donker and Robert Diener, dkt. #256, is GRANTED IN PART and DENIED IN PART. Defendants may present the opinions of Diener, Donker and Lindeman regarding why customers purchase or play video amusement games, so long as the opinions are based on the witnesses' specific personal knowledge, observations and experience in the video amusement game industry. Defendants may not present Lindeman's opinions in which he breaks down by percentage the

reasons why customers play video amusement games.

b. Plaintiff's motion to permit lay testimony of Steven Haenchen, dkt. #259, is GRANTED.

c. Plaintiff's motion to exclude evidence of the claimed illegality of the games, dkt. #262, is GRANTED.

2. Defendants' motions in limine are resolved as follows:

a. Defendants' motion regarding the scope of plaintiff's copyright protection, dkt. #255, is DENIED.

b. Defendants' motion to exclude Curtis Reynolds from testifying at trial, dkt. #270, is DENIED.

c. Defendants' motion to exclude plaintiff from seeking to disgorge profits from defendants Game Management, Q Game, Donker, Grond, Young, Stimac, Lindeman, McLeod or the tavern defendants, dkt. #272, is DENIED.

3. Defendant George Simonis's motion in opposition to plaintiff's motions in limine, dkt. #283, and his motion requesting that plaintiff be required to identify the games it is asserting and its theories of infringement, dkt. #282, are DENIED.

Entered this 29th day of May, 2013.

BY THE COURT:

/s/  
BARBARA B. CRABB  
District Judge