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It Is Unusual: Courts Must Decide What Choreography Can Be Copyrighted

BY [JUSTIN CHARLES](#)/ ON FEBRUARY 10, 2019



In the early 1990s, while actor Alfonso Ribeiro was in the midst of portraying Carlton Banks on the highly successful sitcom *The Fresh Prince of Bel-Air*, he received a script that included some ambiguous directions: "Carlton Dances."^[1] Despite rarely providing any improvisation throughout the series' six season run, Ribeiro created what he called "the corniest dance on the planet." Mixing elements of Courtney Cox in Bruce Springsteen's *Dancing In The Dark* Video with Eddie Murphy in *Delirious* to create what is now known as "The Carlton," a dance move that has outlived the popularity of the series that birthed it.^[2]

Twenty years after *The Fresh Prince of Bel-Air* went off the air, Ribeiro is at the center of a dispute that raises an interesting question – are dance moves copyrightable? Ribeiro, as well as Brooklyn based rapper 2 Milly, and the family of Instagram star "Backpack Kid," have all filed suit against Epic Games, creator of the massive money-making video game *Fortnite*, alleging that Epic is unfairly profiting from the three plaintiff's "creative expression, likeness and celebrity, and trademark without [their] consent or authorization."^[3] The complaints identify several causes of action including Infringement of Copyright, Violation of Right of Publicity, and Unfair Competition.^[4]

To better understand the issue, one must first be familiar with *Fortnite* and the unique way it has become the most popular video game in the world. In response to changes in the video

game industry, video game developer Epic made a change to their business model – they released *Fortnite* completely free of charge across all platforms.^[5] Gamers could download and play *Fortnite* without ever spending money on devices such as cell phones, personal computers, and video game consoles like Sony's *PlayStation*. Epic makes money solely by having gamers purchase add-ons such as costumes, stickers, and dance moves. Epic currently estimates that *Fortnite* has 200 million users, and analysts predict the game will generate \$2 billion this year.^[6] Included in that projection are the sales of virtual dance moves, most of which were popularized by celebrities, musicians, and internet personalities. Epic copies and sells these virtual dance moves to its users, without ever getting permission or sharing profits with the original creators.

Riberio and the other plaintiffs brought claims against Epic upon seeing not only the massive profits Epic games were making, but also the lack of accreditation for the dance moves they created. This raises the question whether these plaintiffs are entitled to any protection for the dance moves they rightfully created? That question becomes complicated.

The 1976 Copyright Act included "choreographic works" as a copyrightable subject matter for the first time, broadening the scope of copyright protection for works of dance.^[7] Previously, choreography could only be copyrighted as a "dramatic composition," which required the dance to have "told a story, developed or characterized an emotion, or otherwise conveyed a dramatic concept or idea."^[8] Frustratingly, there is no definition of "choreographic works," and courts have yet to give a clear and concise definition to help guide an understanding of what can or cannot be copyrighted. The Compendium of Copyright Office Practices, Compendium II (1984), defines choreographic works as "the composition and arrangement of dance movements and patterns... Choreographic works need not tell a story in order to be protected by copyright."^[9]

It further provides "Choreography represents a related series of dance movements and patterns organized into a coherent whole," as well as the caveat that "[s]ocial dance steps and simple routines are not copyrightable... Thus, for example, the basic waltz step, the hustle step, and the second position of classical ballet are not copyrightable. However, this is not a restriction against the incorporation of social dance steps and simple routines, as such, in an otherwise registrable choreographic work. Social dance steps, folk dance steps, and individual ballet steps alike may be utilized as the choreographer's basic material in much the same way that words are the writer's basic material."^[10]

The Compendium's guidelines help paint a picture of what types of choreography are meant to be offered copyright protection. It suggests that copyrightable choreography be a "series" of dance movements, not simply basic steps. "Social dance steps" are specifically considered to be not copyrightable, with the waltz step and hustle step used as example. Of course, stringing together these uncopyrightable individual steps into a larger comprehensive work may create a copyrightable work of choreography.

This seems to make sense in light of the seminal case of *Feist Publications v. Rural Telephone Service* (1991).^[11] In *Feist*, the Supreme Court held that independent created works must have a “modicum of creativity” to be afforded copyright protection in holding that a telephone company’s “white pages” guide was not copyrightable because there was no originality in its compilation of uncopyrightable facts.^[12] The Compendium would suggest that simple dance moves such as the waltz step does not reach that “modicum of creativity” because it’s a simple movement. To hold it copyrightable would stifle the ability of others to not only enjoy this simple move, but to create larger works that incorporate it, and would seem to be in conflict with The Copyright Clause of the Constitution’s purpose, “to promote the progress of science and useful arts.”

As the Compendium suggests, in the world of dance choreography, a simple step may be comparable to a word, which would be uncopyrightable. String a few words together and you have a complete sentence which moves closer to copyrightability. Several sentences make a paragraph, and several paragraphs make a story. Somewhere in between “words” and “story,” that “modicum of creativity” is found which would make the work copyrightable.

So, how does this relate to the dance moves at issue? Let’s look at Alfonso Ribeiro’s “The Carlton” dance as an example. *Fortnite* [has re-created five seconds of Ribeiro’s dance moves](#),^[13] which consists of essentially two simple, repeated moves. These two moves are extremely short and simple, and to hold them copyrightable individually would stifle the creativity of others who may wish to incorporate a swinging of the elbows, for instance, into a larger work. Putting the two moves together inches closer to copyrightability, but most likely still falls short of the level of creativity necessary to find a copyright. Going back to *Feist*, the Supreme Court suggested that a compilation of uncopyrighted facts could be copyrightable if they were selected or arranged in a creative way.^[14] Ribeiro’s [three-minute-long routine from *Dancing With The Stars*](#)^[15], which incorporates the two moves that *Fortnite* has allegedly copied, seems to be closer to the type of dance routine that should be afforded copyright protection. Here, dozens of moves are strung together to create a cohesive piece. Allowing this work of choreography to be copyrighted would not stifle future creators – no one could “accidentally” use the entire three-minute work in creating their own larger work. Dancers at night clubs would not be doing this entire three-minute routine on the dance floor. Even though the larger choreography may be eligible for copyright protection, the smaller, five-second portion still remains uncopyrightable. Ron Chernow’s 978 page biography of Alexander Hamilton, for instance, is copyrightable. However, he would not prevail in a claim for infringement of the words “strong position,” seen on page 62.^[16]

It would seem that these short, five-second dance moves are precisely the types of “social dance moves” that the Compendium recommends should not be afforded copyright protection. Ribeiro and the other plaintiffs will likely have a hard time proving that they have valid copyrights on these brief dance moves. However, the courts are not bound to follow the

guidelines set forth in the Compendium, and as courts have not had to decide this issue in the past, the outcome is uncertain.

It would seem the plaintiff's stronger claim is their Right of Publicity. California's Right of Publicity statute says "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling... shall be liable for any damages sustained by the person or persons injured as a result thereof."^[17] Here, the plaintiffs would need to prove that *Fortnite's* dance moves are actually intended to profit off the plaintiff's likeness. For instance, Ribeiro would need to show that players are purchasing the dance to make their character invoke the look of Ribeiro – that these dances are actually replacements for *Fortnite* simply licensing a Ribeiro character and selling that to its players.

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^[1] Mannie Holmes, *Alfonso Ribeiro Explains How the Carlton Dance Was Invented on 'The Fresh Prince of Bel-Air'*, *Variety* (Aug. 19, 2015), <https://variety.com/2015/tv/news/fresh-prince-of-bel-air-alfonso-ribeiro-carlton-dance-1201570543/>.

^[2] *Id.*

^[3] Brian Crecente, *'Fortnite' Dance Lawsuits: The Carlton, the Floss, the Milly Rock, What Is Going On?*, *Variety* (Dec. 18, 2018), <https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141/>.

^[4] *Id.*

^[5] *Id.*

^[6] *Id.*

^[7] *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 160-161 (2d Cir. 1986).

^[8] *Id.* at 160.

^[9] Compendium of Copyright Office Practices, Compendium II 450.03(a).

^[10] *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986).

[11] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

[12] *Id.*

[13] TY_, Fortnite Fresh Dance Reference (Side by Side), YouTube (Dec. 17, 2017), https://www.youtube.com/watch?v=8y4lc_P2Cok.

[14] *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 341 (1991).

[15] HopMedia, Alfonso Ribeiro doing the Carlton on DWTS, YouTube (Oct. 7, 2014), https://www.youtube.com/watch?v=pbSCWgZQf_g.

[16] Ron Chernow, *Alexander Hamilton*, 62 (2010).

[17] Cal. Civ. Code §3344 (West 2018).