

COPYRIGHT LAW

Hanagami v. Epic Games: One Small Step ...

By Thomas Kjellberg and Robert W. Clarida

On August 24, 2022 the Central District of California granted defendant's 12(b)(6) motion to dismiss in *Hanagami v. Epic Games Inc.*, 2022 WL 4007874 (C.D. Cal. Aug. 24, 2022), in which plaintiff Kyle Hanagami claimed that Defendant Epic Games infringed his registered copyright in a choreographic work titled "How Long Choreography."

On November 11, 2017, Plaintiff, a Los Angeles-based choreographer and dance teacher, uploaded to YouTube a video of himself and others dancing to the song "How Long" by Charlie Puth. The five-minute video, which portrays five different groups of dancers performing the same series of movements, has received more than 36.5 million views as of this writing. On February 20, 2021, Plaintiff registered his copyright claim in the choreographic work fixed in the video with the U.S. Copyright Office.

While the Copyright Act expressly provides (in § 102(a)(4)) for copyright protection for "pantomimes and choreographic works" fixed in a tangible medium of expression, neither term is defined in the Act. The Court in *Hanagami* adopted the definition contained in Copyright Office Circular 52 (Copyright Registration of Choreography and Pantomime): "Choreography is the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole." Circular 52 further notes that acceptable formats of fixation for choreographic works include traditional dance notation, such as Laban Notation and Benesh Dance Notation, video recordings of a performance, and textual descriptions, photographs, or drawings.

The Complaint states that Defendant's video game *Fortnite* is a "multiplayer shooting game where players can explore a virtual world, build and destroy structures, and compete to be the last player alive." While *Fortnite* is free for users to play, it has an "in-game marketplace" where players can purchase virtual currency, with which they can purchase virtual customizations for their in-game avatars. Such customizations can include clothes, weapons and, as relevant here, "emotes": animated movements or dances, which players' avatars can perform in *Fortnite*.

On August 25, 2020, Defendant released an in-game emote called "It's Complicated" that Plaintiff alleged contains "the most recognizable portion of," and "duplicates ... the footwork, movement of the limbs, movement of the hands and fingers, and head and shoulder movement covered by," the How Long Choreography. Plaintiff sued, alleging direct and contributory copyright infringement as well as unfair competition under California law. Defendant moved to dismiss, arguing that Plaintiff's copyright infringement claims failed because the "It's Complicated" emote, incorporated in Defendants' work, is not substantially similar to the How Long Choreography as a matter of law.

To survive a 12(b)(6) motion to dismiss, a plaintiff bringing a claim for copyright infringement must sufficiently allege (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. The second element, copying, has two distinct components: actual, or factual, copying, and unlawful appropriation. The Court found that Plaintiff sufficiently alleged ownership of the How Long Choreography copyright as well as actual copying by Defendant (the latter apparently based on the allegation that the video "went viral after its release"). At issue, accordingly, was whether Plaintiff sufficiently stated a claim of

“unlawful appropriation”; that is, whether it sufficiently alleged that Plaintiff’s choreographic work and Defendant’s emote are substantially similar as to protected expression.

The Court referred to the portion of Plaintiff’s work at issue – the two-second combination of eight bodily movements, set to four beats of music – as “the Steps.” The Court reviewed Plaintiff’s video and Defendant’s emote, and compared side-by-side still images of the dances [a sampling shown below] and concluded that ten of the poses in the video and the emote are “the same.”





The question before the Court was whether the alleged “sameness” was substantial enough to amount to copyright infringement. In the Ninth Circuit the test for substantial

similarity contains both “extrinsic” and “intrinsic” components. Under the extrinsic test the Court reviews the parties’ works side-by-side, and considers specific objective criteria that can be analyzed to determine whether the works are substantially similar. The extrinsic test may be applied and decided by the Court as a matter of law; however, the intrinsic test, which examines an ordinary person’s subjective impressions of the similarities between the two works, is reserved for the trier of fact.

In applying the extrinsic test, the Court must take care to inquire only whether the protectable elements of the works, standing alone, are substantially similar. The Court, accordingly, must “filter out” and disregard the unprotectable elements of the plaintiff’s work – ideas and concepts, stock or standard features, and material in the public domain or otherwise not original to the plaintiff. The Court then compares the protectable elements that remain to corresponding elements of the defendant’s work to assess whether the works are substantially similar.

The “filtration” process, the Court noted, is more readily applied to certain types of works than to others. Literary and dramatic works, for example, typically contain numerous protectable expressive elements – plot, themes, dialogue, mood, setting, pace, characters, and sequence of events – that can be objectively compared once the unprotected elements have been filtered out. Other types of works, such as photographs and the choreographic works at issue here, are comprised largely or entirely of components or elements that, viewed in isolation, are unprotectable, rendering filtration sufficiently problematic that courts have omitted it when dealing with such works.

Defendant contended that not only the individual poses, but “the Steps” as a whole, were unprotectable “building blocks for a choreographer’s expression.” The Court agreed, relying

heavily on guidance from the U.S. Copyright Office, in particular the *Compendium (Third) of U.S. Copyright Office Practices*, the Copyright Office’s administrative manual. The *Compendium* instructs that the individual elements of a choreographic work – single steps and short dance routines – are not copyrightable for the same reason that individual words, short phrases, numbers, notes, colors and geometric shapes are not copyrightable. As a matter of policy, those elements, the building blocks of choreographic expression, must remain available to all; allowing one person to monopolize any of them would impede rather than foster creative expression.

The Copyright Office, the Court noted, has consistently rejected applications to register copyright claims to individual steps and short routines – including, notably, applications by actor Alfonso Ribeiro to register “The Carlton,” a dance move he performed on *The Fresh Prince of Bel-Air*; by “Backpack Kid” Russell Horning to register “The Floss”; and by Pilobolus Dance Co. to register a 14-second routine called “Five-Petal Flower” – but has registered claims to longer choreographic works into which such steps and routines were incorporated.¹ As the Copyright Office’s *Compendium* of registration practices explains, while a “complex and intricate” (and hypothetical) dance titled “Made in the USA” could be registered as a choreographic work, the Office would reject a claim limited to a gesture within the work in which the dancers form the letters “U, S, A” with their arms.

The Court found that while “the Steps” evince more creativity than the basic waltz step, the hustle step, or second position in classical ballet, on “the continuum of choreography, ‘the

¹ Registration No. PA0002147439 for FLOSSIN DANCE in the name of Russell Horning includes a note from the Copyright Office specifying that the “Basis for Registration” is “Choreography registered based on original selection, coordination, and/or arrangement of steps or movements,” and that the “Registration does not extend to individual dance steps.”

Steps’ are closer to a short routine like the ‘Floss’ dance or to the ‘U, S, A’ movements,” neither of which would be protectable by itself. Plaintiff had cited, and the Court had found, no authority to suggest that “the Steps” are protectable outside of the context of the whole of Plaintiff’s work; indeed, the weight of authority suggested otherwise.

The Court proceeded to evaluate the similarities between the works under the Ninth Circuit’s extrinsic analysis, which requires that the works be “considered as a whole,” and held that they are not substantially similar, because other than “the Steps,” which are unprotectable on their own, “Plaintiff identifies no other similar creative elements in Plaintiff and Defendant’s choreographic works.”

The Court, curiously, identified a number of purported differences between the two works (“Plaintiff’s dance is performed by humans in the physical world, and Defendant’s Emote by animated characters in a virtual world. The works are performed for different audiences, as Plaintiff’s video was performed at Plaintiff’s dance studio and published for a YouTube audience. Defendant’s Emote is performed by *Fortnite* players in-game for an in-game audience.”), none of which has any discernable bearing on the substantial similarity analysis.

CONCLUSION

As the Supreme Court recognized in *Feist v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), “the mere fact that work is copyrighted does not mean that every element of the work may be protected.” The same holds equally true for creative works as it does for the factual compilation that was at issue in *Feist*. Thus while a journey of a thousand miles may begin with a single step, the *Hanagami* case demonstrates that a successful claim for infringement of copyright in choreography requires considerably more.

Copyright © 2022 Thomas Kjellberg and Robert W. Clarida

Thomas Kjellberg is of counsel to the New York law firm of Cowan, Liebowitz & Latman, P.C. He is a past Trustee of the Copyright Society and former chair of the ABA Copyright Office Affairs Committee, and is the chief author of the annual review of copyright decisions published each year in the *Journal of the Copyright Society of the USA* and delivered, with Mr. Clarida, at the Copyright Society's annual meeting. Mr. Kjellberg's firm performs legal services for Epic Games, Inc., but has no role in the matter described above.

Robert W. Clarida is a partner in the New York law firm of Reitler, Kailas & Rosenblatt LLC and the author of the treatise *Copyright Law Deskbook* (BNA). He is a past Trustee of the Copyright Society, a past Board member of the American Intellectual Property Law Association and former chair of the Copyright and Literary Property Committee of the Association of the Bar of the City of New York.