Incredible Technologies, Inc. v. Virtual Technologies, Inc. 400 F.3D 1007 (7TH CIR. 2005)

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I. INTRODUCTION

In Incredible Technologies, Inc. v. Virtual Technologies, Inc., the United States Court of Appeals for the Seventh Circuit had to determine whether federal law protected the constituent elements of Golden Tee, a popular video golf game, from copyright and trade dress infringement by the manufacturer of PGA Tour Golf, a rival video game. In February of 2003, Golden Tee’s creator and manufacturer, Incredible Technologies, Inc. (“IT”), filed claims of copyright and trade dress infringement against Virtual Technologies, Inc., d/b/a Global VR (“Global”), creator of PGA Tour Golf, in the United States District Court for the Northern District of Illinois. IT alleged that Global infringed its copyrights in Golden Tee’s instructional display and video game imagery, and that Global infringed on Golden Tee’s trade dress. The district court denied IT’s request for a preliminary injunction, concluding that IT had failed to demonstrate a likelihood of success on the merits of either of its copyright claims or its trade dress claim. On appeal, the Seventh Circuit in Incredible Technologies held that, notwithstanding the substantial similarity between Golden Tee and PGA Tour Golf, Golden Tee’s instructional display, video game imagery, and trade dress were not entitled to protection from

1. Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007 (7th Cir. 2005).
2. Id. at 1010.
3. Id. at 1010-11.
4. Id. at 1010.
infringement under federal law.  

II. BACKGROUND

Golden Tee, a popular coin-operated video golf game found in taverns across the United States, runs on computer software which projects sounds and images of golfers and golf courses through a video screen and speakers in a kiosk-like display cabinet. Players roll a “trackball,” a plastic white ball embedded on the game’s control panel, first backwards, then forwards, to simulate the swing of a virtual golfer on the screen. Golden Tee’s easy-to-use format not only made it one of the most successful coin-operated games of all time, surpassing all kinds of classic games like PAC-MAN and Space Invaders, but also spurred the production of PGA Tour Golf, a rival game that had been designed to be as similar to Golden Tee as possible. In response to the threat posed by PGA Tour Golf to Golden Tee’s dominance of the video golf game market, IT filed claims of copyright and trade dress infringement against Global in the United States District Court for the Northern District of Illinois in February of 2003.

IT asserted two claims of copyright infringement before the district court. IT first contended that the instructions that Global used to inform players how to operate PGA Tour Golf’s trackball, as well as the layout of the controls themselves, were identical to the instructions and layout of controls on the Golden Tee machine. The second infringement claim concerned IT’s copyright in the imagery presented on Golden Tee’s video display screen. IT argued that the images of golf courses, clubs, and golfers depicted in PGA Tour Golf were indistinguishable from

5. Id. at 1016.
6. Id. at 1009.
7. Incredible Techs., 400 F.3d at 1009-10.
8. Id. at 1009.
9. Id. at 1010.
10. Id.
11. Id. at 1009.
12. Id. at 1010.
13. Incredible Techs., 400 F.3d at 1009.
those appearing in the Golden Tee game.\textsuperscript{14}

In a third claim, IT alleged that PGA Tour Golf's control panel infringed on Golden Tee's trade dress.\textsuperscript{15}

IT petitioned the district court for a temporary restraining order, but that relief was denied.\textsuperscript{16} Thereafter, IT sought a preliminary injunction against Global.\textsuperscript{17} Following a six-day hearing, the district court denied IT's request.\textsuperscript{18} Although the district court found that Global had access to and directly copied Golden Tee's trackball instructions and video imagery, the court held that IT failed to demonstrate a likelihood of success on the merits of its copyright and trade dress claims so as to justify issuing a preliminary injunction.\textsuperscript{19} The district court determined that the manner in which IT expressed the trackball instructions on Golden Tee's control panel was not the result of creative choice.\textsuperscript{20} Rather, because the composition of the instructions had been determined by utilitarian concerns, the court found that IT was entitled to protection only from virtually identical copying — which had not been shown.\textsuperscript{21} Furthermore, the district court concluded that the placement of buttons on Golden Tee's control panel was dictated by a concern for convenience.\textsuperscript{22} As to IT's claim of infringement on Golden Tee's video game imagery, the district court held that, because Golden Tee's video displays were composed of images which were inherent in the game of golf, the \emph{scenes a faire} doctrine precluded copyright protection for such imagery.\textsuperscript{23} Finally, the district court determined that IT's trade dress was not entitled to protection from infringement because the control panel and trackball were functional.\textsuperscript{24} IT appealed the district court's ruling to the United States Court of Appeals for the Seventh

\textsuperscript{14} Id. at 1010.
\textsuperscript{15} Id. at 1009.
\textsuperscript{16} Id. at 1010.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} \textit{Incredible Techs.}, 400 F.3d at 1010.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 1010-11.
\textsuperscript{22} Id. at 1014.
\textsuperscript{23} Id. at 1011, 1014.
\textsuperscript{24} Id. at 1011.
III. LEGAL ANALYSIS

The United States Court of Appeals for the Seventh Circuit affirmed the district court’s order denying IT’s request for a preliminary injunction. Reviewing the district court’s decision for abuse of discretion, the court of appeals first held that the lower court did not abuse its discretion in holding that the instructional display and layout of buttons on the Golden Tee machine were dictated by utilitarian concerns and were, therefore, entitled to protection only from identical copying. The Seventh Circuit also found no abuse of discretion in the district court’s determination that the *scenes a faire* doctrine barred copyright protection for Golden Tee’s video imagery. The court further held that the district court properly concluded that IT had no likelihood of success on the merits of its trade dress claim because Golden Tee’s trade dress was functional.

A. The Scope of Copyright Protection as Applied to Video Arcade Games.

Before turning to the merits of IT’s appeal, the Seventh Circuit found it germane to comment on the applicability of certain principles of copyright law to an infringement dispute having its origin in the particular context of video arcade games.

To prevail on a copyright infringement claim, the Seventh Circuit noted, a plaintiff must prove ownership of a valid copyright and copying of constituent elements of the work that are original. Copying will be inferred, the court stated, when the defendant had access to the copyrighted work and the accused work is

25. *Incredible Techs.*, 400 F.3d at 1012.
26. *Id.* at 1016.
27. *Id.* at 1011.
28. *Id.* at 1013-14.
29. *Id.* at 1015.
30. *Id.*
31. *Incredible Techs.*, 400 F.3d at 1011-12.
32. *Id.* at 1011.
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substantially similar to the copyrighted work. The test for substantial similarity, in turn, requires a court to determine whether the defendant copied from the plaintiff's work and, if so, whether the copying went so far as to constitute an improper appropriation.

After reviewing the record, the Seventh Circuit found it clear that Global had set out to copy Golden Tee. Having determined that Global copied IT's work, the court observed that the only issue remaining was whether Global's copying went so far as to constitute an improper appropriation. The court noted that this issue would, in the run of the mill infringement case, be answered with reference to the "ordinary observer" test. That test asks whether an accused work is so similar to a copyrighted work that an ordinary observer would conclude that the defendant unlawfully infringed upon the plaintiffs' protectable expression. The Seventh Circuit, however, warned that the "ordinary observer" concept had to be viewed with caution in this case because, notwithstanding how similar an ordinary observer might conclude Golden Tee and PGA Tour Golf were, several elements of each game could not be copyrighted at all. Therefore, the court reasoned, the substantial similarity test was inapposite in this context because any substantial similarity which an "ordinary observer" might perceive between Golden Tee and PGA Tour Golf was caused by

33. Id. at 1011 (quoting Atari, Inc. v. North American Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir.1982)).
34. Id. at 1011 (citing Atari, 672 F.2d at 614).
35. Id. at 1011.
36. Id.
37. Incredible Techs., 400 F.3d at 1011 (citing Atari, 672 F.2d at 614).
38. Id.
39. Id.
40. Id.
41. Id. at 1012.
the juxtaposition of non-copyrightable elements.\(^{42}\)

Having articulated this important caveat, the court turned to the question of whether the district court abused its discretion in denying IT's request for a preliminary injunction.\(^{43}\)

**B. Golden Tee's Instructions and Control Panel Layout Are Not Creative**

Golden Tee's instructional display contained a visual representation of nine possible shots that could be made with the trackball, an arrow indicating which way to roll the trackball, and textual instructions.\(^{44}\) Before the Seventh Circuit, IT argued that, in effect, the district court had denied IT copyright protection in the instructional display because IT had chosen the best, most effective method of explaining how the trackball system functioned.\(^{45}\) The court observed that by framing the issue in that fashion, IT had misinterpreted the district court's holding.\(^{46}\) In the court's view, the district court had merely found that, although there may have been more than one way to explain how the trackball could be manipulated to effect a desired shot, the expressions on Golden Tee's control panel were utilitarian explanations of the system and not sufficiently original to merit copyright protection.\(^{47}\) Agreeing that the level of creativity present in these instructions was less than minimal, the court held that the district court's conclusion that the instructions were protected only from virtually identical copying — which did not exist here— was not an abuse of discretion.\(^{48}\)

The Seventh Circuit also found no abuse of discretion in the district court's conclusion that the layout of buttons on the control panel was motivated primarily by a concern for convenience.\(^{49}\) The court was satisfied that, to a large degree, the layout of Golden

\(^{42}\) Id.

\(^{43}\) Incredible Techs., 400 F.3d at 1012.

\(^{44}\) Id. at 1013.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Incredible Techs., 400 F.3d at 1014.
Tee’s control was the result of functional considerations.\(^5\) The placement of the trackball in the center of the control panel, the court reasoned, was necessary if both right-handed and left-handed players were to play the game equally well.\(^5\) Moreover, the court accepted Global’s argument that the buttons on its machine had to be placed, like Golden Tee’s, across the center of the panel for ease of manufacturing.\(^5\)

Accordingly, the Seventh Circuit held that the district court did not abuse its discretion in finding that IT failed to demonstrate a likelihood of success on the merits of its copyright infringement claim regarding Golden Tee’s instructions and control panel.\(^5\)

**C. Golden Tee’s Video Imagery is Subject to the Scenes a Faire Doctrine**

The second issue before the Seventh Circuit was whether the district court’s conclusion that Golden Tee’s video game imagery was subject to the *scenes a faire* doctrine constituted an abuse of discretion.\(^5\) The *scenes a faire* doctrine precludes copyright protection for incidents, characters, or settings which, practically speaking, are indispensable or standard in the treatment of a given topic.\(^5\)

The court held that the district court’s conclusion was not an abuse of discretion.\(^5\) In order to be realistic, the court reasoned, a video golf game such as Golden Tee or PGA Tour Golf must include images of golf courses, golf clubs, golfers, sand traps and water hazards because each feature was inherent in the game of golf.\(^5\) The court also observed that Golden Tee’s selection menus (for choosing players, courses, and clubs) were standard among all video arcade games.\(^5\) Therefore, the court concluded, because

\(^{50}\) Id.  
\(^{51}\) Id.  
\(^{52}\) Id.  
\(^{53}\) Id. at 1013-14.  
\(^{54}\) Id. at 1015.  
\(^{55}\) Incredible Techs., 400 F.3d at 1011.  
\(^{56}\) Id. at 1015.  
\(^{57}\) Id.  
\(^{58}\) Id.
those elements were indispensable to a realistic presentation of
golf in the video arcade format, the district court correctly
determined that the *scenes a faire* doctrine precluded copyright
protection in Golden Tee’s video imagery from everything except
virtually identical copying.\(^59\)

In the Seventh Circuit’s view, there were sufficient differences
between Golden Tee’s imagery and that of PGA Tour Golf to
preclude a finding of copyright infringement.\(^60\) Most significantly,
the court pointed to the fact that while Golden Tee’s golfers and
golf courses were generic, PGA Tour Golf’s players and courses
were representative of real-life golfers and courses.\(^61\) Moreover,
while both Golden Tee and PGA Tour Golf featured caricatures of
television golf announcers, the condescending phrases offered by
the announcers in each game were notably distinct.\(^62\)

Based on these considerations, the Seventh Circuit held that the
district court’s ruling that IT had not demonstrated a likelihood of
success on the merits of its claim that Global had infringed Golden
Tee’s copyrighted video game imagery was not an abuse of
discretion.\(^63\)

**D. Golden Tee’s Trade Dress is not Protected**

According to the Seventh Circuit, IT’s final claim, alleging
infringement on Golden Tee’s trade dress, required little
discussion.\(^64\) The term trade dress refers to the appearance of a
product when that appearance is used to identify the producer.\(^65\) In
order to succeed on this claim, the court observed, IT would have
to establish that its trade dress was nonfunctional, that it acquired a
secondary meaning, and that a likelihood of confusion existed
between Golden Tee’s trade dress and that of PGA Tour Golf.\(^66\) IT

\(^{59}\) *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Incredible Techs.*, 400 F.3d at 1015.

\(^{62}\) *Id.*

\(^{63}\) *Id.*

\(^{64}\) *Id.*

\(^{65}\) *Id.* (quoting Publications Int’l, Ltd. v. Landoll, Inc., 164 F.3d 337, 338
(7th Cir. 1998)).

\(^{66}\) *Id.* (citing Computer Care v. Service Sys. Enters., Inc., 982 F.2d 1063
could not meet this burden, the court found, because the fact that both Golden Tee's control panel and trackball were intertwined with artistic and utilitarian ingredients made each component functional.\(^{67}\) By definition, then, IT had no likelihood of success on that aspect of its trade dress claim.\(^{68}\) As to the machines' display cabinets, the court found that the visual presentation of each machine was sufficiently dissimilar to obviate any confusion between the two games.\(^{69}\) The court pointed out that while Golden Tee's cabinet was white and emblazoned with Golden Tee logos, PGA Tour Golf's cabinet was colored an intense blue and was dotted with PGA Tour Golf and EA Sports logos.\(^{70}\)

Finding that IT could not demonstrate a likelihood of success on the merits of its trade dress infringement claim, the court held that the district court did not abuse its discretion in denying IT a preliminary injunction on its trade dress claim.\(^{71}\)

**IV. CONCLUSION**

In *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, the United States Court of Appeals for the Seventh Circuit held that, because the creator and manufacturer of the Golden Tee video golf game could not demonstrate a likelihood of success on the merits of its copyright and trade dress infringement claims, its request for a preliminary injunction against the makers of the rival PGA Tour Golf game had been properly denied. The key element of the Seventh Circuit's decision was the court's determination that the "ordinary observer" test, regularly employed by courts as a means of gauging unlawful copyright infringement, was inapposite where, as in Incredible Technologies, the substantial similarity between two works flowed from non-copyrightable components. Heeding the principle that the copyright laws preclude appropriation of only those elements of a work protected by the

\(^{67}\) *Incredible Techs.*, 400 F.3d at 1012.
\(^{68}\) *Id.* at 1015.
\(^{69}\) *Id.*
\(^{70}\) *Id.* at 1016.
\(^{71}\) *Id.*
copyright,22 the court avoided granting protection to those elements of Golden Tee which, although most visible — the idea of a video golf game and the trackball system — were most clearly ineligible for copyright protection.

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72. Id. at 1011.