

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
*Southern Division***

**JAYLEN BRANTLEY and JARED
NICKENS,**

*

Plaintiffs,

*

v.

*

Case No.: 8:19-cv-594-PWG

**EPIC GAMES, INC., JOHN AND JANE
DOES 1 THROUGH 50, and JOHN DOE
CORPORATIONS 1 THROUGH 10,**

*

*

Defendants.

*

* * * * *

MEMORANDUM OPINION AND ORDER

Plaintiffs Jaylen Brantley and Jared Nickens bring this action against Defendant Epic Games, Inc. for the alleged unauthorized appropriation of the dance the “Running Man” that they allegedly created, named, and popularized.¹ Plaintiffs claim that Epic Games intentionally copied the movements of the “Running Man” dance and incorporated them as a feature of its highly popular online video game *Fortnite*. They bring eight causes of action under common law and the federal Lanham Act for invasion of the right of privacy/publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution, and false designation of origin. Plaintiffs seek both compensatory and injunctive relief. Epic Games now moves to dismiss the claims against it.² For the reasons discussed below, Epic Games’ motion to dismiss is granted and Plaintiffs’ claims are dismissed with prejudice.

¹ Brantley and Nickens also name as Defendants John and Jane Does 1 through 50 and John Doe Corporations 1 through 10 as “the creators and developers of the Fortnite video game franchise.” ECF No. 18, Am. Compl., ¶ 6. I will refer to all defendants collectively as “Epic Games” or

² The motion is fully briefed. *See* ECF Nos. 27, 28, 29. A hearing is not necessary. *See* Loc. R. 105.6 (D. Md. 2018).

Background

Plaintiffs Brantley and Nickens allege that in 2016 they created, named, and popularized the dance move which they titled the “Running Man.” Am. Compl. ¶¶ 2, 3, 9. Brantley and Nickens allege that they incorporated the dance into breaks at University of Maryland basketball games, and that the dance subsequently went viral on social media. *Id.* ¶ 10. Plaintiffs claim to have incited the online popularity of the Running Man by challenging others to imitate the dance and post the performance on social media. *Id.* They state that the Running Man videos have over 100 million views on YouTube and thousands of people have posted videos of themselves performing the dance. *Id.* ¶ 11.

The popularity of the “Running Man Challenge” allegedly exploded in part after a live performance of the dance by Brantley and Nickens on the *Ellen DeGeneres Show*. *Id.* ¶ 2. While Plaintiffs repeatedly allege in their complaint that they “created” the dance, during the *Ellen* segment two high school students from New Jersey – Kevin Vincent and Jeremiah Hall – are credited with creating the dance. ECF No. 27-2 (video of *Ellen* segment).³ Brantley and Nickens appear later in the segment and state that *they* copied the dance from a video that they saw on Instagram. *Id.* Nonetheless, Brantley and Nickens claim that the “Running Man” has become synonymous with them. Am. Compl. ¶ 13.

Defendant Epic Games is the creator and developer of the *Fortnite* video game franchise. *Id.* ¶ 16. *Fortnite* is a free-to-play online multiplayer video game which supports

³ Although the video of the *Ellen* segment was included as an exhibit to Epic Games’ Motion to Dismiss, and not attached to the Complaint, I take judicial notice of it without converting the motion to one for summary judgment, as the video is central to Plaintiffs’ claims, was incorporated by reference in the Complaint, and its authenticity is not in dispute. *See* Am. Compl. ¶ 2; *Witthohn v. Federal Ins. Co.*, 164 Fed. Appx. 395, 396 (4th Cir. 2006) (When reviewing a motion to dismiss, “a court may consider . . . documents central to plaintiff’s claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed.”)

up to one hundred players during a single game. *Id.* ¶¶ 17, 18. *Fortnite* allows each player to select and create their own individualized avatar which is extensively customizable. *Id.* The players then compete in a battle-royale style shooting match where the last player standing is declared the victor. *Id.* ¶ 17. At any point during the match, the player can command their online avatar to perform programmed movements called “emotes” which express the player’s emotions in the game. *Id.* ¶¶ 20, 21. *Fortnite*’s massive popularity can be attributed not just to its gameplay, but also to the incorporation and popularity of in-game emotes. *Id.* ¶ 21.

Because *Fortnite* is free-to-play, the game is primarily supported by purchases made at the game’s electronic storefront. *Id.* ¶ 18. At the electronic storefront, players can purchase various customizations for their online characters including costumes, equipment, and unique emotes. *Id.* In July 2018, Epic Games produced a new emote which was called the “Running Man” emote (the “Emote”). *Id.* ¶ 26. The Emote could be purchased for roughly five dollars on the *Fortnite* electronic storefront or purchased as part of a package included with the latest installment of *Fortnite*. *Id.*

Brantley and Nickens allege that Epic Games created the Emote by impermissibly copying the movements of the “Running Man” dance and profited from the sale of the Emote on the *Fortnite* electronic storefront. *Id.* ¶¶ 26–28, 32. Brantley and Nickens bring a total of eight causes of action against Epic Games under theories of invasion of the right of privacy/publicity, unfair competition, unjust enrichment, trademark infringement, trademark dilution, and false designation of origin. Epic Games moves to dismiss the claims against it.

Standard of Review

Plaintiffs’ claims are subject to dismissal if they “fail[] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The purpose of Rule 12(b)(6) “is to test the

sufficiency of a complaint and not to resolve contests surrounding the facts, the merits or the applicability of defenses.” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). A pleading must meet the standard of Rule 8(a), which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The complaint must contain factual content, and more than “a formulaic recitation of the elements of a cause of action” or “naked assertion[s] devoid of further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). Therefore, mere legal conclusions will not suffice. *Iqbal*, 556 U.S. at 678. Finally, the factual allegations presented in the complaint must be construed “in the light most favorable to [the] plaintiff.” *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008).

Discussion

Epic Games argues that the Copyright Act preempts Brantley and Nickens’ claims for invasion of the right of privacy/publicity (Count I), common law unfair competition (Count III) and unjust enrichment (Count IV). Similarly, Epic Games argues that Brantley and Nickens’ claims for Lanham Act unfair competition (Count II) and false designation of origin (Count VII) are precluded by the Copyright Act. Finally, Epic Games argues that Plaintiffs failed to plausibly allege a valid trademark for their claims for Lanham Act trademark infringement (Count V), common law trademark infringement (Count VI), and Lanham Act trademark dilution (Count VII).⁴ I agree.

I. Plaintiffs’ Common Law Privacy, Unfair Competition, and Unjust Enrichment Claims are Preempted by the Copyright Act

The Copyright Act expressly preempts a broad array of other claims. Specifically, § 301

⁴ Epic Games also argues that Brantley and Nickens’ claims should be dismissed under First Amendment principles and for failure to state a claim. Because I dismiss the claims for the reasons discussed herein, I do not address these arguments.

of the Copyright Act states as follows:

On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

17 U.S.C. § 301. This statutory language establishes a two-prong test for determining copyright preemption: “first, the work must be within the scope of the subject-matter of copyright as specified in 17 U.S.C. §§ 102, 103, and second, the rights granted under state law must be equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106.” *U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir. 1997) (quoting *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 229 (4th Cir. 1993)) (internal quotation marks omitted). I analyze each of these prongs in turn.

a. The Running Man is Within the Subject Matter of Copyright

Under the first prong of the test for copyright preemption, I must consider whether the work in question – the Running Man dance – falls within the subject matter of copyright as specified in sections 102 and 103 of the Copyright Act. As relevant here, section 102(a) provides that “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: . . . choreographic works.” 17 U.S.C. § 102(a). Section 102(b) provides that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.