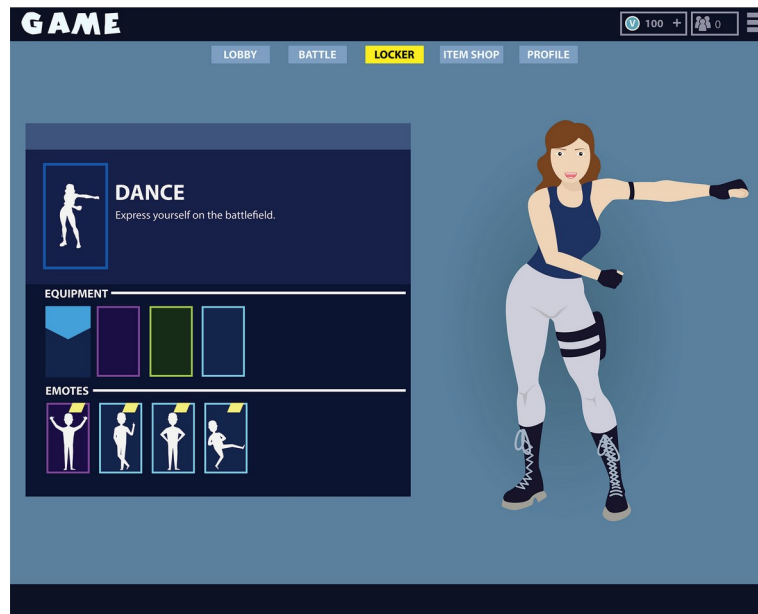


Epic Games Battles for Victory Dances in Fortnite Copyright Lawsuits

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by Tiffany Shimada



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If you know how to Floss and Milly Rock, then you are way more hip than most, including the author of this post. Both are popular dance moves, along with the Shoot, Running Man, and the Carlton, the latter made famous by Alfonso Ribeiro as Carlton in *The Fresh Prince of Bel-Air*. All of these dance moves have been made the subject of litigation recently, as the creators and artists behind these dances have all sued Epic Games, Inc. in the Central District of California and District of Maryland for alleged appropriation of the dances by avatars starring in the video game Fortnite Battle Royale. Cases: *Ferguson v. Epic Games, Inc.*, No. 2:18-cv-10110 (C.D. Cal. Dec. 5, 2018); *Ribeiro v. Epic Games, Inc.*, No. 2:18-cv-10412 (C.D. Cal. Dec. 17, 2018); *Redd v. Epic Games, Inc.*, No. 2:18-cv-10444 (C.D. Cal. Dec. 17, 2018); *Baker v. Epic Games, Inc.*, No. 2:19-

cv-00505 (C.D. Cal. Jan. 23, 2019); *Brantley et al. v. Epic Games, Inc.*, No. 8:19-cv-00594 (D. Md. Feb. 25, 2019).

While it is free to play Fortnite, a player must pay very real US dollars to acquire Vinderbucks or “V-Bucks,” which is currency to buy special features for avatars, including fresh dance moves called “emotes.” Fortnite is premised upon being dropped into a world with other players where you survive by making weapons, collecting resources to survive, and shoot to kill until you or your crew are the last one(s) standing. In between the surviving and killing, avatars stop and engage in fun, including the allegedly misappropriated dance moves.

For your reference, here is a chart of the dance moves by artist as accessible on YouTube.com, along with random Fortnite avatars performing the allegedly similar dance moves:

Dance Move & Artist	Fortnite Emote
Milly Rock by Terrence Ferguson AKA 2 Milly https://www.youtube.com/watch?v=PMzDoFuVgRg (at 3:33)	Swipe It https://www.youtube.com/watch?v=qwA40G5avrY
The Carlton Dance by Alfonso Ribeiro AKA Carlton in <i>The Fresh Prince of Bel-Air</i> https://www.youtube.com/watch?v=ZwS14TiO7Pk (at 3:57)	Fresh https://www.youtube.com/watch?v=rkW-Kv0AAWI
Flossin Dance by Russell Horning AKA Backpack Kid https://www.youtube.com/watch?v=iGk5fR-t5AU (at 6:03)	Floss https://www.youtube.com/watch?v=vzhZVhZLtZA
Shoot by James Baker AKA Blocboy JB https://www.youtube.com/watch?v=NV-3s2wwC8c (at 2:06)	Hype https://www.youtube.com/watch?v=drp8aRIKPQ8
Running Man by Jaylen Brantley and Jared Nickens https://www.youtube.com/watch?v=qM2qdfnALBM	Running Man https://www.youtube.com/watch?v=9CoJEYkJyqM

The main bases of the lawsuits are claims for copyright and trademark infringement, and right of publicity. Under copyright law, and specifically 17 U.S.C. § 102(a)(4), choreographic works are eligible subject matter for copyright protection. However, what constitutes a protectable choreographic work is fact-specific, and the originality and creativity must be more than *de minimis*. Run of the mill dance steps, social dances, and

simple routines won't cut the rug under Copyright Compendium Section 805.1. Section 805.4(D) of the Copyright Compendium goes even further, likening simple dance steps to words and short phrases: put together they are creative expression worthy of copyright, but on their own, they are just basic components of dance that anyone can use. Whether the dance moves in these cases can meet the more than *de minimis* standard is questionable. Aside from the "Flossin Dance," none of the other dances have been registered to date. Further, Blocboy JB has amended his complaint to drop copyright claims altogether after being denied registration for the Shoot dance, relying solely on his trademark infringement and right of publicity claims.

Epic Games notes in its motion to dismiss Ferguson's Milly Rock suit that the Swipe It emote is not substantially similar, the crux of any copyright claim. Further, Epic Games argues that its use of the Swipe It dance is sufficiently transformative to overcome any trademark rights or right of publicity held by Ferguson under the precedent set by *Rogers v. Grimaldi*, 875 F2d 994 (2d Cir. 1989), a case that weighs First Amendment freedom of speech/expression against trademark rights and right of publicity, allowing artistic works that are transformative enough to survive the echoes of fame created by the original artists.

It remains to be seen whether a case about Ginger Rogers and Fred Astaire should set precedent for 2 Milly, or whether those writing the Copyright Act of 1976 could anticipate how one dance move could catapult an artist to worldwide fame on YouTube. On the other hand, by 1976, Chubby Checker had already made famous the Twist, and everyone knew how to do Dee Dee Sharp's Mashed Potato and Little Eva's Loco-motion. Should these artists have been paid by everyone doing these dances on TV? Does your answer change if the dancers are avatars in a very profitable video game? All of us wallflowers will have to wait and see how the dance battles end between each of these artists and Epic Games.