

# Shoot to kill the competition

## One European trademark application still under review could cause havoc to the video game industry



*Ben Wodecki reports*

New moving trademarks have the potential to advance the trademark world towards new horizons, but with new forms of trademarks potentially closing off avenues for disputable rights in unusual areas, the potential for mishap is present and legislative intervention could be necessary.

EUTM017282203 is a multimedia mark filed by Rebellion, a video game developer best known for its Sniper Elite series. The trademark in question relates to the Sniper Elite games and protects the franchise's key draw—gory slow-motion kills.

The games allow players to pick up the sniper rifle of Lieutenant Karl Fairburne in a third-person tactical shooter stealth game centred around various theatres of World War II. Players can pick off soldiers from great distances, with the camera following the bullet as it punctures through bodies and organs, displaying each gory detail in slow motion.

Rebellion filed a 25-second clip at the EU Intellectual Property Office (EUIPO) in 2017 depicting three of these gory killcams in classes nine, 28, and 41 in Nice classifications.

Not only is the clip fairly long for a motion mark, but its gory contents could lead to it being refused. Furthermore, there is a possibility that this mark, if granted, could stop other game developers that want to use similar mechanics, such as a slow motion

bullet cam, which is already present in other games. The application is still under examination, but should it be refused? What can the trademark world learn from this perplexing application?

### Sharpshooting situations

Rebellion's attempts to trademark this mechanic could be a way of stopping infringing 'clone' games. Since the rise of mobile gaming, video games have been plagued with such copycats and last year PUBG Corporation, the maker of PlayerUnknown's Battlegrounds, took a clone game to court claiming its mechanics infringed its copyright.

If Rebellion is successful, it is likely other companies will follow suit to tackle copy-cats. However, a great concern from the potential grant of this trademark is that it may hold the power to lock away in-game mechanics. Michael Lee, founding partner at Lee Law dubbed the mark "game-changing".

Some are concerned that it could cause problems throughout the video game industry as it might allow for game developers to create a monopoly on certain looks or camera shots that have, until now, been commonly used in the industry. Morrison Rothman senior counsel Keith Cooper described Rebellion's mark as an "end-run around traditional ways to protect gameplay footage".

The mechanic in question has already been used in a similar way by a number of video game, including Max Payne, Red Dead Redemption, and Fallout 4.

## Moving Marks • Features



Often dubbed ‘bullet time’, many of these mechanics are similar—a bullet traveling towards an enemy in slow motion.

Rebellion was not the first to use such a mechanic and examples of similar concepts can be seen in other forms of media, including cinema.

Lee offers a similar example to Rebellion’s mark from the *Mortal Kombat* games. If its developers, NetherRealm Studios attempted to obtain a similar trademark for its new style of x-ray cutscenes during bone-crushing combos, would that lead to one claiming actual use against the other? This is a question that is yet to be answered.

Would there have been any benefit if Rebellion registered the mark as another form of IP rather than a moving trademark? Patents are hard to obtain, especially for software, and can be very expensive.

Copyright could have been an avenue, but the concept of copyrighting a killcam mechanic could be considered *scènes à faire*, which prevents the copyrighting of functional elements that are indistinguishable from the underlying idea such that there would be no other way to express the idea.

While we await the results of Rebellion’s EUIPO application, how might the US trademark system react to such a mark? Alan Behr, partner at Phillips Nizer says a grant would be unlikely. He adds that Rebellion appears to “have the pig by the wrong ear”.

In the US, the trademark could also raise the scandalous marks issue. The 25 second moving mark clip features three headshots, which could be upsetting to some.

### Crosshairs trained on the future

Lee warns that trademarked game mechanics could “stifle video game creativity”. He explains that development studios would have to conduct major research before creating games to find out if some key mechanics are trademarked and not usable.

Generally, this is not how video game companies operate. Behr, who spent time as the chief legal officer for the New York company that eventually became Atari, says that, historically, video game companies have been “particularly courteous with each other when it came to trademark rights”.

He remarked on when the company announced the first-person shooter game *Quake* without owning the trademark rights, and no one had tried to take advantage by “grabbing the mark”.

While a company protecting its rights is not bad faith, it is rare that these sorts of concepts are sought to be protected in the video game industry and it may seem unusual.

But those in the industry must begin to come to terms with the fact that, if this moving mark is granted by the EUIPO, the future of video game mechanics could change drastically.