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Intellectual Property Alert

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Protect your dance moves? The Ninth Circuit approves

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The court's ruling on the extent of copyrightability of short-form choreographic works creates protections for choreographers and risks for content creators.



What's the impact?

- The Ninth Circuit's decision in *Kyle Hanagami v. Epic Games, Inc.* is a win for choreographers and provides much needed guidance regarding copyright protections for choreographic works.
- Under *Hanagami*, snippets of choreography as minimal as two seconds may be entitled to copyright protection, creating uncertainty for the future of viral TikTok dances and other short-form content.
- *Hanagami* reaffirms that the Ninth Circuit applies a higher bar for dismissal of infringement claims than other jurisdictions, such as the Second Circuit. Choreographer plaintiffs may find more favorable outcomes when filing within the Ninth Circuit.

On November 1, 2023, the Ninth Circuit unanimously reversed the district court's dismissal of Kyle Hanagami's copyright infringement action against Epic Games, Inc., the video game developer

behind *Fortnite*.¹ The court held that at the motion to dismiss stage, courts must only consider whether the plaintiff has plausibly claimed that an alleged infringing work is substantially similar to the original work by comparing the creative selection and arrangement of elements of both works. Particularly with respect to choreography, the copyrighted work at issue in *Hanagami*, the Ninth Circuit stated that courts should not focus solely on similarities between the static poses that make up the choreography, but rather all the dynamic elements that are embodied in the work, which may include body shapes, transitions, and tempo. The Ninth Circuit's reversal is a decided win for choreographers. This is particularly true in today's world where TikTok dances can go viral and be monetized at a moment's notice, leaving little recourse or upside for the creatives behind such moves.

Copyright and choreography

Section 102(a)(4) of the Copyright Act provides copyright protection for "choreographic works," created after January 1, 1978, that are fixed in some tangible medium of expression. The Copyright Office states that fixation can take the form of dance notation, video recordings, textual descriptions, or photographs.

The Ninth Circuit uses a two-part test—the extrinsic/intrinsic test—to determine whether one work is substantially similar to another, therefore constituting copyright infringement. As the court recently confirmed in *Antonick v. Elec. Arts, Inc.*:²

[A plaintiff] must prove both substantial similarity under the "extrinsic test" and substantial similarity under the "intrinsic test." The "extrinsic test" is an objective comparison of specific expressive elements. The "intrinsic test" is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

Under the extrinsic test, courts must first distinguish between protectable and unprotectable elements of the work, and "ask only whether the protect[a]ble elements in two works are substantially similar."³ This process is called "filtering." If similarities remain after filtering out unprotectable elements, it is improper to grant a motion to dismiss. Instead, a jury must then make a determination under the intrinsic test. Historically, the Ninth Circuit has disfavored dismissing copyright claims for lack of substantial similarity at the pleading stage, explicitly recognizing that "most judges are not sufficiently trained in the specifics of the art form at issue to make reliable conclusions about similarity."⁴

¹ *Kyle Hanagami v. Epic Games, Inc.*, No. 22-55890 (9th Cir. Nov. 1, 2023)

² *Antonick v. Elec. Arts, Inc.*, 841 F.3d 1062 (9th Cir. 2016)

³ *L.A. Printex Indus. Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 849 (9th Cir. 2012).

⁴ *Williams v. Gaye*, 895 F.3d 1106 at 1119 (9th Cir. 2018).

District Court decision

Hanagami filed the underlying lawsuit in 2022, which involved Epic Games' sale of an "emote" called "It's Complicated" within *Fortnite*. An emote is a dance move or dynamic pose that a player may purchase and use for their in-game character. For example, if a player purchased the "It's Complicated" emote, it would allow their character to perform a two-second dance ([depicted here](#)).

In his complaint, Hanagami alleged that the "It's Complicated" emote infringed his five-minute choreographic work, "How Long," which he first published in 2017 and registered with the US Copyright Office in 2021. Epic Games filed a motion to dismiss, arguing that the snippet of "How Long" at issue was not protectable. The district court agreed, granting Epic Games' motion to dismiss on August 24, 2022. The court found that, after filtering out the elements it deemed unprotectable under the extrinsic/intrinsic test, the portion of "How Long" at issue was not protectable under copyright law (as opposed to entirety of Hanagami's five-minute choreography, which was protectable).

Ninth Circuit decision

In his appellate brief, Hanagami argued that the district court's application of the extrinsic test was impermissibly narrow because it isolated the poses in his choreography and determined that those discrete portions, standing alone, would not be eligible for copyright protection. In so doing, Hanagami continued, the court failed to give due consideration to the other expressive elements in his choreography, as well as the fact that "It's Complicated" used the most recognized portions of "How Long"; therefore, the district court created dangerous precedent for future copyright holders.

In its answering brief, Epic Games followed the district court's line of reasoning, arguing that individual dance steps or simple routines are not entitled to copyright protection. Epic Games pointed out that "It's Complicated" was similar to the "Carlton," "Floss," and "Milly Rock" dances for which the Copyright Office denied copyright registrations, all representing mere "building blocks" of expression.

Applying the extrinsic/intrinsic test, the Ninth Circuit found that the lower court came to the incorrect conclusion during the filtering process. While acknowledging that "choreography is composed of various elements that are unprotectable when viewed in isolation," *Hanagami* at 19, the court emphasized that "[w]hat is protectable is the choreographer's 'selection and arrangement of the work's otherwise unprotected elements.'" The trier of fact is to assess whether an alleged infringer's selection and arrangement is substantially similar to the underlying work.

The court found persuasive Hanagami's argument that "'poses' are not the only relevant element underlying a choreographic work, but also body position, body shape, body actions,

transitions, use of space, timing, pauses, energy, cannon, motif, contrast[,] [and] repetition.” The court analogized to infringement in the music context, where focusing on just notes in assessing infringement of music would be akin to focusing on just poses in assessing infringement of choreography. Under this analytical framework, the court held that Hanagami plausibly alleged that “It’s Complicated” was substantially similar to “How Long,” giving life to the adage that the whole is greater than the sum of its parts.

Key takeaways

- / Choreographers seeking to pursue infringement claims may find greater success filing within the Ninth Circuit. Relatedly, if licensing a choreographic work or otherwise contracting in connection with their choreographic works, businesses or creators might prefer to choose California as the choice of law.
- / Companies and creatives should review their portfolio of content to determine whether they’ve created any choreographic works that might be protectable and register such works with the copyright office. For example, an athlete with signature celebratory dance or a dance influencer who posts choreography on Instagram might try to register and therefore protect those works, especially if such works form a key part of their business or brand.
- / Influencers who are asked to perform choreography as part of a branded post on social media should be wary of potential infringement claims that may arise. In such cases, influencers should opt for an alternative creative concept, or ask the brands to represent and warrant that they own such choreography and indemnify in the event of a legal claim.
- / Artificial Intelligence technology has been used to monitor infringement of static images and music but has yet to be tested in the choreographic context. Content creators should be wary of advancements in this area, which may lead to widespread enforcement of infringement claims against repurposed dance routines published on platforms such as YouTube or TikTok.
- / Inherently tied to technology and advancements thereof, intellectual property is a dynamic area of law. As demonstrated by *Hanagami*, attorneys representing rightsholders should keep apprised of developments in the space and should not be afraid to put forth good faith, creative arguments to protect their client’s intellectual property rights.

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