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RICHARD W. WIEKING
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NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAPCOM U.S.A., INC., a)
California corporation,)
)
Plaintiff,)
)
vs.)
)
DATA EAST CORP., a Japanese)
corporation and DATA EAST USA,)
INC., a California corporation,)
)
Defendants.)

No. C 93-3259 WHO
**MEMORANDUM DECISION
AND ORDER**

The motion of defendants, Data East Corp. and Data East USA, Inc. (collectively "Data East"), for summary judgment having come before the Court, the Court having considered the pleadings and having had the benefit of oral argument, and for the reasons stated by the Court at the hearing and hereinafter, Data East's motion for summary judgment is **DENIED** in part and **GRANTED** in part.

//

I.

1
2 In this action for copyright infringement, plaintiff
3 Capcom U.S.A., Inc. ("Capcom") alleges that Data East has copied
4 the distinctive appearances, special moves and combination
5 attacks of many of the characters of Capcom's videogame Street
6 Fighter II for use in its own fight video, Fighter's History. In
7 an opinion and order dated March 16, 1994 ("Order"), which
8 includes a detailed recitation of the facts of this case, the
9 Court denied Capcom's motion for preliminary injunction.

10 Data East maintains that the determinations made by the
11 Court in the Order are binding here and dictate a grant of
12 summary judgment in its favor. More specifically, Data East
13 maintains that based on (1) this Court's rulings under the
14 extrinsic test for copyright infringement; (2) the undisputed
15 facts concerning the audiovisual elements produced by the games;
16 and (3) the undisputed facts concerning other elements of popular
17 culture that existed prior to creation of the Capcom's game, Data
18 East is entitled to summary judgment on Capcom's claim for
19 copyright infringement.

20 In response, Capcom maintains that, despite the Order
21 denying its request for a preliminary injunction, summary
22 judgment is inappropriate for several reasons. First, it
23 maintains that because the Court found under the extrinsic test
24 of the Ninth Circuit's two-pronged test for copyright
25 infringement that several of Fighter's History characters and
26 moves were similar to protectable expression in Street Fighter
27 II, then, at a minimum, these items create a triable issue for
28 the jury.

1 Second, Capcom maintains that because the Court
2 identified similarities between Fighter's History and several
3 protectable elements in Street Fighter II under the extrinsic
4 test, then the entire game, including both protectable and
5 unprotectable expression, must be submitted to the jury for
6 analysis of similarity in "total concept and feel" under the
7 intrinsic test--the second part of the Ninth Circuit's two-
8 pronged test for copyright infringement.

9 Finally, Capcom maintains that the Court's rulings under
10 the extrinsic test regarding what did and did not constitute a
11 stereotype and what expression in Fighter's History was and was
12 not similar to protectable expression in Street Fighter II were
13 all premised on disputed factual issues, the resolution of which
14 is not appropriate for summary adjudication. Each of these
15 arguments is discussed in turn. The Court begins, however, with
16 an examination of the preclusive effect that determinations made
17 in an order denying a preliminary injunction have on a later
18 motion for summary judgment.

19 A.

20 Preclusive Effect of Preliminary
21 Injunction Determinations

22 A preliminary injunction is an extraordinary,
23 discretionary remedy. Equal Employment Opportunity Comm'n v.
24 Recruit U.S.A., Inc., 939 F.2d 746, (9th Cir. 1991). As a
25 general rule, a court's findings of fact and conclusions of law
26 on preliminary injunction "are not binding at trial on the
27 merits." See Univ. of Texas v. Camenisch, 451 U.S. 390, 395
28 (1981). As one court has noted "the decision of either the trial

1 or appellate court in granting or denying the temporary
2 injunction does not constitute the law of the case and will not
3 estop the parties nor the Court as to the merits of the case."
4 Benson Hotel Corp. v. Woods, 168 F.2d 694, 697 (8th Cir. 1948).
5 Moreover, denial of a motion for preliminary injunction does not
6 necessarily entitle the prevailing party to summary judgment.
7 Securities and Exchange Comm'n v. North Am. Research and Dev.
8 Corp., 59 F.R.D. 111, 114 (S.D.N.Y. 1972).

9 As the Seventh Circuit has noted, a court may be remiss
10 to rely on its findings of fact and conclusions of law made at
11 the preliminary injunction stage in deciding a motion for summary
12 judgment for at least two reasons: (1) the findings are often
13 based on incomplete evidence and a rushed consideration of the
14 issues and (2) "the questions focused on differ in deciding a
15 motion for preliminary injunction and in deciding a motion for
16 summary judgment." Communications Maintenance, Inc. v. Motorola,
17 Inc., 761 F.2d 1202, 1205 (7th Cir. 1985) (citation omitted).

18 In the instant matter, and with regard to the first
19 reason, the record regarding the audiovisual output of the two
20 games was well-developed by the time of the preliminary
21 injunction hearing. The Court recognizes, however, that since
22 the preliminary injunction hearing, considerable discovery has
23 taken place and produced new evidence that Capcom maintains
24 bolsters its initial argument that direct copying may have
25 occurred.

26 The second reason, regarding the different standards used
27 in the two motions, is also relevant. As the Seventh Circuit
28 noted:

1 In the [motion for a preliminary injunction] a
2 court considers whether there is a reasonable
3 likelihood that the moving party will prevail on
4 the merits; in the [motion for summary judgment] a
5 court considers whether there is any issue of
6 material fact remaining after construing the facts
7 in a light most favorable to the non-moving party.

8 Id. (emphasis in original) (citation omitted).

9 In holding that determinations made at the preliminary
10 injunction stage are not binding on a later motion for summary
11 judgment, courts have been careful to note that in resolving a
12 motion for preliminary injunction, courts are frequently required
13 to weigh evidence and make credibility decisions that are
14 inappropriate in the summary judgment context. The Third Circuit
15 has pointed out that:

16 on a motion for summary judgment the responsi-
17 bility of the district court is to determine if
18 there are triable issues, rather than to try those
19 issues and making findings based on the affidavits
20 and other materials accompanying the motion.

21 Country Floors v. Partnership of Gepner and Ford, 930 F.2d 1056,
22 1062 (3d Cir. 1991).

23 In addition, courts have noted that litigants eager to
24 consolidate a motion for preliminary injunction with a trial on
25 the merits can do so pursuant to Rule 65(a)(2) of the Federal
26 Rules of Civil Procedure and that this is the proper procedure to
27 follow, rather than having the prevailing party on a motion for
28 preliminary injunction move to end the case through a motion for
summary judgment. Securities and Exchange Comm'n, 59 F.R.D. at
114. In considering the SEC's motion for summary judgment
shortly after the Commission had obtained a preliminary
injunction, the court sympathized with the Commission's desire to
"expedite the final determination" of the matter, but noted that

1 the "answer does not lie . . . in judicial constriction of the
2 substantial rights of litigants." Id.¹

3 Finally, Wright and Miller, in their treatise on federal
4 civil procedure, note that in ruling on a motion for preliminary
5 injunction, a court must be careful not to infringe upon a
6 party's right to a jury trial. They note "an issue on which a
7 party demands and is entitled to a jury trial that is relevant
8 both to the preliminary injunction and the merits of the claim
9 may not be finally determined by the judge in a consolidated
10 hearing." 11 Wright and Miller, Federal Practice and Procedure,
11 § 2950 at 496-97 (West 1973). With respect to findings made at
12 the preliminary injunction stage, they caution:

13 [i]t must be remembered that the court's
14 determination is only provisional and the purpose
15 of the preliminary injunction is simply to prevent
16 irreparable harm during the period before a jury
17 trial can be held to decide the merits. The
18 crucial point is that the court's findings of fact
19 on a preliminary injunction hearing will not
20 infringe the right to a jury trial on those
21 issues; the jury may redetermine them for itself
22 without regard to the court's initial conclusions
23 under Rule 65(a).

19 Id. at 498.

20 Data East attempts to skirt this body of law with two
21 arguments. First, it maintains that many of the determinations
22 contained in the Court's Order were purely legal in nature and,
23 consequently, are binding on the present summary judgment ruling
24 under the "law of the case" doctrine. Second, Data East argues
25 that, to the extent the Court's legal rulings were predicated on
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27 ¹In the instant matter, at the hearing on the preliminary
28 injunction, the Court expressed a willingness to consolidate the
hearing with a trial on the merits, but neither party expressed
an interest in the proposal.

1 factual determinations, the underlying material facts were not--
2 and still are not--disputed. Thus, it maintains that the matter
3 is appropriate for summary judgment.

4 As noted at the outset, Capcom argues that summary
5 judgment is inappropriate because the Court found under the
6 extrinsic test that Fighter's History contained some elements
7 similar to protectable expression in Street Fighter II and, under
8 prevailing Ninth Circuit law, Capcom is guaranteed a jury trial
9 at least with respect to those elements. In addition, Capcom
10 maintains that the Court's determination that other elements of
11 Street Fighter II were either not protectable or not copied by
12 Data East was premised on disputed material facts. The parties'
13 arguments are discussed below.

14 B.

15 Capcom's Entitlement to a Jury Trial

16 Capcom first argues that because the Court found during
17 its extrinsic "dissection" analysis, that Fighter's History
18 contained three characters and five special moves that were
19 similar to protectable expression in Street Fighter II, then, at
20 a minimum, it is entitled to a jury trial on these eight
21 elements.

22 To support its position, Capcom relies on Shaw v.
23 Lindheim, 919 F.2d 1353 (9th Cir. 1990). In Shaw, the Ninth
24 Circuit reversed the district court's granting of summary
25 judgment in favor of the defendant where the plaintiff had
26 alleged that the defendant copied his television pilot script.
27 The district court found, under the extrinsic test, that several
28 elements of the defendant's alleged copy were similar to the

1 protectable expression in the plaintiff's script. Under the
2 intrinsic test, however, the district court concluded that no
3 reasonable juror could conclude that the "total concept and feel"
4 of the two works was substantially similar. Id. at 1358.

5 In reversing the district court, the Ninth Circuit held
6 that "the intrinsic test for expression is uniquely suited for
7 determination by the trier of fact." Id. (emphasis in the
8 original) (citations omitted). The court further observed:

9 [o]nce a court has established that a triable
10 question of objective similarity of expression
11 exists, by analysis of each element of the
12 extrinsic test, its inquiry should proceed no
13 further. What remains is a subjective assessment
14 of the 'concept and feel' of two works of
15 literature -- a task no more suitable for a judge
16 than a jury.

17 Id. at 1360.

18 Data East maintains that because the Ninth Circuit has
19 expressly confined the rule of Shaw to copyright actions
20 involving literary works, it does not apply to the present
21 action. See Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th
22 Cir. 1991) (stating that the holding in Shaw "is explicitly
23 limited to literary works"). The Ninth Circuit, however, has
24 been less than consistent in its application of the rule in Shaw.

25 For example, one year after its apparent limiting of the
26 rule of Shaw to literary works in Pasillas, the court rejected a
27 party's argument that Shaw was inapplicable to copyright cases
28 involving computer software. In Brown Bag Software v. Symantec
Corp., 960 F.2d 1465 (9th Cir. 1992), cert. denied, ___ U.S. ___,
113 S. Ct. 198 (1992), the plaintiff argued that the district
court had improperly granted summary judgment. It maintained

1 that because the district court had concluded that the two
2 software programs at issue shared common ideas, the rule of Shaw
3 dictated that a triable issue of fact existed, thereby precluding
4 summary judgment. Id. at 1476. Addressing the defendant's
5 argument that the rule in Shaw was inapplicable to computer
6 software cases, the court stated:

7 we cannot conclude as a matter of law that the
8 programs at issue here, or computer programs in
9 general, are so nonliterary or so limited in their
variety of expression as to avoid the application
of the rule announced in Shaw.

10 Id. The court ultimately upheld the grant of summary judgment
11 on a separate ground, holding that because the district court had
12 found no similarity between the two works under the extrinsic
13 test, then summary judgment was appropriate. Id. at 1477.

14 In addition, language in Ninth Circuit cases other than
15 Shaw support the premise that once some portion of a plaintiff's
16 work has satisfied the extrinsic test, a triable issue of fact
17 exists thereby precluding summary judgment. For example, in Data
18 East USA, Inc. v. Epyx, 862 F.2d 204, 208 (9th Cir. 1988), the
19 Ninth Circuit stated that the intrinsic test "is a subjective
20 test which depends on the response of the ordinary reasonable
21 person." This characterization of the intrinsic test indicates
22 that application of the intrinsic test's "total concept and feel"
23 standard is a task more suitable for a jury at trial, than a
24 judge on summary judgment. See also Sid & Marty Krofft
25 Television Prod., Inc. v. McDonald's Corp., 562 F.2d 1157, 1166
26 (9th Cir. 1977) (intrinsic test "is uniquely suited for
27 determination by the trier of fact"); 3 M. Nimmer, Nimmer on
28 Copyright, § 13.03(E)(3) at 62.14 (1989) ("the second step in the

1 [Kroft] analytic process requires that the trier of fact then
2 decide 'whether there is substantial similarity in the
3 expressions of the ideas so as to constitute infringement.'").

4 As such, Capcom is entitled to a jury trial with respect
5 to, at least, the eight elements of Fighter's History that the
6 Court determined, under the extrinsic test, were similar to
7 protectable expression in Street Fighter II.

8 Capcom next argues that under prevailing Ninth Circuit
9 case law, once a court finds that there is objective similarity
10 of protectable expression under the extrinsic test--as this Court
11 did--then both the protectable and the unprotectable elements of
12 the two works must be compared as a whole by the jury under the
13 intrinsic test's "total concept and feel" standard. In addition,
14 Capcom faults the Court for comparing only the protectable
15 expression in Street Fighter II under the intrinsic test, rather
16 than comparing the two works as a whole for similarity in total
17 concept and feel.

18 A review of the Ninth Circuit case law on this point,
19 however, reveals ample support for the Court's decision to
20 consider only protectable expression in its intrinsic analysis.
21 In Shaw, for example, the Ninth Circuit makes repeated reference
22 to the requirement that a court compare only protected expression
23 under the intrinsic test. Reviewing the test for copyright
24 infringement first enunciated in Krofft, the court stated:

25 the test permits a finding of infringement only if
26 a plaintiff proves both substantial similarity of
27 general ideas under the 'extrinsic test' and
28 substantial similarity of the **protectable
expression of those ideas under the 'intrinsic
test.'**

1 | Shaw, 919 F.2d at 1356 (emphasis added) (citations omitted); see
2 | also id. at 1361 ("If a district court concludes, . . . under the
3 | extrinsic test, that reasonable minds might differ as to whether
4 | there is substantial similarity between the **protected expression**
5 | of ideas in two literary works, . . . there is a triable issue of
6 | fact that precludes summary judgment.") (emphasis added)).

7 | Next, in Data East, a case which also involved competing
8 | videogames, the Ninth Circuit stated:

9 | we hold that the [district] court did not give the
10 | appropriate weight and import to its findings
11 | which support Epyx's argument that the
12 | similarities result from unprotectable
13 | expression. . . . The lower court erred by not
14 | limiting the scope of Data East's copyright
15 | protection to the author's [protectable]
16 | contribution. . . .

17 | Data East, 862 F.2d at 209. Finally, in Brown Bag Software, the
18 | Ninth Circuit went to great length to explain the interplay
19 | between the extrinsic and intrinsic tests and the functions
20 | served by each noting:

21 | analytic dissection [performed during the
22 | extrinsic test] is relevant not only to the
23 | copying element of a copyright infringement claim,
24 | but also to the claim's ownership element. One
25 | aspect of the ownership element is the copyright-
26 | ability of the subject matter. . . . To the
27 | extent a plaintiff's work is unprotected or
28 | unprotectable under copyright, the scope of the
29 | copyright must be limited. Thus, where two works
30 | are found to be similar without regard to the
31 | scope of the copyright . . . , Data East teaches
32 | that the source of the similarity must be
33 | identified and a determination made as to whether
34 | this source is covered by plaintiff's copyright.

35 | Brown Bag Software, 960 F.2d at 1476 (citations omitted); see
36 | also Pasillas, 927 F.2d at 443 ("Apart from these non-protectable
37 | elements, the district court concluded that the masks are not at
38 |

1 all alike, and we agree. The 'total concept and feel' of the
2 McDonald's mask . . . is completely different from that of
3 [plaintiff's]").

4 Finally, and as a matter of logic, if the Court were to
5 accept Capcom's argument that both the protectable and
6 unprotectable elements of a work can be compared for similarity
7 in "total concept and feel" under the intrinsic test, then the
8 dissection required under the extrinsic test would be rendered
9 meaningless. There would be no point in performing analytic
10 dissection to separate the protectable elements from the
11 unprotectable ones during the extrinsic test as the Ninth Circuit
12 clearly requires, if, in the end, courts were free to compare the
13 two works in their entirety under the intrinsic test.

14 As such, Capcom's argument that it is entitled to submit
15 both games to the jury simply because the Court found some
16 expression in Street Fighter II to be protectable is without
17 merit. One alternative argument, however, deserves separate
18 consideration.

19 C.

20 Were the Court's findings based on disputed facts?

21 Finally, and in the alternative, Capcom maintains that
22 the Court may not award Data East summary judgment on those
23 elements of Street Fighter II that the Court found, under the
24 extrinsic test, to be either unprotectable or not copied by Data
25 East because the Court's findings in this area were premised on
26 disputed factual issues.

27 The standard for summary judgment in copyright cases is
28 the same as in other areas of the law. The Ninth Circuit has

1 stated:

2 [a]lthough summary judgment is not highly favored
3 on questions of substantial similarity in
4 copyright cases, summary judgment is appropriate
5 if the court can conclude, after viewing the
6 evidence and drawing inferences in a manner most
7 favorable to the non-moving party, that no
8 reasonable juror could find substantial similarity
9 of ideas and expression.

10 Narell v. Freeman, 872 F.2d 907, 909-10 (9th Cir. 1989)
11 (citations omitted). Furthermore, while recognizing that
12 "[s]ubstantial similarity is usually an extremely close issue of
13 fact," Litchfield v. Spielberg, 736 F.2d 1352, 1355 (9th Cir.
14 1984), the court "frequently ha[s] affirmed summary judgment in
15 favor of copyright defendants on the issue of substantial
16 similarity." Narell, 872 F.2d at 910. The court has warned,
17 however, that summary judgment is precluded and "[a] 'genuine
18 issue' exists when the plaintiff provides indicia of 'a
19 sufficient disagreement' concerning the substantial similarity of
20 two works 'to require submission to a jury.'" Brown Bag
21 Software, 960 F.2d at 1472 (quoting Anderson v. Liberty Lobby,
22 Inc., 477 U.S. 242, 251-52 (1986)) (other citations omitted).

23 The Court will examine Capcom's argument that the
24 findings in the Order were premised on disputed facts in the same
25 categorical fashion that it ruled on the motion for preliminary
26 injunction.

27 (1) Miscellaneous game features

28 In its Order, the Court first determined that alleged
similarities between several miscellaneous features of the two
games, such as the "attract mode" and "vs." screens and the
methods used for selecting players, tracking vitality and

1 designating winners, were commonplace in the videogame industry
2 and, consequently, unprotectable scenes-a-faire. See Data East,
3 862 F.2d at 208; see also March 16 Opinion and Order at 17:18-
4 18:11.

5 Capcom presented insufficient evidence to rebut this
6 determination, advanced by Data East and, ultimately adopted by
7 the Court. Indeed, several non-infringing videogames that Capcom
8 submitted to the Court for purposes of comparison contained
9 features similar to those that Capcom claimed Data East copied
10 from Street Fighter II for use in Fighter's History.

11 As such, there is no triable issue of fact with respect
12 to the unprotectable nature of Street Fighter II's miscellaneous
13 game features and Data East is entitled to summary judgment with
14 respect to this category of alleged similarities.

15 (2) Control sequences

16 Next, the Court held that Street Fighter II's specific
17 joystick and button control sequences were not protectable for
18 several alternative reasons: (1) because, under the merger
19 doctrine, the idea sought to be expressed through the controls
20 and the control sequence itself often merged and was, therefore,
21 unprotectable; (2) because there were both functional and
22 practical constraints that limited the range of expression
23 available to game developers trying to design control sequences;
24 and (3) because the sequences served a "utilitarian function" and
25 were unprotectable under the useful articles doctrine. See
26 March 16, 1994 Opinion and Order at 13:17-17:17 and legal
27 authority cited therein.

28 This determination was almost purely legal in nature and,

1 although Capcom may disagree with the outcome of the Court's
2 legal analysis, this does not create a triable issue of fact for
3 the jury. Data East is entitled to summary judgment with respect
4 to the alleged similarities in control sequences between the two
5 games.

6 (3) Characters and special moves.

7 The Court's findings regarding the games' characters and
8 special moves were the result of a two-part analysis which must
9 now be parsed to determine the appropriateness of summary
10 judgment with respect to these elements. See generally, March 16
11 Opinion and Order at Appendix.

12 With respect to the various characters at issue, the
13 Court first concluded that to the extent many of Street Fighter
14 II's characters were, at their core, stereotypes, they were not
15 protectable pursuant to the scenes-a-faire doctrine. See Apple
16 Computer, Inc. v. Microsoft Corp., 821 F. Supp. 616, 623 (N.D.
17 Cal. 1993). The Court's analysis did not stop there.

18 Second, the Court recognized that the expressive details
19 of a particular stereotype were copyrightable and that six Street
20 Fighter II characters contained protectable expression. See,
21 e.g., Atari v. North American, etc., 672 F.2d 607, 617 (2d Cir.
22 1982), cert. denied, 459 U.S. 880 (1982). The Court concluded
23 that, with respect to the protectable expressive details of
24 Street Fighter II's characters: (1) three Fighter's History
25 characters (Feilin, Ray and Matlok) were similar to three Street
26 Fighter II characters (Chun Li, Ken and Guile); but (2) three
27 other Fighter's History characters (Samchay, Mizoguchi and
28 Marstorius) were more different than similar to three Street

1 Fighter II characters (Sagat, Ryu and Zangief). See generally
2 March 16, 1994 Opinion and Order at Appendix 1:1-8:18.

3 As already noted above, because the Court concluded under
4 the extrinsic test that Feilin, Ray and Matlok had features
5 similar to protectable aspects of Chun Li, Ken and Guile, a jury
6 must be given an opportunity to determine whether Data East
7 copied these characters from Capcom.

8 In addition, because the Court's determination that the
9 other three sets of characters were more dissimilar than similar
10 was based on disputed factual issues, Capcom should have the
11 opportunity to present these characters to the jury to determine
12 if they were copied. With respect to the disputed factual
13 issues, the testimony of each party's expert conflicted sharply
14 concerning whether these last three sets of characters were
15 similar and the amount of attention that videogame players afford
16 to micro differences between two characters versus their overall
17 appearances. As the sole factfinder at the preliminary
18 injunction stage, the Court had to decide these issues, but that
19 does not mean that the decision was purely legal in nature or
20 that it was not based on disputed facts.

21 Second, and with respect to the characters' special
22 moves, the Court also conducted a two-part analysis. First, it
23 held that pursuant to prevailing case law, the moves were not
24 copyrightable under the merger doctrine to the extent that they
25 contained no expressive detail beyond the basic idea that they
26 portrayed, such as a simple kick. Under this theory, the Court
27 removed seven challenged moves from consideration. See March 16
28 Opinion and Order at 23:24-24:18. With respect to the remaining

1 20 special moves that Capcom alleged Data East copied and that
2 the Court concluded contained copyrightable expression, the Court
3 determined that Fighter's History contained five moves similar to
4 Street Fighter II moves, but that 15 others were more dissimilar
5 than similar.

6 As noted previously, because the Court found, under the
7 extrinsic test, that five of the special moves in Fighter's
8 History were similar to five protectable moves in Street Fighter
9 II, Capcom is entitled to submit these five sets of moves to the
10 jury for comparison.

11 In addition, because the Court's assessment that the
12 remaining fifteen sets of analogous moves were more dissimilar
13 than similar was premised on directly conflicting testimony
14 concerning similarity, Capcom may also submit these moves to the
15 jury for consideration of copying.²

16 To decide the motion for preliminary injunction pending
17 before it, the Court had no choice but to make a myriad of both
18 factual and legal conclusions. Having viewed hours of videotape
19 and guided by the almost exclusively contradictory opinions of
20 two experts, the Court concluded that to the extent elements of
21 Street Fighter II were protectable, many of the comparable
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23 ²In addition, and as a threshold matter, the Court
24 determined that, unlike Street Fighter II, Fighter's History did
25 not have preprogrammed "combination attacks." This determination
26 was based on sharply conflicting expert testimony and
27 declarations. The import of this determination was that it
28 prompted the Court to separate combination attacks and examine
their individual components to assess protectability and
similarity, rather than viewing the combination as a whole. This
more segmented analysis clearly impacted some of the Court's
conclusions that individual elements of a Street Fighter II
combination attack were not protectable or, if protectable, were
not actually copied in Fighter's History.

1 elements in Fighter's History were more different than similar.
2 This conclusion, however, does not mean that no reasonable juror
3 could disagree with the Court's outcome on the question of
4 substantial similarity and, consequently, does not mean that
5 summary judgment is appropriate with respect to these elements.
6 The jury should now be given the opportunity to make the
7 determination of similarity anew.

8 Accordingly,

9 **IT IS HEREBY ORDERED** that Data East's motion for summary
10 judgment is **DENIED** in part and **GRANTED** in part.

11 Dated: August 18, 1994.

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14 
15 William H. Orrick
16 United States District Judge
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