

Dale M. Cendali
Joshua L. Simmons
Shanti Sadtler Conway
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-6460
dale.cendali@kirkland.com
joshua.simmons@kirkland.com
shanti.conway@kirkland.com

Megan L. McKeown
KIRKLAND & ELLIS LLP
609 Main Street
Houston, TX 77002
Telephone: (713) 836-3600
Facsimile: (713) 836-3601
megan.mckeown@kirkland.com

Attorneys for Plaintiff Epic Games, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

EPIC GAMES, INC.,

Plaintiff,

- against -

SICK PICNIC MEDIA, LLC and MATTHEW F.
GEILER,

Defendants.

Case No. 19-cv-11215

ECF Case

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY JUDGMENT OF NON-INFRINGEMENT

Plaintiff Epic Games, Inc. (“Epic Games”), by and through its attorneys, Kirkland & Ellis LLP, for its Complaint, hereby alleges against Defendants Sick Picnic Media, LLC (“Sick Picnic”) and Matthew F. Geiler (“Geiler”) (collectively, “Defendants”) as follows:

NATURE OF THE ACTION

1. Epic Games has been forced to bring this action seeking a declaration that, contrary to infringement claims asserted by Defendants, the Pump It Up Emote in Epic Games' fantastical, multiplayer video game, *Fortnite*, does not infringe their copyright or trademark rights.

2. *Fortnite* is set in a fictional world in which players, represented by original characters of various genders, ethnicities, and species, compete in a battle royale with a variety of accessories and weapons. The players choose how their in-game characters look and move, including by selecting short, pre-programmed movements that allow the player to express his or her emotions in the game or to taunt other players. These are known as emotes.

3. This case concerns one of those emotes: a Halloween-themed emote called "Pump It Up" that Epic Games made available for a single day shortly before Halloween in the fall of 2019 as part of its annual *Fortnitemales* event (the "Pump It Up Emote"). In the Pump It Up Emote, the avatar performs a brief dance to a Halloween-themed song developed by Epic Games while the head of whatever avatar the player has selected is transformed into a jack-o'-lantern face designed by Epic Games. The jack-o'-lantern face has moving green flames pouring from the eyes, nose and mouth, a broad, grinning mouth, a long, prominent stem that curves, and dark striations delineating the segments of the pumpkin giving it a yellow-and-orange design. The Pump It Up Emote can be performed by any avatar in the game, including fantastically dressed male avatars, female avatars, and avatars of other species.

4. Defendants have alleged that the Pump It Up Emote infringes their copyright to a "character," which they refer to as the "Dancing Pumpkin Man," that appeared in a video in which Defendant Geiler is dressed in a plain black unitard he did not make, wearing as a mask a

jack-o'-lantern decoration he did not create, dancing to a song he did not write in front of a static, generic graveyard image (the "Video"). A true and correct copy of the Video is attached hereto as **Exhibit 1**. There is no infringement here, however, as Defendants do not own a protectable character and the jack-o'-lantern-headed figures are in any case not substantially similar as a matter of law. Defendants' alleged "character" is not protectable as it is not "sufficiently delineated" as a matter of law. Rather, it is simply the idea of an ordinary jack-o'-lantern head on a non-descript, plain black unitard body. This does not rise to the level of specificity needed, as a matter of law, to create a copyrightable character.

5. Moreover, Defendants did not create the attributes of that alleged "character," and thus they cannot own a copyright to them. Defendants have admitted that Geiler did not create the face of the jack-o'-lantern—rather he took a preexisting, third-party Halloween jack-o'-lantern decoration from his company's holiday lobby display and fashioned it into a mask. Nor did Geiler create the simple black unitard.

6. In any case, these preexisting materials are not substantially similar to *Fortnite's* Pump It Up Emote. In contrast to *Fortnite's* Pump It Up Emote, the Defendants' alleged character's jack-o'-lantern face has a narrower mouth and a smaller aperture to the eyes and nose, there are no moving green flames shining through the holes, its jack-o'-lantern head is smaller than *Fortnite's* Pump It Up Emote and is a uniform orange color, as opposed to a striated, yellow-and-orange-toned design. The stem on Defendants' jack-o'-lantern is smaller than the stem in the Pump It Up Emote. The bodies and costumes of the figures are also not substantially similar. The body of Defendants' alleged "character" is an ordinary man in a plain black unitard. *Fortnite* has over 200 avatars (including female avatars and avatars of other species) whose heads can be briefly replaced by the Pump It Up Emote—none of these avatars'

bodies wear a plain black unitard. Nor is the music used in the Video the same music as used in the Pump It Up Emote. A comparison of the Defendants’ alleged “character” with multiple examples of *Fortnite* avatars performing the Pump It Up Emote is shown below:



7. Defendants’ trademark claims similarly fail because symbols may serve as trademarks only where used in commerce to identify the source or origin of a product or service. They also must be distinctive for such product or service—the Dancing Pumpkin Man is none of these things. Moreover, the First Amendment protects expressive works like *Fortnite*’s Pump It Up Emote, as Epic Games’ use is artistically relevant because it allows *Fortnite* players to express themselves during gameplay using a culturally-relevant reference to Halloween, as part of *Fortnite*’s Halloween-themed *Fortnitemales* event, and the use is not explicitly misleading. Nor does the Pump It Up Emote create a likelihood of confusion as to source, affiliation, or sponsorship with Defendants or their claimed trademark.

8. Moreover, as discussed in detail below, Defendants’ claims also are fundamentally flawed as no protectable elements of the Video, or any “character,” have been used in *Fortnite* without Defendants’ authorization. This is because Defendants already granted Epic Games a license to the “character,” the Video and the content therein.

9. As Defendants have refused to accept these fundamental intellectual property principles, Epic Games brings this action to clarify the parties' rights and seeks a declaratory judgment that the Pump It Up Emote does not infringe any copyright or trademark rights held by Defendants.

THE PARTIES

10. Plaintiff Epic Games, Inc. is a Maryland corporation having its principal place of business in North Carolina. It is a multinational publisher, developer, and distributor of video games and software, including *Fortnite*.

11. Upon information and belief, Defendant Sick Picnic Media, LLC is a Nebraska limited liability company registered to do business and having offices in Omaha, Nebraska.

12. Upon information and belief, Sick Picnic serves as Geiler's agency for professional contracting and licensing of Geiler's live entertainment performances.

13. Defendant Matthew F. Geiler is an individual who, upon information and belief, is the CEO and owner of Sick Picnic and resides in the State of Nebraska.

JURISDICTION AND VENUE

14. This is an action arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*

15. This Court has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202 because there is a substantial and concrete controversy between the parties of sufficient immediacy that warrants a declaratory judgment. This Court has jurisdiction over this matter pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331 and 1338 in that this matter involves an action arising under the Copyright Act and the Lanham Act.

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.