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Fortnite Almost Free from Suit over Dance Moves

On March 31st, the Eastern District of Pennsylvania dismissed with prejudice all but one of plaintiff's claims in *Pellegrino v. Epic Games*, No. 19-1806 (E.D. Pa. Mar. 31, 2020). As in several other recent cases, the dispute in *Pellegrino* arose out of an unauthorized use of dance moves in the popular video game Fortnite Battle Royale. Unlike those other cases, however, instead of suing for copyright infringement, professional saxophone player Leo Pellegrino brought claims for misappropriation of likeness and for trademark infringement under both the Lanham Act and Pennsylvania state law.

Pellegrino alleged that he developed a signature dance move while playing the saxophone. He further alleged that one of Fortnite's "emotes," the "Phone It In," plays a saxophone while dancing and thus misappropriates and infringes that signature dance move.

Court Rejects Plaintiffs Claims

The court first concluded that the First Amendment barred Pellegrino's Pennsylvania state law claims for right of publicity and privacy. The court applied the Transformative Use test, as formulated by the Third Circuit in *Hart v. EA Entertainment*, 717

F.3d 141 (2013), and found that the Fortnite avatar at issue neither resembled Pellegrino, nor shared his biographical information or what he did in real life, and was, therefore, sufficiently transformative to merit "First Amendment protections that are not outweighed by Pellegrino's interests in his likeness."

Pellegrino's state unjust enrichment claim was dismissed because, since the use of Pellegrino's likeness was unauthorized, plaintiff failed to allege that plaintiff conferred a benefit to defendant, one of the elements of unjust enrichment under Pennsylvania law. The court similarly rejected Pellegrino's state law claim for unfair competition because plaintiff did not allege that the parties were in competition. The court also dismissed Pellegrino's state law claim for trademark infringement because it met both the subject matter and equivalence requirements for copyright preemption under Section 301 of the Copyright Act, 17 U.S.C. § 301. First, the court concluded that plaintiff's Signature Move is a dance that falls within the ambit of copyrightable choreographic works pursuant to Section 102 of the Copyright Act, 17 U.S.C. § 102. Second, the court found that, because the complaint alleged merely that Epic copied Pellegrino's intellectual property without permission, Pellegrino failed to allege "an extra element" that would make the state trademark infringement claim "qualitatively different from a copyright infringement claim."

Regarding claims pursuant to the Lanham Act, the court

dismissed Pellegrino's claim for trademark dilution because the complaint failed to allege that Epic made trademark use of the Signature Move to identify its own product, Fortnite. Separately, relying on *Dastar Corporation v. Twentieth Century Fox Film Corporation*, 539 US 23 (2003), the court dismissed Pellegrino's claim for false designation of origin under the Lanham Act. In *Dastar*, the Supreme Court held that a claim for false designation of origin under the Lanham Act is inappropriate when a defendant's alleged use of a plaintiff's mark is likely to cause consumer confusion as to the person who originated the ideas or communications embodied in tangible products sold in the marketplace. Since Pellegrino claimed consumer confusion over who authored the Signature Move rather than over who produced the "Phone It In" emote, the court concluded that *Dastar* barred the Lanham Act claim for false designation of origin.

Judge Padova, however, rejected Epic's argument that *Dastar* also barred Pellegrino's claim for false endorsement under the Lanham Act because those allegations "do not relate to the alleged confusion over the origin of the Signature Move." Pellegrino is allowed to proceed only on this claim, which is based on allegations that "Epic used Pellegrino's Signature Move to generate significant income by creating the false impression that Pellegrino endorsed Fortnite."

The court concluded by denying Pellegrino's motion for leave to amend his complaint on the grounds that any amendments would be futile. This decision, along with recent victories in *Solid Oak Sketches, LLC v. 2KGames*,

Inc. and AM General LLC v. Activision Blizzard, Inc. are good news for the video game industry.

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