

Epic Dance Moves Win Legal Dance-Off (Mostly)

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In a recent decision, Judge John R. Padova of the federal court for the Eastern District of Pennsylvania dismissed seven out of eight of the claims brought by musician Leo Pellegrino alleging that Epic Games unlawfully copied his “Signature Move” in its massively popular online

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video game, “Fortnite.” Although Pellegrino’s false endorsement claims survives, this was a significant victory for Epic, since the remainder of Pellegrino’s right of publicity, privacy, unfair competition, unjust enrichment, and trademark claims were dismissed with prejudice. Like several other recent decisions, this decision provides guidance to video game companies seeking to incorporate elements of reality into their games.

Leo Pellegrino is a professional saxophone player and member of the “brass house” band, “Too Many Zooz.” According to Pellegrino’s complaint, “[u]sing [Pellegrino’s]

unique anatomy—specifically his externally rotatable feet—Pellegrino was able to create the Signature Move, a series of movements that express his own unique dancing style” while playing a saxophone. The complaint further alleges that “[b]y executing the Signature Move in concert and festival performances in front of hundreds of thousands of people and in online videos with millions of views, his Signature Move has grown in popularity and has become inextricably linked to his identity.” For those of you who, like me, aren’t particularly hip to the brass house music scene, Pellegrino’s Signature Move looks like this. It’s kind of like a hyperactive version of the dance professional wrestler Junkyard Dog used to do with kids after wrestling matches, but with more foot twisting and a saxophone. Although the Court’s reference to Pellegrino’s “unique anatomy” suggests that a particular anatomy is required to do the dance, having externally rotated feet appears to be somewhat common.

Epic’s Fortnite is a multiplayer online battle royale game in which players work competitively and collaboratively with others to be the last person or team standing, after dispatching all other players with weapons and other violence. Fortnite is free to download and play, but Epic generates revenue by selling things to players in the game, such as “emotes.” An emote allows a player to perform particular dance moves with their character, or avatar. Here is a side-by-side video comparing Pellegrino executing his Signature Move and a Fortnite avatar performing the emote at issue, which is called “Phone It In.” Assuming that this is not the only way to dance while holding a saxophone, Phone It In’s resemblance to the Signature Move seems more than coincidental, but Pellegrino and the Fortnite avatar look completely different.



Pellegrino’s Counts I-III were right of publicity and privacy claims. Epic moved to dismiss them on First Amendment grounds since video games are protected by the First Amendment as an expressive work. In the Third Circuit, courts balance First Amendment protections and publicity and privacy rights using the Transformative Use Test. As the Court explained, under the Transformative Use Test, First Amendment protections outweigh a celebrity’s interest in their “likeness if the likeness is so transformed that it

has become primarily the defendant's own expression rather than the celebrity's likeness." The Court noted that in a previous video game case, *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013), which involved the use of college football player Ryan Hart's likeness in a NCAA Football series of games, the Third Circuit applied the Transformative Use Test by first considering whether Hart's "identity," defined as including both his appearance and biographical information, was sufficiently transformed. Second, the Third Circuit considered "the manner in which Hart's identity was 'incorporated into and transformed by' the expressive work" by looking at the context of the digital avatar and querying whether that avatar "did in the game what Hart did in real life." Applying these considerations, Judge Padova concluded that Phone It In passed the Transformative Use Test because the complaint demonstrated that Fortnite's heavily customizable avatars do not share Pellegrino's appearance or biographical information, and the avatars execute the Signature Move only in the context of a battle royale competition, not in the context of a musical performance, like Pellegrino would do. Accordingly, the Court dismissed Pellegrino's publicity and privacy claims.



The Court also dismissed Pellegrino's unjust enrichment claims because the complaint did not allege a contractual or quasi-contractual relationship in which Pellegrino conferred benefits on Epic. In addition, the Court dismissed Pellegrino's unfair

competition claim because it did not accept Pellegrino's contention that he, a musician, and Epic, a video game company, are competitors "in the field of selling dance performances."

Under Count VI, Pellegrino asserted both false designation of origin and false endorsement claims. The Court dismissed Count VI with respect to the false designation of origin because it was barred by *Dastar Corp. v. 20th Century Fox Film Corp.*, 539 U.S. 23 (2003). In *Dastar*, the U.S. Supreme Court held that false endorsement claims cover the origin of the good itself (e.g., the Fortnite video game) not the "idea, concept, or communication embodied in those goods" (e.g., Pellegrino's Signature Move), which would fall under copyright law.

However, the Court denied Epic's motion to dismiss with respect to Pellegrino's false endorsement claim. The Court based its decision on the complaint's allegations that

Pellegrino created the Signature Move, was identified with it due to his performances and online videos, Fortnite players' immediate recognition that Phone It In embodied Pellegrino's signature move, and Epic intentionally mimicking the Signature Move and naming it Phone It In to allude to a 2017 Google Pixel 2 phone commercial featuring Pellegrino. According to the Court, these allegations were sufficient to plausibly claim that Epic had created the false impression that Pellegrino had endorsed Fortnite.

Pellegrino also asserted state trademark infringement and federal trademark dilution claims. The Court held that the state trademark claim was directed to the Signature Move, which is a dance, and choreographic works are specifically covered by 17 U.S.C. § 102(a)(4) of the Copyright Act. Since Pellegrino's state trademark claim was equivalent to a copyright claim, the Court dismissed it as being preempted by the Copyright Act. The Court also dismissed Pellegrino's trademark dilution claim because the complaint did not allege that Epic's use of the Signature Move was intended to be a trademark for Fortnite, as required by the dilution provisions of the Lanham Act. In other words, Epic might use the Signature Move in its game, but the key missing allegation is that Epic uses the Signature Move as a trademark to identify Fortnite.

Usually, when a court dismisses a plaintiff's claims for the first time, it will allow the plaintiff leave to amend the complaint unless there is, or would be, undue delay, bad faith, dilatory motive, prejudice, or futility. Here, the Court found that amending the dismissed claims would be futile, and it therefore denied Pellegrino's motion for leave to amend his complaint and dismissed those claims with prejudice.

Under the rationale of this case, video game companies can copy a celebrity's dance move, and perhaps other actions, without running afoul of publicity and privacy rights as long as the copying is done in a transformative way. Putting a celebrity musician's likeness and signature dance in a game about musical performances probably won't fly, but giving the same sweet moves to a character that looks nothing like the celebrity and putting them in a completely different context, as was done here, would be less risky. Even so, if a signature move is strongly identified with a celebrity, or the game company names it in a way that alludes to the celebrity, the game company might have to litigate a false endorsement claim beyond the pleading stage. How the parties and Court ultimately resolve the false endorsement claim could provide some more interesting case law about the limits of incorporating dance moves into a video game. This decision also indicates that future plaintiffs should consider adding copyright claims to their complaints if copyrightable content has been copied, since some of Pellegrino's trademark claims were dismissed for being preempted by copyright law. We will see if Pellegrino tries to add copyright infringement claims to his current complaint or files a new complaint for copyright infringement.