



FORTNITE LITIGATION BATTLE ROYALE: WILL COPYRIGHT INFRINGEMENT CLAIMS AGAINST GAME CREATOR FOR THE UNAUTHORIZED USE OF DANCE MOVES SURVIVE?

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Three celebrity entertainers, Alfonso Ribeiro (better known as Carlton from “The Fresh Prince of Bel-Air”), rapper 2 Milly, and Backpack Kid, filed federal lawsuits against videogame creator, Epic Games, for the unauthorized use of their originally created dances and likenesses within the massively popular videogame Fortnite. The plaintiffs are seeking monetary damages and injunctive relief to prohibit Epic from displaying and selling identical versions of their dances—the “Carlton Dance,” “Milly Rock,” and the “Floss.”¹ The complaints state causes of action for (1) direct infringement of copyright, (2) contributory infringement of copyright, (3) violation of rights of publicity under California law, and (4) unfair competition under California law.²

What is Fortnite?

Fortnite is a free-to-play online videogame where players fight against each other in what is known as a Battle Royale and the last person or team standing wins. Think William Golding’s 1954 novel *Lord of the Flies*. Fortnite has been touted as one of the most popular and successful videogames of all time, having brought in over

\$2 billion in 2018, with millions of players dropping into battle on a daily basis.³

The game begins with 100 players—in the form of their personally customized avatars—suspended above a remote island in a flying school bus. Players parachute onto the island where there are various points of interest. They must move quickly to collect weapons, building materials, and other treasures (loot) or risk being eliminated by other players or a toxic storm that is slowly closing in and reducing the size of the battleground.

Since Fortnite is free to play, Epic generates profits through the operation of a virtual store. There, contestants purchase a variety of offerings that allow them to uniquely express themselves through their avatar. These offerings include parachutes (gliders), costumes (skins), harvest tools (pickaxes), and—most notably—dances (emotes).

The availability of the dances (emotes) within Fortnite, together with the game’s explosion in popularity created a cultural phenomenon where gamers, celebrities, and professional athletes alike began performing “Fortnite dances” on television, social media, and at live sporting events.

Who are the Parties?

Defendant Epic Games is a private company with its principal place of business in North Carolina.⁴ Epic created and developed the Fortnite franchise, which was first released in July 2017. Epic generated \$318 million from Fortnite alone in May 2018, the biggest month ever for a videogame.⁵

Ribeiro is an actor best known for portraying the character

Carlton Banks on “The Fresh Prince of Bel-Air.” Ribeiro claims that, in 1991, he created a dance, the Carlton Dance, which was first featured on an episode of the hit television series. Ribeiro asserts that in January 2018, Epic began selling an emote titled “Fresh,” which is allegedly identical to his dance.⁶

Terrence Ferguson is a rapper from Brooklyn, N.Y. He is better known under the name of 2 Milly.⁷ Ferguson released a single in 2014 titled *Milly Rock* featuring the hook “I Milly Rock on any block,” which celebrates the Milly Rock dance Ferguson claims he created years ago. Ferguson asserts that in July 2018, Fortnite began selling an emote labeled “Swipe It,” which is allegedly identical to his Milly Rock dance.⁸

Russel Horning is an Instagram-famous teenager hailing from Lawrenceville, Ga. He is better known as Backpack Kid. Backpack Kid, whose lawsuit was filed by his mother, began his rise to fame when singer Rihanna posted a video of him performing a dance now known as the Floss on Instagram. Popstar Katy Perry invited him to perform the Floss live with her on Saturday Night Live and then featured him in her music video for *Swish Swish*, where he is seen performing the Floss. Backpack Kid claims to have copyrights in the Floss. He asserts that in December 2017, Epic began selling an emote labeled “Floss,” which is allegedly identical to his dance.⁹

What is the Likelihood of Success of Plaintiffs’ Copyright Claims?

To prevail on an infringement claim, a plaintiff must prove two elements: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.¹⁰ Because the Fortnite emotes appear identical to the plaintiffs’ dances,¹¹ satisfying the second element of an infringement claim may be the easier task for the plaintiffs than the first.¹² The primary issues are whether plaintiffs’ works are copyrightable as “choreographic works,” or whether they constitute “social dances,” which are not subject to copyright protection.

Are Dances Subject to Copyright Protection?

Under the 1976 Copyright Act, dances may be subject to copyright protection if they qualify as original works of choreography. Like other creative works, dances are available for statutory copyright if “fixed in any tangible medium of expression.”¹³ Prior to the 1976 Act, however, there was no explicit federal protection for choreography.¹⁴ Since the codifying of the 1976 Act, there has been little litigation over what constitutes a work of choreography.¹⁵ But, in 2017, the U.S. Copyright Office released Chapter 800 of *The Compendium of U.S. Copyright Office Practices*, which describes the types of works the Copyright Office considers copyrightable choreography.¹⁶

What Constitutes a Work of Choreography?

Choreography is the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole.¹⁷ In evaluating a claim to copyright in choreography, the Copyright Office focuses on whether the work contains the following criteria: (1) rhythmic movements of one or more dancers’ bodies, (2) a series of dance movements or patterns organized into an integrated expressive compositional whole, (3) a story, or theme or abstract composition conveyed through movement, (4) a presentation before an audience, (5) a performance by skilled individuals, and (6) musical or textual accompaniment.¹⁸

The presence or absence of one of these elements, however, does

not determine whether a particular work constitutes choreography.¹⁹ There is an important distinction between choreographic works and social dances that are not protectable.²⁰

What is a Social Dance and are Plaintiffs’ Works Social Dances?

A social dance is intended to be performed by members of the general public for their own personal enjoyment.²¹ Examples include: (1) ballroom dances, (2) folk dances, (3) line dances, (4) square dances, (5) swing dances, and (6) break dances.²² The following is an illustrative example of a social dance:

Seymour Winkler created a line dance for a song titled “The Slip,” which was featured in a famous music video. The dance consists of a few steps, a turn, a hop, and a snap, which is then repeated in different directions. “The Slip” is often performed at weddings and other social occasions, and members of the general public often perform Seymour’s line dance when the song is played.²³

The Carlton Dance, Milly Rock, and the Floss are dances capable of being performed by the public. Like the example of “The Slip,” the plaintiffs’ dances are relatively short and consist of a few basic movements. The dances have often been performed by the public, which the plaintiffs even concede in their complaints. For example, Backpack Kid writes:

Since its creation in 2016 and its rise to fame soon after, Backpack Kid’s dance maintained its popularity. Videos of the dance, known as the “Floss” or “Flossing,” gained widespread recognition and notoriety, particularly on social media. *Hundreds of thousands of fans*, including celebrities and athletes, have *posted videos of themselves Flossing* on social media.²⁴

This admission by Backpack Kid that “hundreds of thousands of fans” have posted videos of themselves performing the Floss is problematic for his copyright claim. The fact that hundreds of thousands of fans can perform his dance could support a finding that it constitutes a social dance—one generally capable of being performed by members of the general public. And the same goes for the Carlton Dance and the Milly Rock, which Ribeiro and Ferguson admit have been performed by “thousands” of fans.²⁵

Will the Plaintiffs’ Copyright Claims Survive?

Like a game of Fortnite, the plaintiffs will have to battle for their copyright claims to survive. While the copyrightability of dances portrayed and sold within a videogame is a matter of first impression, with little guiding precedent, it is possible the courts will expand the definition of choreographical works to include the plaintiffs’ dances.²⁶ Alternatively, the courts could find that the plaintiffs’ works are too simple and too easily performed by members of the public to be eligible for copyright protection.

Even assuming the dances are eligible for copyright protection, the plaintiffs will have to prove their creations are “original works of authorship.”²⁷ A work is “original” to the author and thus qualifies for copyright protection if it is independently created and possesses some minimal degree of creativity.²⁸ This could also prove problematic.

Backpack Kid claims he is the “undisputable creator” of the Floss, which he insists he created in 2016. However, there is a 2010 video of

a young man performing the Floss currently viewable on YouTube.²⁹ Similarly, Ribeiro claims he created his dance for “The Fresh Prince of Bel-Air” in 1991. But Ribeiro has admitted in interviews that the Carlton Dance is actually the byproduct of two separate dance routines performed by other notable celebrities in the 1980s.³⁰ Thus, aside from the primary issues of whether the dances are subject to copyright protection as choreographic works, or whether they represent social dances, at least two plaintiffs will be challenged to prove their dances are original works of authorship.

Whatever the outcome, a precedent will be set in the videogame industry resulting in developers either shelling out thousands (perhaps even millions) in licensing fees to entertainers whom they wish to profit from, or, in the alternative, a mass appropriation of dances (emotes) by famous entertainers repackaged for profit. Much like the Battle Royale genre, the last litigant standing will win. ☺



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Endnotes

¹Since the drafting of this article, Memphis, Tennessee-based rapper BlocBoy JB has filed a similar infringement lawsuit against Epic Games.

²See Complaint, *Terrance Ferguson v. Epic Games*, Case No. 2:18-cv-10110-AS (C.D. Cal. Dec. 5, 2018), ECF No. 1 [hereinafter Ferguson Complaint]; Complaint, *Anita Redd v. Epic Games*, Case No. 2:18-cv-10444-R-MAA (C.D. Cal. Dec. 17, 2018), ECF No. 1 [hereinafter Backpack Kid Complaint]; Complaint, *Alfonso Ribeiro v. Epic Games*, Case No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018), ECF No. 1 [hereinafter Ribeiro Complaint]. The lawsuits are pending in the United States District Court for the Central District of California. The causes of action differ slightly in each lawsuit. For example, Backpack Kid pled claims for trademark infringement and dilution, but the other two plaintiffs did not assert trademark claims.

³See Ferguson Complaint 4 ¶ 16; see also Patrick Shanley, “Fortnite” Earned \$2.4 Billion in 2018, *HOLLYWOOD REP.* (Jan. 16, 2019), <https://www.hollywoodreporter.com/heat-vision/fortnite-earned-24-billion-2018-1176660>.

⁴The plaintiffs have also named “Does 1 through 50.”

⁵Backpack Kid Complaint 8, ¶ 31.

⁶See Ribeiro Complaint 3-4, 9-10.

⁷See Ferguson Complaint 2-4.

⁸*Id.* at 3.

⁹See Backpack Kid Complaint 3-5, 8-10.

¹⁰*Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row*, 471 U.S. 539, 548 (1985)).

¹¹Chizzy, *Fortnite—Dances In Real Life (VS) All Dances *NEW** Ft: Backpack Kid, Carlton, YouTube (Dec. 20, 2017), <https://www.youtube.com/watch?v=IBaiZbMEnyA>; see also CBS News: The National, *Rapper 2 Milly Swing Fortnite Makers Over Dance Moves*, YouTube (Dec. 10, 2018), <https://www.youtube.com/>

[watch?v=CDI0W5H7Jtk](https://www.youtube.com/watch?v=CDI0W5H7Jtk).

¹²Each of the complaints contain a provision stating the plaintiff is in the process of registering his dance with the U.S. Copyright Office. See Ferguson Complaint 11, ¶ 42; see also Ribeiro Complaint 11, ¶ 42; see also Backpack Kid Complaint 11, ¶ 45.

¹³17 U.S.C. § 102(a).

¹⁴See 17 U.S.C. § 102(a)(4); *Martha Graham Sch. & Dance Found. Inc. v. Martha Graham Ctr. of Contemporary Dance Inc.*, 380 F.3d 624, 632 (2d Cir. 2004); *Horgan v. Macmillan Inc.*, 789 F.2d 157, 160 (2d Cir. 1986).

¹⁵See *Bikram's Yoga Coll. of India LP v. Evolution Yoga LLC*, 803 F.3d 1032, 1043 (9th Cir. 2015).

¹⁶U.S. COPYRIGHT OFF., THE COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES: CHAPTER 800, WORKS OF THE PERFORMING ARTS (Sept. 29, 2017), <https://www.copyright.gov/comp3/chap800/ch800-performing-arts.pdf> [hereinafter COMPENDIUM].

¹⁷See *id.*

¹⁸COMPENDIUM § 805.4(A).

¹⁹See *id.*

²⁰See *id.* (citing H.R. Rep. No. 94-1476, at 54 (1976), reprinted in 1976 U.S.C.A.N. at 5667 (“choreographic works’ do not include social dance steps and simple routines”); S. Rep. No. 94-473, at 52 (1975)).

²¹*Id.*

²²COMPENDIUM, § 805.5(B)(2).

²³*Id.*

²⁴Backpack Kid Complaint 4, ¶ 17 (emphasis added).

²⁵See Ribeiro Complaint 10, ¶ 36; see also Ferguson Complaint 9, ¶ 36.

²⁶See *Bikram's Yoga Coll. of India LP*, 803 F.3d at 1043 (when considering the issue of whether a sequence of yoga exercises represented a copyrightable choreographic work, held the sequence was not a copyrightable choreographic work under the idea/expression dichotomy).

²⁷17 U.S.C. § 102(a).

²⁸*Feist Publ'ns*, 499 U.S. at 361, 113 L.Ed.2d 358, 18 U.S.P.Q.2d 1275.

²⁹Backpack Kid Complaint 12, ¶ 42; see also Ryan Mayall, *Ryan Mayall “The Dance,”* YouTube (Oct. 18, 2010), <https://www.youtube.com/watch?v=4N-C22u4FfU>.

³⁰Huffpost Live, *Alfonso Ribeiro: Courteney Cox Is “The Mom Of The Carlton Dance,”* YouTube (Oct. 18, 2015), <https://www.youtube.com/watch?v=YU-nVmcoDJs> (Ribeiro admits the Carlton Dance is a combination of a dance move performed by Courteney Cox during a Bruce Springsteen music video and a dance move performed by Eddie Murphy during a standup routine).