

“Running Man” Case Trips, Falls, and Is Dismissed

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Just two months ago, we published a [post](#) about an Eastern District of Pennsylvania decision in the *Pellegrino v. Epic Games* case regarding Epic’s online battle royale video game, Fortnite. In that case, saxophonist Leo Pellegrino alleged that a Fortnite “emote” (i.e., a feature sold by Epic to players to allow their avatars to perform a particular gesture, dance, etc.) titled “Phone It In” impermissibly copied his signature dance move. The court [dismissed](#) all of Pellegrino’s claims except for false endorsement, but he voluntarily [dismissed](#) the rest of his case on April 29, 2020.

On May 29, 2020, a federal district court in Maryland [granted](#) Epic another victory by dismissing with prejudice all claims against it for its use and sale of a different emote,

“Running Man.” Plaintiffs Jaylen Brantley and Jared Nickens alleged in their complaint that in 2016 they created, named, and popularized a dance called the “Running Man” and incorporated it into breaks during basketball games at the University of Maryland. The dance went viral on social media, and Brantley and Nickens encouraged others to post videos on social media of themselves performing Running Man. Running Man became even more popular after Brantley and Nickens were invited to bust their move [on The Ellen Show](#). Despite the allegations in their current [complaint](#), Brantley and Nickens told noted dance aficionado Ellen DeGeneres that they copied the dance after New Jersey high school students Kevin Vincent and Jeremiah Hall, who also appeared on the show, created it, and posted it on Instagram.

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

Regardless, Brantley and Nickens now allege that “[t]he Running Man has become synonymous with Plaintiffs [Brantley and Nickens], who are credited with creating the dance and video that became ‘viral.’” They further allege that Fortnite’s Running Man emote is an unauthorized copy of their Running Man dance. Therefore, they asserted claims for invasion of the right of privacy/publicity (Count I), Lanham Act and common law unfair competition (Counts II and III), unjust enrichment (Count IV), Lanham Act and common law trademark infringement (Counts V and VI), Lanham Act trademark dilution (Count VII), and Lanham Act false designation of origin (Count VIII) against Epic.



Repeatedly citing *Pellegrino*, United States District Judge Paul W. Grimm dismissed all of Brantley and Nickens’s claims with prejudice.

First, he held that Counts I, III, IV, and VIII are preempted by the Copyright Act. The two-prong test for copyright preemption requires finding (1) that the work is within the scope of subject matter specified in 17 U.S.C. §§ 102-103 and (2) that the rights granted under state law are equivalent to the exclusive rights with the scope of federal copyright under 17 U.S.C. § 106. “Choreographic works” are specifically recognized as a copyrightable work under 17 U.S.C. § 102(a) of the Copyright Act when they are fixed in a tangible medium, but copyright protection does not extend to *ideas* embodied in those works.

Moreover, there is an important distinction between a choreographic work—i.e., “a related series of dance movements and patterns organized into a coherent whole”—and a mere dance—i.e., “social dance steps or simple routines” like “the basic waltz step, the hustle step, the grapevine, or the second position in classical ballet”—because only the former can be protected by copyright. Although Judge Grimm concluded that Running Man falls somewhere on the spectrum between a choreographic work and a dance, he explained that this distinction ultimately did not matter since “the scope of copyright preemption is greater than the scope of copyright protection,” and Running Man is within

the “general subject matter” of copyright under a choreographic work. Accordingly, Running Man meets the first prong of the copyright preemption test. Regarding the second prong, Judge Grimm determined that the plaintiffs’ claims for invasion of right of publicity/privacy, common law unfair competition, unjust enrichment, and false endorsement were equivalent to the exclusive reproduction, performance, distribution, and display rights that are exclusive to the Copyright Act. Therefore, these claims are preempted by federal copyright.

For similar reasons, Judge Grimm dismissed plaintiffs’ Lanham Act unfair completion and false designation of origin claims for being properly the subject of the Copyright Act, not the Lanham Act since they pertained to the copying of ideas or concepts and failed to allege facts indicating confusion in the market place.

Finally, Judge Grimm concluded that Brantley and Nickens failed to plausibly allege a valid trademark as required by their trademark infringement and dilution claims. Plaintiffs failed to allege that Running Man is a valid trademark that identifies a good or service as required by 15 U.S.C. § 1127. Although plaintiffs alleged that Running Man is distinctive and immediately recognizable based on their likenesses, the court pointed out that, “as a general rule images and likenesses do not function as trademarks.” In addition, Brantley and Nickens failed to adequately allege that Running Man identifies a unique good or service, essentially arguing that Running Man is a trademark for the plaintiffs performing Running Man. This argument fails, however, because trademarks are not goods or services and cannot be used to identify themselves. Thus, all claims were dismissed with prejudice.

Brantley once again confirms that content creators, such as Epic and other video game companies, are generally allowed to put dance moves into their own work without violating publicity, privacy, trademark, or copyright laws, provided that the only thing being copied are the movements of the dance. There are limits, however. Copying the dancer’s likeness could still be a violation of the dancer’s privacy and publicity rights. In addition, context matters. Had Epic used the dance in a college basketball video game instead of a battle royale video game, this case might have been a closer call. Moreover, if a dance actually were somehow used to identify a unique good or service, then copying that dance could run afoul of the trademark laws. However, as long as content creators are only copying the latest popular dance steps and not the dancers, they should be pleased with this decision.