



no dancing around reversal in copyright choreography case

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In 2022, Choreographer Kyle Hanagami (“Hanagami”) brought suit against video game developer and publisher Epic Games, Inc. (“Epic”), claiming that a virtual animation – known as an “emote” – that Epic sold as downloadable content for its game *Fortnite* infringed Hanagami’s registered copyright in one of his choreographic works. In August 2022, the United States District Court for the Central District of California dismissed the lawsuit on the grounds that any similarities did not relate to copyrightable expression. On November 1, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded the action for further consideration. *Hanagami v. Epic Games, Inc.*, No. 22-55890, (9th Cir., Nov. 1, 2023).

Kyle Hanagami is an acclaimed choreographer who has worked with celebrities like Jennifer Lopez, Britney Spears, and Justin Bieber. In 2017, he published a video (the “How Long Video”), containing a five-minute dance. He later registered his work with the copyright office.

The litigation related to Epic’s videogame, *Fortnite*, where players could purchase the emote using real money to give their in-game avatar the ability to perform the dance. Hanagami argued that his copyrighted dance steps “were identical to Epic’s emote and comprised the most recognized portion of his work.”

The district court granted Epic’s motion to dismiss Hanagami’s claims under Federal Rule of Civ. Pro. 12(b)(6), ruling that, “Hanagami failed to plausibly allege that Epic’s emote was substantially similar to his registered choreography.” The court first found that the choreography is composed of “a number of individual poses” that are not protectable “when viewed in isolation.” The court also determined that the overall “steps” Epic allegedly copied—a “two-second combination of eight bodily movements, set to four beats of music”—were not protectable under the Copyright Act because they were only a “small component” of Hanagami’s copyrighted work. The Ninth Circuit reversed.

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The Court first noted that, "the field of choreography copyright has remained a largely undefined area of law" and then went on to make two key holdings. First, the panel held that Hanagami plausibly alleged that his choreography and Epic's emote shared substantial similarities under the "extrinsic test" for assessing substantial similarity. The Court formally adopted the U.S. Copyright Office's definition of choreography: "The composition and arrangement of a related series of dance movements and patterns organized into a coherent whole." In applying the extrinsic test to choreography, the following factors should be considered, along with pose: body position, body shape, body actions, transitions, use of space, timing, pauses, energy, canon, motif, contrast, and repetition. In formulating this test, the court emphasized that while isolated elements of a work might not be protected, the focus is on a "choreographer's selection and arrangement of the [work's] otherwise unprotected elements." In this regard, the Court analogized to substantial similarity cases involving music and photography. The district court erred by only focusing on static poses.

Second, the Court of Appeals found that the district court erred in finding that the allegedly copied "two second combination of eight bodily movements, set to four beats of music" was an unprotectable "small component" of Hanagami's work. The Court dismissed the idea that because the allegedly copied segment was "short," it was necessarily unprotectable, stating that "[s]hort does not always equate to simple." Ultimately, the Ninth Circuit held that the District Court "failed to assess the discrete combination of elements of the Registered Choreography" and, therefore, "erred in deciding as a matter of law at the motion-to-dismiss stage that the two works were not substantially similar."

One notable aspect of the opinion that might apply beyond the issue of choreography is the Court's statement that, "It is generally disfavored for copyright claims to be dismissed for lack of substantial similarity at the pleading stage." The Panel provided no citation for this proposition, which appears to conflict with a number of published and unpublished cases that have dismissed infringement claims at the pleading stage. The Court tempered its pronouncement by noting that this does not mean that all substantially similar cases will survive the pleading stage, because some cases involve scenarios where nothing in discovery could change a court's conclusion that works are not substantially similar." But the Court concluded that in the case before it, discovery and expert testimony could be relevant to the outcome.

This is not the first *Fortnite*-dance-related litigation Epic has faced. *Fortnite* features a variety of "emotes" that have led to similar lawsuits over choreographic works. In 2019, actor Alfonso Ribeiro (of the "Carlton Dance"), rapper 2 Milly, and internet personalities Backpack Kid and Orange Shirt Kid voluntarily dismissed their copyright suits in the wake of the United States Supreme Court decision in *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) ("*Fourth Estate*"). In *Fourth Estate*, the Supreme Court held that copyright owners must wait until the Copyright Office has approved or denied an application for registration before bringing an infringement action. *Fourth Estate* was not a factor here, because Hanagami had registered his copyright.

The Ninth Circuit's ruling touches on, as the panel observed, "a largely undefined area of law." Mitchell Silberberg & Knupp LLP will continue to watch litigation in this area as it develops.