

FORTNITE CRUSHES CHOREOGRAPHER'S COPYRIGHT CLAIMS

Hodgson Russ Intellectual Property Alert
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The boundaries of protection for dance choreography under copyright law were put to the test in a recent case brought against the creator of the popular game Fortnite. Professional dancer and choreographer Kyle Hanagami filed a lawsuit against Epic Games, claiming that his copyrighted dance moves appeared in portions of the Fortnite game without his approval.

Hanagami is not the first to sue Epic Games for its use of dance moves. But what sets his claims apart is the fact his moves were actually copyrighted. Unfortunately, this did not win the day.

The Lawsuit

Hanagami, a professional dancer and choreographer based in Los Angeles, California, recently filed a lawsuit against Epic Games, the developer and distributor of the video game Fortnite. Hanagami, claiming copyright infringement and unfair competition by Epic Games, asserted that the developer copied a portion of his copyrighted choreography and utilized the choreography in the Fortnite game.

Hanagami is well known in the dance and music industry, and he choreographs for music videos, television shows, and commercials. Hanagami choreographed a dance to singer Charlie Puth's "How Long" song and published a [video](#) of himself and others performing the choreography in November of 2017. Hanagami registered a copyright for the "How Long" choreography with the U.S. Copyright Office in 2021.

Fortnite, a free multiplayer game set in a virtual world, allows players to purchase certain "virtual items" through an in-game marketplace. Among those items are "emotes" or animated movements and dances that Fortnite characters perform. Hanagami claimed that Epic Games copied a portion of his "How Long" choreography for its Fortnite emote entitled "It's Complicated." Specifically, Hanagami claimed that the "It's Complicated" emote utilized his two-second, four-count sequence of steps that takes place at the beginning of the song's chorus.

A video showing a side-by-side comparison of Hanagami's choreography and the Fortnite "It's Complicated" emote, which was utilized by Hanagami's lawyers, can be viewed [here](#).

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Court Grants Epic Games' Motion to Dismiss

Epic Games moved to dismiss Hanagami's claims for direct and contributory copyright infringement and unfair competition. In analyzing Epic Games' motion to dismiss, the Court focused on whether the two works were "substantially similar." Substantial similarity is a two-part test that looks at extrinsic and intrinsic similarities. The intrinsic test analyzes an "ordinary person's subjective impressions of the similarities between the two works." The extrinsic test compares, by listing and analyzing, "specific criteria" to determine whether the works are substantially similar. The extrinsic test can be applied and decided as a matter of law.

Before applying the extrinsic test, the Court, as required, filtered out the unprotectable elements of Hanagami's choreography. Then, the Court analyzed whether the protectable elements of the choreography were substantially similar to the Fortnite emote. While the Court acknowledged that Hanagami's steps and the emote were *identical*, the Court found that the choreography was composed of individual poses that, when viewed in isolation, were not protectable under copyright law. The Court stated that short dance steps such as Hanagami's were unprotectable in isolation, just as social dance steps like the Floss or Carlton are unprotectable.

The Court commented that Hanagami was and is entitled to copyright protection only as to "how" the steps are expressed in isolation within the entirety of his five-minute registered "How Long" choreography—not each individual step in isolation. The Court ultimately held that no substantial similarity existed and dismissed Hanagami's copyright claims. The Court also dismissed the unfair competition claim as preempted by the Copyright Act.

Takeaways

While dance choreography may be copyrightable, there are limitations to the copyright's protection. Hodgson Russ's intellectual property team helps clients protect their intellectual property rights by prosecuting and defending claims of ownership. Hodgson Russ can also help secure trademarks, copyrights, and other protections for businesses and individuals. For more information, please contact [Jodyann Galvin](#) (716-848-1520) or any member of our [Intellectual Property Litigation Practice](#).