FOOTBALL, FORTNITE, FORTUNE

I. Introduction

In 2016, the NFL became the "No Fun League" after heavily penalizing players for celebrations.[1] In 2017, after announcing plans to relax the rules against end zone celebrations, the NFL saw a rise in them.[2] That same year, a video game called Fortnite exploded onto the scene. Fortnite fans were particularly interested in the dances they could make their video game characters perform—dances already created and performed by pop culture icons. This paper argues that when considering Fortnite's actions and the marketability of end zone celebrations, it is foreseeable that Fortnite could one day copy them. If that happens, while some players could successfully sue under copyright law, most would have to find a remedy elsewhere.

II. End Zone Celebrations, Fortnite, and Madden

Football is a staple in many households; each week, millions watch the game. Every year, National Football League (NFL) athletes benefit by taking advantage of this passion, not only by earning millions of dollars in salary, but also by signing lucrative endorsement deals. While success on the field is a starting point, an athlete with a captivating personality stands to gain even more financially. A unique end zone celebration that captures fans' hearts contributes to that personality and makes the player more marketable.

One such marketable player was Elbert "Ickey" Woods. After Woods scored a touchdown, he would "shuffle his feet to the right and hold the football out to the right, shuffle his feet to the left and hold the football out to the left, and finally finish by doing three hops to

[1] Mark Maske, *The NFL Never Wanted to Be the No Fun League. It Just Happened that Way—Until Now*, WASH. POST (July 20, 2017), https://www.washingtonpost.com/news/sports/wp/2017/07/20/the-nfl-never-wanted-to-be-the-no-fun-league-it-just-happened-that-way-until-now/?utm_term=.b208cfd76505.
[2] Kevin Patra, *NFL Relaxing Touchdown Celebration Rules for Players*, NFL (May 23, 2017, 1:10 PM), http://www.nfl.com/news/story/0ap3000000810537/article/nfl-relaxing-touchdown-celebration-rules-for-players.

the right and spiking the football into the ground."[3] This end zone celebration resonated with fans, and Woods's popularity grew. Woods leveraged his celebrity status to get endorsement deals; as recently as 2016, he performed the "Ickey Shuffle" in a Geico commercial.[4]

End zone celebrations could soon become a legal issue given the exploitive use of choreography in Fortnite. The game generates revenue when players buy in-game currency to purchase various items and dances known as "emotes."[5] It is precisely these "emotes" which have led one artist to complain; Brooklyn rapper, 2 Milly, sued Fortnite creator Epic Games for allegedly stealing his signature "Milly Rock" dance and renaming it "Swipe It."[6] Imagine the amount of money an artist could make through licensing given that Epic Games has earned over one billion dollars in sales from Fortnite[7]—largely due to the added interest created by emotes.[8]

2 Milly is not the only one feeling shortchanged. Another emote available in Fortnite is the "Ride the Pony,"[9] which is identical to the dance "Gangnam Style."[10] Another is the "Floss," taken from "Backpack Kid" Russell Horning, who became famous when he did the dance while performing with Katy Perry.[11] Fortnite also uses a popular dance from the television show "Scrubs," performed by actor Donald Faison.[12] Another is "Fresh," which looks exactly like

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[3] *Ickey Shuffle*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ickey_Shuffle.
[4] Kalyn Kahler, *Ickey Woods is Still Shuffling*, SPORTS ILLUSTRATED (Jan. 29, 2016), https://www.si.com/mmqb/2016/01/29/ickey-woods-nfl-cincinnati-bengals-ickey-shuffle-super-bowl.
[5] Shawn Farner, *What These Fortnite Emotes Really Mean*, SVG, https://www.svg.com/134565/what-these-fortnite-emotes-really-mean/ (last visited Feb. 1, 2019).
[6] Eriq Gardner, *Rapper 2 Milly Sues Epic Games for Lifting His Dance Routine in 'Fortnite'*, HOLLYWOOD REP. (Dec. 5, 2018, 10:27 AM), https://www.hollywoodreporter.com/thr-esq/rapper-2-milly-sues-epic-games-lifting-his-dance-routine-fortnite-1166625.
[7] LEGAL ENTM'T, *supra* note **Error! Bookmark not defined.**.
[8] Said one Fortnite fan: "Without the emotes you wouldn't have any fun. It would just be another battle royale game." Kaufman, *supra* note **Error! Bookmark not defined.**.
[9] Wood, *supra* note **Error! Bookmark not defined.**.
[10] Annie Pilon, *What is Gangnam Style? And What Does it Mean for Business?*, SMALL BUS. TRENDS (Nov. 1, 2017), https://smallbiztrends.com/2013/05/what-is-gangnam-style.html.
[11] Joshua Morris, *From Fortnite to the Classroom: The 'Floss' Dance Craze Sweeping Schools*, TES (Apr. 24, 2018), https://www.tes.com/news/fortnite-classroom-floss-dance-craze-sweeping-schools.
[12] *Fortnite Dances in Real Life*, BEANO, https://www.beano.com/posts/7-best-fortnite-dances-in-real-life (last visited Jan. 28, 2019).

actor Alfonso Ribeiro's "Carlton Dance" from the 1990's television show "Fresh Prince of Bel-Air."[13] Perhaps buoyed to action after seeing 2 Milly sue Epic Games, Alfonso Ribeiro also sued the Fortnite creator in December 2018.[14]

Like Fortnite, the NFL video game series "Madden," created by EA Sports, finds inspiration from real life. As video game technology improved, the playable NFL characters went from solely wearing NFL athletes' names, to having those athletes' faces, to—in the latest iteration—acting out the athletes' real-life signature end zone celebrations. The crucial difference between EA Sports and Fortnite is EA Sports pays for the right to do all of this; it licenses directly from the NFL the right to use team names, uniforms, and symbols, and it licenses from the NFL Players Association the personality rights to the more than 2,000 NFL athletes.[15] Since Fortnite uses highly recognizable dances, and profits handsomely by doing so, why would they not eventually use end zone celebrations as well?

III. Copyright Law: What It Provides and What It Requires

a. Main requirements: originality, work of authorship, and fixation

Copyright law can provide protection for end zone celebrations. A work is typically copyrightable if it is an original work of authorship fixed in a tangible medium of expression.[16] An author seeking copyright protection must establish, among other things, that the work is original.[17] Originality has two elements: independent creation and creativity.[18] To be original, a

[13] Wood, *supra* note **Error! Bookmark not defined.**.
[14] Emily Birnbaum, *'Fresh Prince of Bel Air' Star Accuses 'Fortnite' Creators of Stealing His 'Carlton Dance'*, HILL (Dec. 17, 2018, 5:45 PM), https://thehill.com/policy/technology/421779-fresh-prince-of-bel-air-star-sues-fortnite-creators-for-stealing-his.
[15] Owen Good, *Remember: It's Not Just the NFL's Exclusive License with* Madden*; the Players' Union Has One, Too.*, KOTAKU (Mar. 4, 2013, 11:00 AM), https://kotaku.com/5988357/remember-its-not-just-the-nfls-exclusive-license-with-madden-the-players-union-has-one-too.
[16] 17 U.S.C. § 102(a).
[17] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).
[18] *Id.*

work must be original to the author as opposed to a copy of someone else's work.[19] In addition, while novelty is not required, originality does require a "modicum of creativity."[20] Thus, largely factual works are not protectable; for example, a phonebook with information predictably alphabetically organized would not receive copyright protection for the facts it contains or its arrangement of them.[21]

Copyright also requires that a work is a work of authorship. A "work of authorship"[22] includes: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[23] While choreographic works are undefined in the Copyright Act, the Copyright Office defines "choreography" as "the composition and arrangement of dance movements and patterns," and states such works "need not tell a story in order to be protected by copyright."[24]

Copyright law also requires works to be fixed in a tangible medium of expression.[25] "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[26]

b. Three obstacles: idea/expression, the merger doctrine, and scènes à faire

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[19] *Id.* at 345–46.
[20] *Id.* at 346.
[21] *Feist*, 499 U.S. at 363.
[22] 17 U.S.C. § 102(a) (2018).
[23] *Id.*
[24] U.S. COPYRIGHT OFFICE, COMPENDIUM II: COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 450.01 (1984).
[25] *Id.* § 102(a).
[26] *Id.*

Even after meeting the main requirements of copyrightability, there could still exist obstacles, such as idea/expression, the merger doctrine, and scènes à faire. The fixation requirement focuses on a tangible medium *of expression*, a term that can be more easily understood by reference to what it is *not*. Expression is not an "idea, procedure, process, system, method of operation, concept, principle, or discovery," none of which are copyrightable because they either belong in the public domain or are protected by patent law.[27] The line between idea and expression is not always clear, but typically depends on the level of concreteness and specificity of the work in contrast to the work's abstractness, like an idea.[28] For example, "using cartoon characters drawn in three dimensions who interact in a movie seamlessly with human actors is . . . an idea, rather than an expression."[29]

An extension of this idea/expression dichotomy is the merger doctrine: when there is only one or a few ways of expressing an idea, courts will find the idea merges with its expression and the work is therefore not copyrightable.[30] For example, when a sweepstakes owner tried to copyright the wording of his competition's rules, the court denied the copyright because it found that relatively few possible rule phrasings existed and therefore one variation of those possibilities did not merit protection.[31]

Similarly, certain elements in a work may be defined as "scènes à faire" and therefore not protectable. Even if expressive, elements are not copyrightable "if they are standard, stock, or common to a topic, or if they necessarily follow from a common theme or setting."[32] In *Nichols*

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[27] *See* Eldred v. Ashcroft, 537 U.S. 186, 225 (2003).
[28] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
[29] Douglas G. Baird, *Does Bogart Still Get Scale? Rights of Publicity in the Digital Age* 4 (John M. Olin Program in Law and Econ., Working Paper No. 120, 2001), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1177&context=law_and_economics.
[30] Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).
[31] *Id.* at 676.
[32] Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1374 (10th Cir. 1997).

v. Universal Pictures Corp.,[33] a defendant was found not liable for allegedly infringing an author's characters, "the low comedy Jew and Irishman," because the defendant had "not taken from [the author] more than [the characters'] prototypes have contained for many decades."[34] To allow copyright protection of those "stock figures" would give the author a copyright for "what was not original with her."[35]

c. Works made for hire

The ownership of an original work of authorship vests in its creator upon the work's creation.[36] The exception to this rule is any work made for hire.[37] When a work is made for hire, the copyright belongs to the "employer or other person for whom the work was prepared" unless the parties agree otherwise.[38] Specifically, the Copyright Act defines "work made for hire" to include (1) a work prepared by an employee within the scope of his or her employment and (2) a work commissioned from an independent contractor that fits one of several defined categories.[39]

The term "employee" carries its common law agency meaning, centering on whether the hiring party has the "right to control the manner and means by which the product is accomplished."[40] When determining whether an individual is an employee versus an independent contractor, courts will consider factors including: the skill required, the source of the tools needed, and the duration of the relationship between the parties.[41]

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[33] 45 F.2d 119, 122 (2d Cir. 1930).
[34] *Id.*
[35] *Id.*
[36] 17 U.S.C. § 201(a) (2018).
[37] *See id.* § 201(b).
[38] *Id.*
[39] *Id.* § 101.
[40] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).
[41] *Id.*

"Scope of employment" carries its common law agency meaning.[42] Conduct is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."[43]

Thus, although there are several requirements before a work is deemed a work made for hire, the potential consequence is significant: the true creator of the work does not retain its copyright.

IV. Copyright Law Will Not Protect Most End Zone Celebrations

In theory, end zone celebrations can meet copyright law's thresholds for protectability. In practice, most end zone celebrations are too trivial, lacking even the basic creativity required for copyright protection. The work made for hire doctrine complicates the copyrightability challenge further, as ownership of the copyright might be disputed.

Assuming a player comes up with unique expression, copyright's low threshold of originality might be satisfied. Linebacker Ray Lewis would arguably meet this standard with his famous "Squirrel Dance": "a slide to the left, a slide to the right, a wiggle of his legs, a thrust of his pelvis, a puff of his chest, and a roar."[44]

Given the Copyright Office considers "choreographic works"[45] as "dance movements and patterns,"[46] this fourth category of U.S. Code Section 102(a) is the most logical fit for a bodily movement like an end zone celebration. Finally, fixation also would not be a problem, as games are televised, including celebrations. There are, however, other obstacles to copyright.

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[42] *Id.* at 740.
[43] RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).
[44] Simon Samano, *Ray Lewis Shares the Origins of His 'Squirrel' Dance*, USA TODAY (Jan. 6, 2013, 7:46 PM), https://www.usatoday.com/story/gameon/2013/01/06/ravens-ray-lewis-squirrel-dance/1812555/.
[45] U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 450.06 (2d ed. 1984).
[46] *Id.*

The idea/expression dichotomy, merger doctrine, and scènes à faire thin the pool of potentially copyrightable end zone celebrations. For example, a common individual celebration in football is the "spike." Rob Gronkowski throws the ball with all his might, Luke Willson spikes the ball and then heaves his arms in the air, and Jimmy Graham jumps into the air before spiking. Ultimately, they are simply smashing a football into the ground. There are only so many ways to throw a football into the ground, such that the idea of it merges with the expression—becoming unprotectable. Because the spike has become associated with a touchdown, it may also be considered scènes à faire, an unprotectable cliché that inevitably flows from the idea of a touchdown celebration.

Even the most recognizable celebrations are unlikely to be copyrightable. LaDainian Tomlinson was known to flip the ball with one hand while resting the other behind his head, Cam Newton pretends to pull his shirt apart à la Superman, and Victor Cruz salsa danced. Tomlinson's and Newton's celebrations might fail to even meet copyright's low originality threshold because they are "simple routines,"[47] or alternatively fall victim to the merger doctrine much like the spike. Cruz's salsa dance, meanwhile, seems to fit the common understanding of a "social dance."[48]

Even if a player comes up with a copyrightable celebration, the copyright may end up belonging to his team or the NFL. A player is not an independent contractor; at least until he is traded or cut, he plays for one team, and that team controls when and how team practices will occur as well as what a player must do in games. Further, teams pay players an annual salary, another common indicator an individual is an employee rather than an independent contractor.

[47] Horgan v. Macmillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986).
[48] *Id.*

If we know an individual is an employee as opposed to an independent contractor, the next question is whether their conduct was within the scope of employment. As discussed, employee conduct is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."[49] If the team owner is ultimately interested in making money, and the player's celebration creates more fan interest, then it is likely also work "of the kind he is employed to perform."[50] This line of reasoning may equally well fit the "purpose" element.[51] Further, the celebration occurs within the "authorized time and space limits"[52] because, though the clock stops after a score, players are transitioning and fans are still watching. Finally, the celebration happens on the field and therefore satisfies the "space" aspect as well. Since a player in the NFL is an employee and a celebration likely fits within the scope of employment, a player's copyrightable moves could ultimately belong to the employer.

Thus, if Fortnite infringed a copyrightable end zone celebration, the plaintiff might not be the player, but rather the NFL organization or team. Similarly, though Alfonso Ribeiro is suing Fortnite for using the "Carlton Dance,"[53] the real holder of that copyright is likely the owner of "The Fresh Prince of Bel-Air." After all, Ribeiro did the dance within the confines of the show. Work made for hire being an issue assumes a court would even deem the choreography meriting copyright protection in the first place. In Ribeiro's case, that is unlikely, given its lack of independent creation, by his own admission.[54]

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[49] RESTATEMENT (SECOND) OF AGENCY § 228 (AM. LAW INST. 1958).
[50] *See id.*
[51] *See id.*
[52] *See id.*
[53] CBS This Morning, *Alfonso Ribeiro Sues Fortnite Marker for Using "Carlton Dance"*, YOUTUBE (Dec. 18, 2018), https://www.youtube.com/watch?v=rfLQqFZpebo (last visited Jan. 28, 2019).
[54] Christopher Hooton, *Alfonso Ribeiro Reveals the Origin of the Carlton Dance from Fresh Prince*, INDEPENDENT (Aug. 21, 2015), https://www.independent.co.uk/arts-entertainment/tv/news/alfonso-ribeiro-reveals-the-origin-of-the-carlton-dance-from-fresh-prince-10465625.html.

Even after clearing the hurdles of copyrightability, a player can lose ownership of his work; this could serve as a strong deterrent against creating the work.

CONCLUSION

Given the renewed freedom to celebrate touchdowns, and considering the present state of the Fortnite controversy, it remains to be seen whether Fortnite will copy NFL celebrations. Courts must strike a balance between avoiding unjust enrichment for those like Epic Games and staying true to the goals and limits of copyright law. The public is harmed when a mere idea or simplistic expression is protected; on the other hand, when an author is denied copyright protection, the incentive to create sometimes disappears. This is especially true given Fortnite's financial success.

As discussed, most end zone celebrations do not deserve copyright protection, but some still do. We could see Antonio Brown reveal an end zone celebration so stunningly creative that fans' jaws drop, only for the dance to be copied by Fortnite. Maybe Brown and other football players will keep on dancing regardless—or maybe we will see a new version of the No Fun League.