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## TikTok the Musical: Copyright Issues Raised by the "Ratatouille" Musical

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## TikTok the Musical: Copyright Issues Raised by the "Ratatouille" Musical

### Cover Page Footnote

\* J.D., 2022, University of Washington School of Law; B.A., 2018, University at Buffalo SUNY. I would like to thank all the editors and staff of the Washington Journal of Law, Technology & Arts as well as Professor Robert W. Gomulkiewicz. I would also like to thank my family, colleagues, and friends, especially Cecilia Meyer, J.D. for her support and encouragement.

TIKTOK THE MUSICAL: COPYRIGHT ISSUES RAISED BY THE “RATATOUILLE”  
MUSICAL

Paige V. Gagliardi \*

ABSTRACT

*TikTok the Musical: Copyright Issues Raised by the “Ratatouille” Musical, explores the growing trend in derivative works and the failures of current copyright law to address it. This article asserts that while derivative works are excellent creative outlets, a safe haven in a tumultuous world, allowing appropriation of copyrights via the fair use doctrine conflicts with the foundations of copyright law. This article argues that IP giants such as the Walt Disney Company have sent a dangerous message to the general public by allowing the TikTok trend of the #ratatouillemusical to become an actual musical: that unlicensed derivative works will not only go unchallenged by media giants, but they will be lauded. So now the law must reckon with this growing cultural trend of derivative work musicals lest “copyright protection” become a misnomer. Using the only law available and employing a fair use analysis upon the example “Ratatousical,” it becomes clear that the fair use doctrine is inadequate protection for original creators when addressing derivative works created on new platforms such as TikTok, and the need for new best practices must be addressed.*

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## THE OVERTURE: AN INTRODUCTION

Chaos breeds creativity.

Across the country, thousands of live events were canceled, postponed, and rescheduled due to the novel conditions posed by the COVID-19 pandemic.<sup>1</sup> Notably, Broadway completely shuttered its doors on March 12, 2020, and remained so until September 14, 2021. This was the longest that the live theater mecca has ever remained closed.<sup>2</sup> This not only left a painful hole in the lives of those who work in entertainment, but also for millions of fans across the country.<sup>3</sup>

Enter TikTok, a social media app with over 1 billion monthly users.<sup>4</sup> In August 2020, TikTok user Emily Jacobsen created a song centered around the most unlikely subject: Disney/Pixar's 2007 computer animated film "Ratatouille." In the film, Remy the rat follows his dreams of becoming a Parisian chef.<sup>5</sup> Using a high soprano, Jacobsen recorded her "love ballad" for this rat, singing— "Remy, the ratatouille / The rat of all my dreams / I praise you, my ratatouille / May the world remember your name."<sup>6</sup> This tune was posted to TikTok and went viral, sparking a

<sup>1</sup> Kendall Baker, *Why StubHub halted refunds*, AXIOS (Apr. 1, 2020), <https://www.axios.com/why-stubhub-halted-refunds-4ee32449-fe27-414c-96af-c901635e018e.html>.

<sup>2</sup> Michael Paulson, *Broadway's Biggest Hits Reopen in Festive Night of Theater*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/live/2021/09/14/theater/broadway-reopening-shows-nyc>; Laura Collins-Hughes, *Broadway is Back! A Guide to Shows, Tickets, and Covid Protocols*, N.Y. TIMES (Last visited Jan. 5, 2021), <https://www.nytimes.com/article/broadway-shows-tickets-reopening-guide.html>.

<sup>3</sup> Bill de Blasio, Mayor de Blasio Holds Conference to Media regarding COVID-19 Shutdown, (March 12, 2020) (on closing and stopping events: "This is difficult stuff because we know it'll have a serious, serious impact on a number of businesses. Just talking about the over 500 people gatherings – I mean, that's – in this city, especially, a huge number of events, concerts, etcetera, that's really, really painful for the many, many people who work in that field, let alone so many New Yorkers and people all over the country who really look forward to these events, these concerts, these sports events. And it's really going to be a kind of a hole in our lives and it's painful. It's not something we would ever want to do, but it's something we have to do.") (transcript available at <https://www1.nyc.gov/office-of-the-mayor/news/137-20/transcript-mayor-de-blasio-holds-media-availability-covid-19>).

<sup>4</sup> Jessica Bursztynsky, *TikTok says 1 billion people use the app each month*, CNBC (Sept. 27, 2021), <https://www.cnbc.com/2021/09/27/tiktok-reaches-1-billion-monthly-users.html>; *TikTok Statistics – Updated Sep 2021*, Wallaroo, <https://wallaroomedia.com/blog/social-media/tiktok-statistics/#:~:text=In%20November%20of%202018%2C%20TikTok,Tower%20n%20April%2020%2C%202020> (last visited: Jan. 5, 2022).

<sup>5</sup> Kim Lyons, *TikTok's one-night Ratatouille musical will star some of Broadway's biggest names*, THE VERGE (Dec 28, 2020, 4:39 PM EST), <https://www.theverge.com/2020/12/28/22203490/ratatouille-tiktok-musical-tituss-burgess-adam-lambert-wayne-brady-pixar-disney>.

<sup>6</sup> Christina Morales, *On TikTok, Fans Are Making Their Own 'Ratatouille' Musical*, N.Y. TIMES

virtual show unlike any other. Dubbed the “Ratatousical,” thousands of other creators on TikTok lent their acting chops, their dance skills, their design knowledge, their talent for musical composition, and even their ability to produce a musical to collaboratively create a full show centered around Disney’s characters and inspired by Jacobsen’s song.

This collective effort was compiled, and on January 1, 2021, “Ratatouille: The TikTok Musical” premiered, performed virtually by a star-studded cast. Streamed via the TodayTix website in over 138 countries and with more than 200,000 tickets sold, this production raised over \$1.5 million to benefit The Actor’s Fund charity.<sup>7</sup> An encore production streamed on the TikTok platform Sunday, January 10th and raised an extra \$500,000, helping the total revenue of this production to surpass \$2 Million.<sup>8</sup>

This “Ratatousical” is clearly a lucrative piece of intellectual property, but it has left many questions concerning copyright law in the wake of its success. To understand this problem, “Act One” of this paper will introduce our players: copyright law, the fair use doctrine, the “Fandom Problem,” TikTok, the “Ratatousical,” and the Walt Disney Company. The “Intermission” of this paper will address how questions regarding the current trends in copyright law have already been posed, and by not addressing them, clarity regarding doctrine could become complicated further. “Act Two” of this article will apply current copyright tests, such as character copyrightability and the fair use test, to the facts of the “Ratatousical,” turning then to discuss the implications of a fair use finding. “Act Three” discusses the failures of current law in the face of emerging technologies such as TikTok as well as discusses the need to create new best practices, and “The Finale” of this article underscores that the collective creation of the “Ratatouille” Musical on the TikTok app effectively appropriated Disney’s intellectual property and exposed a lack of legal control and protection over their high-worth characters. “The Finale” reiterates that by not clearly enforcing their licenses, media giants have now set a false precedent of clearance for unlicensed derivative works, weakening copyright protection, and have exposed the growing failures of applying a fair use analysis.

## I. ACT ONE: SETTING OUR STORY’S STAGE

### *A. Scene 1: Copyright Law*

Consider this the backdrop of this article: copyright law.<sup>9</sup>

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(Nov. 30, 2020, *updated* Jan. 3, 2021), <https://www.nytimes.com/2020/11/30/arts/tiktok-disney-ratatouille-musical.html>.

<sup>7</sup> Allison Shoemaker, *That Ratatouille TikTok musical raked in the dough for The Actors Fund*, AV CLUB (Jan. 4, 2021, 5:02 PM), <https://news.avclub.com/that-ratatouille-tiktok-musical-raked-in-the-dough-for-1845987935>.

<sup>8</sup> Sydney Odman, *'Ratatouille: The TikTok Musical' Raises Record \$2 Million for Actors Fund*, THE HOLLYWOOD REPORTER (Jan. 12, 2021, 9:35 AM PST), <https://www.hollywoodreporter.com/news/ratatouille-the-tiktok-musical-raises-record-2-million-for-actors-fund#:~:text=Since%20its%20premiere%20on%20New,fundraiser%20in%20the%20organization's%20history.>

<sup>9</sup> Pun intended.

Copyright is a form of intellectual property protection grounded in the U.S. Constitution and granted by law for original works of authorship.<sup>10</sup> In an effort to “promote the Progress of Science and useful Arts,” authors and inventors are given the “exclusive Right to their respective Writings and Discoveries” for “limited Times” as soon as their work is fixed in a tangible medium of expression.<sup>11</sup> A work is “fixed” when it is in a form perceptible either directly or with the aid of a machine or device.<sup>12</sup> For example, literary, dramatic, musical, and artistic works such as poetry, novels, motion pictures, songs, choreographic works, costume design, and musicals are all protected under copyright law.<sup>13</sup> Also, works both published and unpublished are protected by copyright.<sup>14</sup> The length of copyright protection, in general, for works created on or after January 1, 1978, is the life of the author plus seventy years following the author’s death.<sup>15</sup> For a joint work with multiple authors, the term is for seventy years following the last surviving author’s death.<sup>16</sup> The duration of a copyright for works made for hire, anonymous works, or pseudonymous works is 95 years from publication or 120 years from creation, whichever is shorter.<sup>17</sup>

Because intellectual property is often intangible and therefore more susceptible to co-option and corruption than real property, copyright law protects not only the use and exclusion of rights, but power to fix its representations.<sup>18</sup> While formal registration with the Copyright Office is voluntary and can occur anytime within the life of a copyright, registration is necessary to bring a claim for infringement of a U.S. work.<sup>19</sup> A copyright is violated or infringed when, without permission, someone other than the copyright holder exercises one of these exclusive and fundamental rights: reproduction, publication, performance, display, and, notably, the right to “prepare a derivative work.”<sup>20</sup>

A derivative work is a “work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>21</sup> Due to the nature of art, creators are often inspired by another artist’s pieces and inevitably

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<sup>10</sup> *Intellectual Property*, BLACK’S LAW DICTIONARY (11th ed. 2019); U.S. CONST. art. 1, § 8, cl. 8; U.S. COPYRIGHT OFFICE, COPYRIGHT IN GENERAL, <https://www.copyright.gov/help/faq/faq-general.html> (last visited Jan. 5, 2022).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 17 U.S.C.A. § 102 (West).

<sup>14</sup> U.S. COPYRIGHT OFFICE, *supra* note 10.

<sup>15</sup> U.S. COPYRIGHT OFFICE, Circular 1 Copyright Basics (revised Sept. 2021), <https://www.copyright.gov/circs/circ01.pdf>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Sophie Thackray, *Can’t Nobody Tell Him Nothin’: “Old Town Road” and the Reappropriation of Country Music by the Yeehaw Agenda*, 10 ARIZ. ST. SPORTS & ENT. L.J. 29, 44 (2021) (citing Madhavi Sunder, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertyization of Free Speech in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 49 STAN. L. REV. 143, 70-71 (1996)).

<sup>19</sup> U.S. COPYRIGHT OFFICE, *supra* note 10.

<sup>20</sup> 17 U.S.C.A. § 106 (West).

<sup>21</sup> 17 U.S.C.A. § 101 (West).

create new works drawing upon another artist's work without the original copyright owner's permission.<sup>22</sup> Because of this, copyright law "must address the inevitable tension between the property rights it establishes in creative works . . . and the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others."<sup>23</sup>

### *B. Scene 2: The Fair Use Doctrine*

Enter a new player, an affirmative defense for unauthorized derivative works: the fair use doctrine.<sup>24</sup>

As defined, a "fair use" use of a copyrighted work is not an infringement when it is for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research."<sup>25</sup> This doctrine "confers a privilege on people other than the copyright owner to use the copyrighted material in a reasonable manner without his consent."<sup>26</sup> Courts, the only arbiter of whether a work is a "fair use," engage in a case-by-case analysis using the non-exclusive factors defined in 17 U.S.C. § 107. The court weighs four factors in determining whether the fair use doctrine applies:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

<sup>27</sup>

These four factors cannot be treated in isolation but are unique considerations that must be addressed individually even while overlapping in assessment.<sup>28</sup> This sensitive balancing of interests is not an easy task because "context is everything."<sup>29</sup> But the Supreme Court in *Campbell* made consideration easier for this "mixed question of law and fact" by assuming a lens that prioritizes the first and fourth factor, declaring "the more transformative the work, the less will be the significance of other factors . . . that would weigh against a finding of fair use."<sup>30</sup>

<sup>22</sup> See *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original thought. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before").

<sup>23</sup> *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

<sup>24</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>25</sup> 17 U.S.C. § 107.

<sup>26</sup> *Calkins v. Playboy Enter. Int'l, Inc.*, 561 F. Supp. 2d 1136, 1140 (E.D. Cal. 2008) citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 715 (9th Cir. 2007).

<sup>27</sup> 17 U.S.C. § 107(1).

<sup>28</sup> *Campbell*, 510 U.S. at 578.

<sup>29</sup> *Id.* at 589.

<sup>30</sup> *Id.* at 578.

Further, the “nonprofit character of an activity must be weighed in any fair use decision” as well.<sup>31</sup>

*SunTrust v. Houghton Mifflin* is an example of a successful fair use defense of a derivative work. In this case, the defendants claimed their 2001 book, *The Wind Done Gone*, which reimagined Margaret Mitchel’s American classic, *Gone with the Wind*, was a parody, and thus a fair use. The court agreed.<sup>32</sup> As Judge Marcus remarked in his concurrence, parody, “[w]hen rendered in harmony with copyright law” as a fair use, serves an important function in society and should be afforded the highest First Amendment protection.<sup>33</sup> As Judge Birch noted in their opinion, “copyright does not immunize a work from comment and criticism.” Rather, it “assures authors the right to their original expression but encourages others to build freely upon the ideas and information conveyed by the work.”<sup>34</sup> Thus, the doctrine of fair use represents a compromise, a way of reconciling the protection of free, creative speech with the legal rights of authors.

Unlike the original, *The Wind Done Gone* told the story of the Civil War in the South through a new, African American perspective that was converse to the wealthy, white perspective of the original.<sup>35</sup> And while Randall included some of the major characters from the original novel, a substantial portion of the plot was wholly original, and “transformed” the original work.<sup>36</sup> With this win, Randall’s new copyright, based upon Mitchell’s copyrighted work, was confirmed, and opened the door to Randall’s exclusive, personal profit from a derivative work. Thus, fair use has effectively allowed unlicensed derivative works to legally appropriate original copyright holders’ rights.

But fair use is not to be construed to be a free ride to profit from unauthorized derivative works. In *Salinger v. Colting*, the court held that Fredrik Colting’s unauthorized sequel of *Catcher in the Rye*, which centered around Salinger’s original protagonist (as well as a fictionalized version of Salinger who wishes to kill his greatest creation) was neither a parody, nor transformative.<sup>37</sup> In *Penguin Random House LLC v. Colting*, illustrated children’s books based on famous novels were found to be copyright infringement.<sup>38</sup> In *Twin Peaks Productions, Inc. v. Publications International*, a book containing detailed summaries of plots of episodes of the television program was not a fair use of teleplays.<sup>39</sup> In *Paramount Pictures Corp. v. Carol Publishing Group*, a book purporting to explain the “Star Trek” phenomenon, which contained plot summaries of copyrighted episodes, did not constitute a fair use.<sup>40</sup> And in *Warner*

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<sup>31</sup> Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984) (quoting H. REP. NO. 94–1476, at 66 (1976)).

<sup>32</sup> Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1277 (11th Cir. 2001).

<sup>33</sup> *Id.* at 1278 (Marcus, J. concurring).

<sup>34</sup> *Id.* at 1265.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Salinger v. Colting*, 641 F. Supp. 2d 250, 263 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

<sup>38</sup> *Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736, 754 (S.D.N.Y. 2017).

<sup>39</sup> *Twin Peaks Prods., Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1383 (2d Cir. 1993).

<sup>40</sup> *Paramount Pictures Corp. v. Carol Pub. Grp.* 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998), *aff’d sub nom.* *Paramount Pictures Corp. v. Carol Pub. Grp., Inc.*, 181 F.3d 83 (2d Cir. 1999).

*Bros. Entertainment Inc. v. RDR Book*, the court found an unauthorized encyclopedia regarding J.K. Rowling's *Harry Potter* series did not constitute a fair use considering Warner Brothers was in the business of creating and marketing motion pictures and goods related to the *Harry Potter* books.<sup>41</sup>

While it can be in the public's best interest to allow for derivatives to be created under the fair use defense, allowing new stories to be built upon the ones we already love, it is also in the public's interest for copyright law to "prevent [. . .] the misappropriation of the skills, creative energies, and resources which are invested in [. . .] protected work."<sup>42</sup>

### C. Scene 3: The "Fandom Problem"

Enter: our complication.<sup>43</sup>

The issue of regulating derivative works has only been exacerbated by cyberspace. Before the internet, the legal consumption of creative content was simple: creative works such as records, films, radio broadcasts, and books were produced, customers then consumed them, and copyright law protected these works. Ordinary use of copyrighted materials, such as playing a record or reading a book, was unregulated by copyright law because it was not monetized nor created an unauthorized copy. But new digital technologies provide an extraordinary opportunity to instantaneously "share" our intellectual property via monetized platforms and instant duplication. It has never been easier to interact with popular culture, to show a friend a piece of art, to critique a movie, to sample one song in another, or to spark creative activity and collaboration. Further, "fandoms," the collective reference to fans of a particular person, team, or fictional series, are now able to form, to find community, or to even create a subculture at an unprecedented international level and participate in "remix culture."<sup>44</sup>

Coined by Lawrence Lessig, "remix culture" refers to the growing prevalence of content that utilizes existing works, because creative content can be manipulated in ways not possible before.<sup>45</sup> Fanfiction, art collages, musical remixes, sampled songs, and fan art—the trend towards interactive, instead of passive, consumption of entertainment by fans—are all part of remix culture. Further, new digital technologies and platforms provide easy, extensive dissemination of these creative expressions. But despite the various original forms fan works take, any work based on preexisting creative works is a derivative under copyright law. Thus, we are confronted with what Kate Romanenkova identified as the "fandom problem;" the reconciling of a growing body of derivative works based on copyrighted content with current copyright law without alienating a specific intellectual property's

<sup>41</sup> Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008).

<sup>42</sup> Apple Comp., Inc. v. Franklin Comp. Corp., 714 F.2d 1240, 1255 (3d Cir. 1983).

<sup>43</sup> In drama, a "complication" is defined as a factor, condition, and/or element that adds difficulty to the plot or conflict in a play. See *DRAMA GLOSSARY*, KET Education, <https://education.ket.org/resources/drama-glossary/> (Last visited Jan. 7, 2022).

<sup>44</sup> FANDOM, Lexico Dictionary, <https://www.lexico.com/en/definition/fandom> (Last visited Feb. 26, 2021).

<sup>45</sup> Lawrence Lessig, *Free(Ing) Culture for Remix*, 2004 UTAH L. REV. 961 (2004).

biggest fans.<sup>46</sup> And while many participants in the popular remix culture do not receive monetary compensation for their work, those that do face a “legal quagmire.”<sup>47</sup> For now, these fan works exist in a precarious, unlitigated copyright twilight zone as no formal protection exists for the participatory consumption of entertainment.<sup>48</sup> Without an amendment to current copyright law, the participatory consumption of entertainment can only be one of two things: an infringing derivative work or a fair use.

#### *D. Scene 4: TikTok*

Enter TikTok: a new creative player.

Novel digital technologies have long bred new modes of tangible, creative expression and TikTok is no exception.<sup>49</sup> With more than 2 billion downloads, 1 billion monthly active users,<sup>50</sup> and a reported \$5.6 billion brought in within the first three months of 2020, TikTok changed the consumption of entertainment.<sup>51</sup>

TikTok became not only a space for fans and creators alike but a platform for commentary and news reporting as well.<sup>52</sup> On this social, short-form video app, creators can post videos using an array of soundtracks, filters, and visual effects, or create their own.<sup>53</sup> Creators can “duet” or “stitch” another’s video in the style of a conversation or use another user’s audio and lip-sync to it. Users can also explore #hashtags to find specific content, follow specific accounts, or use TikTok’s unique “For You” feature that, by utilizing an algorithm based on user’s data, provides an “endless thread” of new videos selected specifically for each user’s enjoyment.<sup>54</sup> And, while targeted content feeds into the highly addictive nature of TikTok, what makes TikTok such an enticing platform is that “it allows those with even the

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<sup>46</sup> Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183 (2014).

<sup>47</sup> *Id.* at 184.

<sup>48</sup> *Id.*

<sup>49</sup> These new modes of expression always complicated copyright law. The Supreme Court first addressed how new technology affected copyright in 1908. Holding that piano rolls did not infringe upon copyrights held by music publishers, the Court determined that a work was considered fixed only if it existed in a form intelligible to humans, not just machines. This ruling effectively allowed new technology to escape the control of copyright. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 28 S. Ct. 319, 52 L. Ed. 655 (1908).

<sup>50</sup> *Supra* Note 4; Taylor Lorenz, *Why 2020 Was the Year That Belonged to TikTok*, N.Y. TIMES, (Jan. 3, 2021), at Section ST, Page 2 (also *This Is Why You Heard About TikTok So Much in 2020* at <https://www.nytimes.com/2020/12/31/style/tiktok-trends-2020.html>).

<sup>51</sup> Paige Leskin, *TikTok's parent company reportedly saw \$5.6 billion in revenue during the first three months of 2020*, BUSINESS INSIDER (Jun. 17, 2020), <https://www.businessinsider.com/tiktok-bytedance-revenue-billions-first-quarter-results-growth-2020-2020-6>.

<sup>52</sup> Eliana Miller, *As TikTok grapples with weightier topics, journalists are tuning in to deliver the news*, POYNTER (June 29, 2020), <https://www.poynter.org/reporting-editing/2020/as-tiktok-grapples-with-weightier-topics-journalists-are-tuning-in-to-deliver-the-news/>.

<sup>53</sup> Matthew Hughes, *What Is TikTok, and Why Are Teens Obsessed with It*, HOW-TO GEEK (Feb. 5, 2020, 6:40 AM EST), <https://www.howtogeek.com/536434/what-exactly-is-tiktok-and-why-are-teens-obsessed-with-it/>.

<sup>54</sup> *Id.*

smallest followings to ‘go viral’ and become online celebrities overnight.”<sup>55</sup> Further, those posting to TikTok are incentivized not only with this ability to reach a large audience, but also with the ability to earn money through the platform’s “Creator Fund.”<sup>56</sup>

Creators also maintain some copyright protections. According to the TikTok user agreement “you or your licensors will own any User Content...you upload or transmit through the Service.”<sup>57</sup> But, like any user agreement, this comes with a caveat in the fine print: “but by submitting User Content via the Services, you hereby grant (i) to [TikTok]...an unconditional irrevocable, non-exclusive, royalty-free, fully transferable ...perpetual worldwide license to use, modify, adapt, reproduce, make derivative works of...your User Content in any format and on any platform.”<sup>58</sup> Thus, users are effectively transferring their exclusive copyright rights by posting to the platform. But this transfer is only for original, authorized content that is uploaded; a condition of access to the Service is to “respect intellectual property rights” and “not to infringe intellectual property rights of any person while using the Services.”<sup>59</sup> For example, you agree not to upload any content “that is the property of someone.”<sup>60</sup>

On its face, the transfer of a creator’s exclusive copyright protection to TikTok is a win for Lessig’s remix culture. TikTok users can now “use, modify, adapt, reproduce, [and] make derivative works of...User Content” without fear of persecution. They can sing and dance along to another user’s song, sharing in, and even adding to, a collective, cultural experience. Nevertheless, following copyright law and TikTok’s User agreement, derivative works based on content originating outside the platform fall into the same twilight zone as other fan works; and with the rapid growth of this platform, addressing this issue has never been more pertinent.

### *E. Scene 5: The “Ratatousical”*

Enter: the unprecedented fan work, “Ratatouille: The TikTok Musical.”

On August 10, 2020, TikTok user Emily Jacobsen posted a song of her own creation about the most unlikely of subjects: Remy the Rat.<sup>61</sup> In Disney/Pixar’s 2007 computer-animated film “Ratatouille,” Remy, the film’s anthropomorphic main character, is inspired to believe “anyone can cook” and follows his dreams of

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<sup>55</sup> *Id.*

<sup>56</sup> The Creator Fund is planned to disperse over \$300 million between the year 2020 and the year 2023 to those that meet viewer and follower requirements, *see The TikTok Creator Fund is now LIVE in the UK, Germany, Italy, France and Spain, and here is how to apply!*, TIKTOK (Sept. 1, 2020), <https://newsroom.tiktok.com/en-gb/the-tiktok-creator-fund-is-now-live-across-europe-and-here-is-how-to-apply>.

<sup>57</sup> *Terms of Service*, TIKTOK, <https://www.tiktok.com/legal/terms-of-use?lang=en> (last visited Jan.4, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Emily Jacobsen (@e\_jaccs), “A love Ballad,” TikTok (Aug. 10, 2020), [https://www.tiktok.com/@e\\_jaccs/video/6859521038418447622](https://www.tiktok.com/@e_jaccs/video/6859521038418447622).

becoming a Parisian chef with a little help from his rat and human friends.<sup>62</sup> Jacobsen's "Ode to Remy" soon caught the interest of Daniel Mertzlufft, a composer and arranger, who transformed the ballad into a big-musical-style number using Jacobsen's lyrics by adding strings, brass, additional vocals, and stage directions.<sup>63</sup> Mertzlufft's 30-second clip finished with a sparkly filter and a banner proclaiming "Coming to Broadway 2021!"<sup>64</sup> Viewed over 2.6 million times, the clip went viral and captured the imagination of millions of TikTok users.<sup>65</sup> Thus, the "Ratatouiseal" was born.

Thousands of inspired TikTok creators began to add their creative vision for a "Ratatouille" musical under the hashtag #ratatouillemusical:<sup>66</sup> user @shoeboxmusicals created a miniature mock-up set;<sup>67</sup> creator @tristanmichaelmcintyre began working on the show's choreography;<sup>68</sup> user @ardellyfoshelly designed ensemble costumes;<sup>69</sup> creator @siswij designed the playbill cover;<sup>70</sup> and users such as @fettuccinefettuqueen began writing songs for other characters like Remy's father.<sup>71</sup> A full musical was being created like never before, and the result of this online sensation was "a virtual show unlike any on Broadway" with "no director, no choreographer, no stage crew."<sup>72</sup>

On December 9, 2020, it was announced on TikTok that the "Ratatouiseal" was indeed coming to "Broadway."<sup>73</sup> Drawing upon the work of the aforementioned creators' work, and by adding an all-star cast hailing from Hollywood and Broadway alike, this viral trend had become tangible creation. Presented by theatrical company Seaview, in association with TikTok and TodayTix Presents, the staged musical premiered on Friday, January 1, 2021 as a limited-run virtual concert on the TodayTix website and sold over 200,000 tickets. The musical also had an encore performance on Sunday, January 10th on TikTok itself with 150,000

<sup>62</sup> RATATOUILLE (Walt Disney Pictures 2007).

<sup>63</sup> Daniel J. Mertzlufft (@danielmertzlufft), "Remy: The Musical OG Song," TIKTOK (Oct. 19, 2020), <https://www.tiktok.com/@danielmertzlufft/video/6885475193410620678> (Last visited: Jan 5, 2022).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> #ratatouillemusical, TIKTOK, [https://www.tiktok.com/tag/ratatouillemusical?is\\_copy\\_url=1&is\\_from\\_webapp=v2](https://www.tiktok.com/tag/ratatouillemusical?is_copy_url=1&is_from_webapp=v2) (last visited Feb. 26, 2021).

<sup>67</sup> Shoebox Musicals (@shoeboxmusicals), "Set Model Building Process! Gusteau's Restaurant," TIKTOK (Nov. 18, 2020), <https://www.tiktok.com/@shoeboxmusicals/video/6896481065855241477>.

<sup>68</sup> Tristan McIntyre (@tristanmichaelmcintyre), "cookin' up some choreo for #ratatouillemusical," TIKTOK (Nov. 13, 2020), [https://www.tiktok.com/tristanmichaelmcintyre/video/6894839741158608134?is\\_copy\\_url=1&is\\_from\\_webapp=v2](https://www.tiktok.com/tristanmichaelmcintyre/video/6894839741158608134?is_copy_url=1&is_from_webapp=v2).

<sup>69</sup> Ardell (@ardellyfoshelly), "Why not?" TIKTOK (Nov. 15, 2020), <https://www.tiktok.com/@ardellyfoshelly/video/6895493098881682693>.

<sup>70</sup> Jess Siswick (@siswij), "The #ratatouillemusical marketing department is brainstorming visuals," TIKTOK (Nov. 13, 2020), <https://www.tiktok.com/@siswij/video/6894854586293669126>.

<sup>71</sup> Gabbi Bolt (@fettuccinefettuqueen), "My official entry to the #ratatouille musical" TIKTOK (Oct. 27, 2020), <https://www.tiktok.com/@fettuccinefettuqueen/video/6888530225508928770>.

<sup>72</sup> Christina Morales, *On TikTok, Fans Are Making Their Own 'Ratatouille' Musical*, (Jan. 3, 2021), <https://www.nytimes.com/2020/11/30/arts/tiktok-disney-ratatouille-musical.html>.

<sup>73</sup> *Supra* note 5.

viewers.<sup>74</sup> In total, the production generated \$2 million to benefit the Actor's Fund.<sup>75</sup> Just like original movie proclaimed, "anyone can cook," this production demonstrated that anyone can create a musical.

This musical, though, is clearly a derivative work. The musical not only used the character Remy, but his father, brother, friends, enemies, and allies. The musical also followed the exact plot of the original movie, transforming it not through perspective, but through song.<sup>76</sup> Is that enough? Is this fair use? Is it a parody? Once again, fan driven work has landed us in the copyright twilight zone and we are left asking "How will copyright law respond?"

#### *F. Scene 6: The Walt Disney Company and Their Intellectual Property*

Enter: The Walt Disney Company—the creative colossus.

Nearly one hundred years ago, Walt Disney and his brother, Roy Disney, started a company that would change the landscape of entertainment forever. From animation to theme parks, from movies to musicals, the Walt Disney Company (hereinafter, Disney) has not only created characters that have become household names, but through smart and calculated exploitation and acquisition of IP, built a media giant that continues to grow in profitability.<sup>77</sup>

An example of Disney's calculated growth is its 7.4 billion dollar acquisition of Pixar, the animation studio led by Apple's Steve Jobs.<sup>78</sup> While this expensive merger raised some eyebrows at the time, it added box office favorites such as the "Toy Story" films, "Finding Nemo" and "The Incredibles" to Disney's lucrative portfolio of intellectual property while allowing them to continue to innovate and expand via this new medium.<sup>79</sup> The first Pixar film to premiere after the merger was "Cars" in 2006, grossing \$461,630,558 in the worldwide box office.<sup>80</sup> The following year, "Ratatouille" premiered, earning \$626,549,695 worldwide.<sup>81</sup> As for most Pixar movies, the films and characters continue to be profitable for Disney. "Ratatouille" specifically continues to draw crowds thirteen years later; in Fall 2021, Disney opened a theme park ride based on the "Ratatouille" movie in their world-famous EPCOT theme park.<sup>82</sup> The new "Ratatouille" ride followed the trend

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<sup>74</sup> Alexandra Del Rosario, 'Ratatouille: The TikTok Musical' Raises \$2M To Become Actors Fund's Most Successful Fundraiser- Update, DEADLINE (Jan. 2, 2021, 7:55 AM), <https://deadline.com/2021/01/ratatouille-the-tiktok-musical-raise-million-the-actors-fund-1234664043/>.

<sup>75</sup> *Id.*

<sup>76</sup> RATATOUILLE: THE TIKTOK MUSICAL (Seaview Productions Holdings, 2021).

<sup>77</sup> SS Rana & Co Advocates, *Role of IP in the Growth of Disney*, LEXOLOGY, <https://www.lexology.com/library/detail.aspx?g=e31b49ef-ca97-43e7-8481-7df54979cf4d>, (last visited Feb. 26, 2021).

<sup>78</sup> Paul R. La Monica, *Disney buys Pixar*, CNN MONEY (Jan. 25, 2006, 8:44 AM EST), [https://money.cnn.com/2006/01/24/news/companies/disney\\_pixar\\_deal/](https://money.cnn.com/2006/01/24/news/companies/disney_pixar_deal/)

<sup>79</sup> *Id.*

<sup>80</sup> *Box Office History for Disney-Pixar Movies*, THE NUMBERS, <https://www.the-numbers.com/movies/production-company/Pixar> (last visited Feb. 26, 2021).

<sup>81</sup> *Id.*

<sup>82</sup> Elizabeth Rhodes, *The New 'Ratatouille' Attraction Just Opened at Epcot— and We Took a*

of previous ride openings based on Disney intellectual property, from which theme park attendance and revenue increased as the ride drew thousands of tourists a day.<sup>83</sup> This further affirms the continued worth of the original “Ratatouille” property.

Unfortunately, the COVID-19 pandemic resulted in an indefinite closure of most Disney’s theme parks, Broadway shows, and movie theaters to exhibit their new movies. For the first time in 40 years, Disney recorded an annual GAAP net loss of \$2.83 billion.<sup>84</sup> This makes the protection of their lucrative IP more important than ever, and as exhibited in the past, Disney notoriously polices their copyrights, and will even go as far as to change the law to protect their creative works.

Disney’s intense pressure to mold copyright law to their needs can be seen in their protection of their first copyrighted character, and their mascot, Mickey Mouse. Under the 1909 Copyright scheme, the protection of Mickey would have expired in 1984. With the impending loss looming, Disney began serious lobbying to push for changes to the Copyright Act.<sup>85</sup> In 1976, Congress passed an extension of protection, saving Mickey from the public domain until 2003.<sup>86</sup> Then in 1998, with only five years remaining on Mickey Mouse’s copyright term, Congress again changed the duration of protection with the Sonny Bono Copyright Term Extension Act of 1998.<sup>87</sup> This legislation extended copyrights for works created on or after January 1, 1978 to the “life of the author plus 70 years” and expanded corporate copyrights protection to 95 years from the year of first publication, or 120 years from the year of creation, whichever expires first.<sup>88</sup> This change in law successfully pushed Mickey’s copyright protection out to 2023.<sup>89</sup>

But legislative pressure is not the only way Disney has policed their intellectual property. Numerous lawsuits have stopped infringing uses of Disney characters and

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*Test Ride*, TRAVEL + LEISURE (Oct. 1, 2021), <https://www.travelandleisure.com/trip-ideas/disney-vacations/remys-ratatouille-adventure-ride-review>; Tom Bricker, *Remy’s Ratatouille Adventure Opening, Construction Photos & Info*, DISNEY TOURIST BLOG (December 28, 2020), <https://www.disneytouristblog.com/remys-ratatouille-adventure-ride-info/>.

<sup>83</sup> *Remy’s Ratatouille Adventure Ride in EPCOT | Details, Opening, FAQs*, ZIGGY KNOWS DISNEY (Nov. 3, 2021), [https://ziggyknowsdisney.com/remys-ratatouille-adventure/#Wait\\_Times\\_and\\_Crowds](https://ziggyknowsdisney.com/remys-ratatouille-adventure/#Wait_Times_and_Crowds); *Star Wars: Rise of the Resistance Boosts Attendance at Walt Disney World as Disney Braces for Long Closures in Asia*, THEME PARK TOURIST (Feb. 5, 2020), <https://www.themeparktourist.com/news/20200205/28649/star-wars-rise-resistance-boosts-attendance-walt-disney-world-disney-braces>; see also David G. Allan, *Star Wars’ Rise of the Resistance ride now open to the public*, CNN (Dec. 6, 2019) <https://www.cnn.com/travel/article/rise-of-the-resistance-orlando-florida/index.html>.

<sup>84</sup> Jeremy C. Owens, *Disney suffers first annual loss in more than 40 years, but stock jumps as losses are not as bad as feared*, MARKETWATCH (Nov. 13, 2020), <https://www.marketwatch.com/story/disney-suffers-first-annual-loss-in-more-than-40-years-but-stock-jumps-as-losses-are-not-as-bad-as-feared-11605215870>.

<sup>85</sup> Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, Art Law Journal (Feb. 15, 2014), <https://alj.artrepreneur.com/mickey-mouse-keeps-changing-copyright-law/#:~:text=Under%20the%201909%20Copyright%20scheme,changes%20to%20the%20Copyright%20Act.>

<sup>86</sup> *Id.*

<sup>87</sup> 17 U.S.C.A. § 304 (West).

<sup>88</sup> *Id.*

<sup>89</sup> *Supra* note 85.

films.<sup>90</sup> As such, it was surprising when the “Ratatouille” fan-made musical progressed past an internet meme to a full-fledged production,<sup>91</sup> all while knowing Disney holds tight to their copyrights. Even more surprising was in promoting the new “Ratatouille” ride, Disney released what seemed to be their contribution to the “Ratatosical:” a “Remy Rap” performed from inside the ride and posted to the Disney Park’s TikTok.<sup>92</sup> Finally, in a statement to *The Verge* magazine, a company representative stated, “We love when our fans engage with Disney stories. We applaud and thank all of the online theatre makers for helping to benefit The Actors Fund.”<sup>93</sup>

But this unprecedented departure from Disney’s former copyright regulation, combined with the blessing from Disney for the staging of the “Ratatouille” Musical, signals the opening of a door to unregulated use of copyrighted material by fans. This is a door Disney and other IP holders may soon wish to try to close.

#### INTERMISSION: ARE WE REPEATING HISTORY?

In a 1948 speech to the House of Commons, Winston Churchill stated, “Those who fail to learn from history are condemned to repeat it.”<sup>94</sup> This quote-turned-household-adage bears truth in this situation: in 2002, the Harvard Law Review issued a warning— that “re-writing cases are likely to recur— and perhaps become more common.”<sup>95</sup> Focusing on the *SunTrust v. Houghton Mifflin* case, the article cautioned that “the sheer amount of attention that the [derivative work] controversy garnered may encourage other[s] to seek similar notoriety (and free publicity).”<sup>96</sup> Further, “re-writing,” or creating a fan work, “is arguably easier than writing. It is easier to take someone else’s characters ... than to create those characters from

<sup>90</sup> *Disney Trademark Infringement: Everything You Need to Know*, UPCOUNSEL (July 8, 2020), <https://www.upcounsel.com/disney-trademark-infringement>.

<sup>91</sup> Internet Meme, otherwise known as “internet fads” or “internet phenomenon” is defined as “an activity, concept, catchphrase or piece of media that gains popularity and spreads rapidly via the Internet. An Internet meme is often helped along by social networking sites and blogs that post and repost popular memes and, in doing so, reinforce the popularity of the memes.” See *Internet Meme*, TECHOPEDIA (Last updated: June 30, 2020), <https://www.techopedia.com/definition/16944/internet-meme>.

<sup>92</sup> Disney Parks (@disneyparks), “Our unofficial audition for #ratatouillemusical,” TIKTOK (Nov. 11, 2020), [https://www.tiktok.com/@disneyparks/video/6897222815758535942?referer\\_url=https%3A%2F%2Fwdwnt.com%2F&referer\\_video\\_id=6897222815758535942](https://www.tiktok.com/@disneyparks/video/6897222815758535942?referer_url=https%3A%2F%2Fwdwnt.com%2F&referer_video_id=6897222815758535942); They also treated Emily Jacobsen (who wrote the original “Remy Love Ballad” to a tour of the ride; see Emily Arnato, ‘Ratatouille’ Fan Gets Sneak Peek of Remy’s Ratatouille Adventure at EPCOT, DISNEY PARKS BLOG (Dec. 28, 2020), <https://disneyparks.disney.go.com/blog/2020/12/ratatouille-fan-gets-sneak-peek-of-remys-ratatouille-adventure-at-epcot/>.

<sup>93</sup> Helen Shaw, *How Ratatouille: The TikTok Musical Came to Be (and Yes, Disney’s Okay With It)*, VULTURE (Dec. 31, 2020), <https://www.vulture.com/2020/12/how-ratatouille-the-tiktok-musical-came-to-be.html>.

<sup>94</sup> Laurence Geller CBE, *Folger Library – Churchill’s Shakespeare*, INTERNATIONAL CHURCHILL SOCIETY, <https://winstonchurchill.org/resources/in-the-media/churchill-in-the-news/folger-library-churchills-shakespeare/>, (Last visited Feb. 26, 2021).

<sup>95</sup> Note, *Gone with the Wind Done Gone: “Re-Writing” and Fair Use*, 115 HARV. L. REV. 1193, 1209 (2002).

<sup>96</sup> *Id.*

scratch.”<sup>97</sup> With the popularity of the *Ratatouille*, other TikTok creators have followed suit and have created more derivative work musicals- including one based on another Pixar property: the 2009 movie “UP.”<sup>98</sup>

Perhaps more concerning is the “Bridgerton” musical trend on TikTok.<sup>99</sup> “Bridgerton,” a Netflix show based upon the worldwide best-selling romance novels by Julia Quinn, has become the streaming service’s most lucrative series yet.<sup>100</sup> In just the first month on air, the show had been viewed by 82 million Netflix accounts.<sup>101</sup> Abusing the success of this Netflix show, and perhaps banking on the viral, profitable nature of TikTok, the Broadway composer hopefuls that call themselves Barlow and Bear wrote more than 15 songs drawing upon the show’s plot, characters, and dialogue to create an unofficial “#BridgertonMusical.”<sup>102</sup> This project was wildly successful, amassing over 51.2 million “likes” on TikTok.<sup>103</sup> But this success does not stop short of the TikTok forum: not only did Barlow and Bear perform with the National Symphony Orchestra one of their Bridgerton songs for the televised Kennedy Center’s 50th Anniversary, they made Forbes 2022 “30 under 30—Social Media” list and have also been given the ultimate recognition for their songs by industry leaders—a Grammy award for Best Musical Theater Album.<sup>104</sup> Sure, this can be written off as complimentary or excellent press, and not seeking legal action against popular creatives during a pandemic is not only a good faith gesture, but a calculated business strategy. And while the Barlow and Bear team later obtain permission to release their concept album,<sup>105</sup> this pattern of musicals makes clear that this “fandom problem” is not going away. Further,

<sup>97</sup> *Id.*

<sup>98</sup> Alexa Willhelm (@alexa.noelle), “Another Pixar musical? TikTok feel free to do your thing,” TikTok (Nov. 11, 2020), [https://www.tiktok.com/@alexa.noelle/video/6897750211607809286?is\\_copy\\_url=1&is\\_from\\_webapp=v2](https://www.tiktok.com/@alexa.noelle/video/6897750211607809286?is_copy_url=1&is_from_webapp=v2); UP! (Walt Disney Pictures 2009).

<sup>99</sup> #bridgertonmusical, TikTok, [https://www.tiktok.com/tag/bridgertonmusical?referer\\_url=https%3A%2F%2Fvariety.com%2F&referer\\_video\\_id=6916241393144892677&is\\_copy\\_url=1&is\\_from\\_webapp=v2](https://www.tiktok.com/tag/bridgertonmusical?referer_url=https%3A%2F%2Fvariety.com%2F&referer_video_id=6916241393144892677&is_copy_url=1&is_from_webapp=v2) (last visited Jan. 5, 2022).

<sup>100</sup> Joan E. Solsman, *Bridgerton is Netflix's most popular show yet (according to Netflix)*, CNET (Jan. 28, 2021, 7:00 AM PST), <https://www.cnet.com/news/bridgerton-is-netflix-most-popular-show-yet-according-to-netflix/#:~:text=Netflix's%20Bridgerton%20was%20watched,series%20ever%2C%20Netflix%20said%20Thursday.>

<sup>101</sup> *Id.*

<sup>102</sup> Jazz Tangcay, ‘Unofficial Bridgerton Musical’ Becomes First Grammy-Winning Album to Originate on TikTok, VARIETY, (Apr. 3, 2022, 1:38 PM PST), <https://variety.com/2022/artisans/news/unofficial-bridgerton-musical-tiktok-grammy-1235222248/>; see also Ellise Shafer, ‘Bridgerton: The Musical’ Blew Up on TikTok. Could Broadway Be Next, VARIETY (Jan. 29, 2021, 9:00 AM PST), <https://variety.com/2021/music/news/bridgerton-the-musical-tiktok-broadway-abigail-barlow-emily-bear-1234893087/>; @abigailbarlowwww, TikTok, [https://www.tiktok.com/@abigailbarlowwww?referer\\_url=https%3A%2F%2Fvariety.com%2F&referer\\_video\\_id=6916241393144892677&is\\_copy\\_url=1&is\\_from\\_webapp=v2](https://www.tiktok.com/@abigailbarlowwww?referer_url=https%3A%2F%2Fvariety.com%2F&referer_video_id=6916241393144892677&is_copy_url=1&is_from_webapp=v2), (last visited Jan. 5, 2022).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; see also “Kennedy Center at 50: ‘Ocean Away’ - Abigail Barlow, Emily Bear and Darren Criss,” (Aired: Oct. 1, 2021) <https://www.pbs.org/video/ocean-away-abigail-barlow-emily-bear-and-darren-criss-ccm9ao/>; 30 under 30- Social Media, FORBES (Dec. 1, 2021) <https://www.forbes.com/30-under-30/2022/social-media>.

<sup>105</sup> David Cohen, *The Unofficial Bridgerton Musical Goes from TikTok to Concept Album, Live Performances*, ADWEEK (Aug. 5, 2021), <https://www.adweek.com/social-marketing/the-unofficial-bridgerton-musical-goes-from-tiktok-to-concept-album-live-performances/>.

Disney's acquiesce regarding the production of the "Ratatousical" undoubtedly set a dangerous precedent and sent a dangerous message to those with no legal knowledge: that not only will unlicensed derivative works go unchallenged by media giants, but they will be lauded and critically acclaimed. So, while copyright scholars have been disparaged for "bemoaning the scope of copyright protection,"<sup>106</sup> there remains no clear guidance on whether copyright protection will be expanded or narrowed. Further, when addressing this trend in remix culture, the only tool to navigate this issue is a fair use inquiry—an analysis that is antiquated in the face of evolving technology. Thus, for Act 2 of this paper, we must examine the foreseeable ways the "Ratatousical" could be attacked or defended under current copyright law, holding it as an example, or perhaps a cautionary tale, for other IP owners.

## II. ACT TWO: CROSSING THE THRESHOLD INTO THE COPYRIGHT TWILIGHT ZONE

### A. Scene 1: The Cause of Action

Assuming for this exercise that Disney did not grant permission for the "Ratatousical" production, there would be a clear cause of action for copyright infringement.<sup>107</sup> To make a prima facie case of copyright liability, the copyright holder must prove "ownership of a valid copyright, and . . . copying of constituent elements of the work that are original."<sup>108</sup> There is no factual dispute regarding Disney's ownership of the film "Ratatouille." Turning to copying, it becomes actionable "by showing that the second work bears a 'substantial similarity' to protected expression in the earlier work."<sup>109</sup>

Substantial similarity "requires that the copying [be] quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement (*actionable* copying) has occurred."<sup>110</sup> Thus, to support a finding of substantial similarity between the "Ratatousical" and "Ratatouille," there must be

<sup>106</sup> *Gone with the Wind Done Gone: "Re-Writing" and Fair Use*, 115 HARV. L. REV. 1193 (2002).

<sup>107</sup> To be clear, this is a hypothetical exercise. Ultimately, Disney did "free up the rights" to perform the limited run benefit concert, but to reiterate, this acquiescence may have mistakenly made a broader statement to the general public (read: people with no legal knowledge) that unlicensed derivative works are fair game and can be profitable for them, when in truth, the following analysis is how the court would likely handle this situation. ("Tom Schumacher, the president of Disney Theatricals... 'Tom said, "That's a good idea. I think Disney can free up the rights ... let's try to do it. I'll clear the path.'" The key seems to have been its brief engagement (it will be online only for 72 hours after its debut) and the focus on the Fund."); see <https://www.vulture.com/2020/12/how-ratatouille-the-tiktok-musical-came-to-be.html>.

<sup>108</sup> *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282, 1296, 113 L.Ed.2d 358 (1991).

<sup>109</sup> *Castle Rock*, 150 F.3d at 137 (citing *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997)); see *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74-75 (2d Cir. 1997) (explaining the distinction between actionable copying and factual copying); Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[A] (2007).

<sup>110</sup> *Castle Rock* at 138 (citing *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir.1997)).

direct evidence of qualitative and quantitative copying.

Qualitatively, the “Ratatousical” draws its content from the creative, original expression found in “Ratatouille.” Each song and scene in the “Ratatousical” centers around attributes and traits of characters created for the movie. For example, the notorious food critic Anton Ego is instantly recognizable in the “Ratatousical” as the character from “Ratatouille.” In both instances he appears as a gray-haired man with a superiority complex and dons a signature dark jacket and reddish scarf. Further, the musical’s climax is the same as the movie: Ego enjoys a plate of ratatouille so much it triggers a flashback to his childhood, thanks the chef (Remy), and, even though it was food prepared by a rat, Ego gives a great review. Lines of this seminal review are quantitatively copied and are the same save for one word (From “Ratatouille:” “It is difficult to imagine more humble origins than those of the genius now cooking at Gusteau’s, who is, in this critic’s opinion, *nothing less* than the finest chef in France;” From the “Ratatousical:” “It is difficult to imagine more humble origins than those of the genius now cooking at Gusteau’s, who is, in this critic’s opinion, *no* less than the finest chef in France.”). This example is only one of many, and this direct evidence of large quantities of verbatim quotations, paraphrased dialogue, plot details, and named characters from the original movie make clear that the “Ratatousical” is substantially similar to “Ratatouille.”

While there is clear copying, should the underlying copyrightability of the original film’s characters be questioned, the court can apply two different tests for affirming that the characters deserve copyright protection: *Towle* and *Warner Brothers*.<sup>111</sup> Under either test, “Ratatouille’s” titular character Remy is entitled to copyright protection. Copyright protection has been extended since the 1950s for characters—both literary and graphic—that constitute “the story being told” in a work.<sup>112</sup> In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting*, the court created the seminal “story being told test.”<sup>113</sup> Under this test, a character is not copyrightable where “the character is only the chessman in the game of telling the story.”<sup>114</sup> This is a “high bar” because “few characters so dominate the story such that it becomes essentially a character study.”<sup>115</sup> But unlike *The Maltese Falcon*’s main character Sam Spade, a detective whose purpose is to facilitate the solving of a crime, the plot of the movie “Ratatouille” is essentially a character study of Remy as he goes on a personal journey to achieve his dream of being a Parisian Chef.

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<sup>111</sup> “*Warner Brothers and Towle* are two different tests for character copyrightability.” Daniels v. Walt Disney Co., 958 F.3d 767 (9th Cir. 2020), *cert. denied sub nom.* Moodsters Co. v. Walt Disney Co., No. 20-132, 2021 WL 78089 (U.S. Jan. 11, 2021) citing Rice v. Fox Broad. Co., 330 F.3d 1170, 1175–76 (9th Cir. 2003), *overruled by* Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin, 952 F.3d 1051 (9th Cir. 2020) (“characters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work” (emphasis added)).

<sup>112</sup> Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954); Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1224 (9th Cir. 2008); *see also* Rice, 330 F.3d at 1175.

<sup>113</sup> Daniels v. Walt Disney Co., 958 F.3d 767 (9th Cir. 2020), *cert. denied sub nom.* Moodsters Co. v. Walt Disney Co., No. 20-132, 2021 WL 78089 (U.S. Jan. 11, 2021) citing Warner Bros. Pictures v. Columbia Broad. Sys., 216 F.2d 945, 950 (9th Cir. 1954).

<sup>114</sup> *Warner Bros. Pictures*, 216 F.2d at 950.

<sup>115</sup> *Daniels* at 774.

Remy is no mere “chessman;” the study of his character is the story, and thus and would be afforded copyright protection under this test.

The merits of this case are also supported under the second test promulgated by *DC Comics v. Towle*. In that case, the court employed a three-part test to determine whether a character in a comic book, television program, or motion picture is entitled to copyright protection.<sup>116</sup> A character like Remy is entitled to copyright protection if (1) the character possesses “physical as well as conceptual qualities,” (2) is “sufficiently delineated to be recognizable as the same character whenever it appears” and “display[s] consistent, identifiable character traits and attributes,” and (3) the character is “especially distinctive” and “contains some unique elements of expression.”<sup>117</sup> Applying the first prong of the analysis, Remy, as well as other “Ratatouille” characters seen in the “Ratatousical,” have appeared graphically in books,<sup>118</sup> theme park rides, and in motion pictures.<sup>119</sup> Thus, Remy has “physical as well as conceptual qualities,” and is thus not a mere literary character and passes the first prong.<sup>120</sup> Second, like the Batmobile, Remy has “consistent . . . character traits and attributes.”<sup>121</sup> Whether appearing as the original movie’s anthropomorphic, animated rat voiced by Patton Oswalt or appearing in the human form of Tituss Burgess for the “Ratatousical,” no matter the physical appearance, Remy is still recognizable as “the sophisticated rat who loves fine food.”<sup>122</sup> The second prong of character analysis is satisfied. Third, Remy is “especially distinctive” and “contains unique elements of expression.”<sup>123</sup> Remy is not “merely a stock character”; he is the main character of a box-office hit, passing the test’s third prong.<sup>124</sup> Thus, applying *Towle*’s three-part test, we conclude unquestionably that Remy is a character that qualifies for copyright protection.

With this finding of substantial similarity and protected character copyrightability, and considering Disney is in the business of creating and marketing motion pictures and related goods, as seen through the creation of rides,<sup>125</sup> books,<sup>126</sup> and musicals,<sup>127</sup> the film “Ratatouille” would be no exception. Thus, Disney can establish a *prima facie* case of infringement.

<sup>116</sup> *DC Comics v. Towle*, 802 F.3d 1012, 1022 (9th Cir. 2015).

<sup>117</sup> *Id.* at 1021.

<sup>118</sup> Kitty Richards, *RATATOUILLE: THE JUNIOR NOVELIZATION* (RH/Disney, 2007).

<sup>119</sup> *ALL ABOUT EPCOT’S REMY’S RATATOUILLE RIDE (COMING 2021)*, Mouse Hacking (Nov. 17, 2020), <https://www.mousehacking.com/blog/remys-ratatouille-adventure>.

<sup>120</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

<sup>121</sup> *DC Comics* at 1021.

<sup>122</sup> Kim Lyons, *TikTok’s one-night Ratatouille musical will star some of Broadway’s biggest names*, THE VERGE (Dec. 28, 2020, 4:39 PM EST), <https://www.theverge.com/2020/12/28/22203490/ratatouille-tiktok-musical-tituss-burgess-adam-lambert-wayne-brady-pixar-disney>.

<sup>123</sup> *DC Comics* at 1022.

<sup>124</sup> *Id.*

<sup>125</sup> *Supra* note 67.

<sup>126</sup> Matt Shope, *Book Review: Little Golden Books: Star Wars: We Are the Resistance*, FANTHA TRACKS (Oct. 24, 2019), <https://www.fanthatracks.com/reviews/book-review-little-golden-books-star-wars-we-are-the-resistance/>.

<sup>127</sup> Debbie Emery, *‘Frozen’ Musical Is Headed to Broadway*, The Hollywood Reporter (Jan. 13, 2014, 6:18 PM PST), <https://www.hollywoodreporter.com/news/frozen-musical-is-headed-broadway-670651>.

### B. Scene 2: The Creator's Fair Use Defense

With a strong *prima facie* case for copyright infringement established, if faced with litigation, the creators of the “Ratatousical” would turn to the previously discussed affirmative defense of fair use for their derivative work. Using the four-factor test, while assuming the *Campbell* lens that prioritizes the first and fourth factor while weighing context, the “Ratatousical” may have an uphill battle to be found to be a fair use.<sup>128</sup>

#### 1. Factor One: Purpose and Character of the Use

Factor 1 of the fair use doctrine examines “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>129</sup> Specifically, the court asks whether the new work supplants the original creation “or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks ... whether and to what extent the new work is ‘transformative.’” The fair use doctrine seeks to protect a derivative work when it “contributes to the enrichment of society.”<sup>130</sup> Courts have found a “transformative purpose both where the defendant combines copyrighted expression with original expression to produce a new creative work... and where the defendant uses a copyrighted work in a different context to serve a different function than the original.”<sup>131</sup>

Similar to the *Suntrust* case, the “issue of transformation is a double-edged sword.”<sup>132</sup> On one hand, the new songs from the “Ratatousical” could add “expression, meaning, [and a] message” to the original “Ratatouille” plot by adding character development not seen in non-musical style productions. For example, in the “Ratatousical,” the characters Colette and Mabel both received their own songs, taking on new importance and adding new perspectives not originally in the story. That said, the success of the “Ratatousical” story depended “heavily on copyrighted elements appropriated from [the original source material] to carry its own plot forward.”<sup>133</sup> So, at best, the purpose of the “Ratatousical’s” use of the “Ratatouille” plot and characters is minimally transformative. Presumably, Disney created the “Ratatouille” movie “for the expressive purpose of telling an entertaining and thought-provoking story”<sup>134</sup> through animation, centering on the character Remy. The “Ratatousical” was not an animated movie but a concert, and thus a different

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<sup>128</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“The more transformative the ... work, the less will be the significance of other factors ... that may weigh against a finding of fair use”); *see also Warner Bros.*, at 1176. (“context is everything”).

<sup>129</sup> 17 U.S.C.A. § 107(1) (West).

<sup>130</sup> *Id.*

<sup>131</sup> *Warner Bros. Entm't Inc.*, at 541; *see, e.g., Campbell*, 510 U.S. at 578-79, 114 S.Ct. 1164; *Blanch*, 467 F.3d at 251; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Castle Rock*, 150 F.3d at 141-42; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>132</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001).

<sup>133</sup> *Id.*

<sup>134</sup> *Warner Bros. Entm't Inc.*, at 541.

type of creative work, still centered on Remy. The most favorable aspect of the “Ratatousical” under this factor was that the concert was performed for the purpose of supporting out-of-work actors during the time of the COVID-19 pandemic.<sup>135</sup> Further to this point, the “Ratatousical” provided an outlet for creators during a national theatrical shut down and raised a record-breaking total of \$2 million for The Actors Fund, making it the most successful fundraiser in the organization’s history.<sup>136</sup>

While it still served an entertainment purpose similar to the original, the “Ratatousical” is at least minimally transformative when compared to “Ratatouille.” This is because the TikTok musical transposed the story into a different type of creative work and, more importantly, served the purpose of benefiting charity. Therefore, based on these facts, this first factor could weigh towards the “Ratatousical’s” fair use.

## 2. Factor Two: Nature of the Copyrighted Work

The second statutory factor examines “the nature of the copyrighted work.”<sup>137</sup> This limiting factor “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”<sup>138</sup> Further, the “scope of fair use is somewhat narrower with respect to fictional works ... than to factual works.”<sup>139</sup> This is because the law recognizes a “greater need to disseminate factual works.”<sup>140</sup> Consequently, the “second factor favor[s] . . . creative and fictional work.”<sup>141</sup>

Compared to other factors, the work’s nature “may be of less (or even of no) importance when assessed in the context of certain transformative uses” such as parody.<sup>142</sup> Nevertheless, the “fictional nature of the copyrighted work remains significant,” and as the “Ratatousical” does not disseminate any new, important facts to the public, the court would weigh this factor in favor of the original copyright owner: Disney.

## 3. Factor Three: Amount and Substantiality of the Use

The third factor of the fair use doctrine examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>143</sup> This factor

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<sup>135</sup> *Supra* note 8.

<sup>136</sup> *Supra* note 8.

<sup>137</sup> 17 U.S.C.A. § 107(2) (West).

<sup>138</sup> *Campbell*, 510 U.S. at 586.

<sup>139</sup> *Castle Rock*, 150 F.3d at 143.

<sup>140</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 563 (1985).

<sup>141</sup> *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993).

<sup>142</sup> *Castle Rock* 150 F.3d at 144 (citing *Campbell*, 510 U.S. at 586 (“creative nature of original ‘Pretty Woman’ song ‘not much help’ to fair use analysis ‘since parodies almost invariably copy ... expressive works’”)).

<sup>143</sup> 17 U.S.C.A. § 107(3) (West).

is not as significant as Factor One and Four, and “the extent of permissible copying varies with the purpose and character of the use.”<sup>144</sup> To determine fair use under Factor 3, the court examines the “quantitative amount and qualitative value of the original work used in relation to the justification for that use.”<sup>145</sup> If the alleged infringer uses only what is necessary for their use, once again weighing context, then “this factor will not weigh against him or her.”<sup>146</sup>

Similar to *Warner Bros. Entertainment Inc. v. RDR Books*, “[d]etermining how much copying of fictional facts and plot elements from the [original work] is reasonably necessary to create [a permissible derivative work] presents a difficult task.” Many successful Broadway musicals, such as *Beetlejuice*, *Wicked*, *Frozen*, and *The Phantom of the Opera*, are based on creative works originally existing in other mediums. In each of those examples, significant copying (and licensing) occurred, and was necessary. The “Ratatousical” is no different, and yet appropriated a substantial portion of the protected elements of “Ratatouille” without prior permission. Characters, plot, design, and dialogue from the original “Ratatouille” are all used in the “Ratatousical.”<sup>147</sup> But since the musical is not providing commentary nor serving a parody purpose, and only relying on an industry standard of licensed copying, the court would weigh this factor in favor of Disney in the case of an unlicensed “Ratatousical.”<sup>148</sup>

#### 4. Factor Four: Market Harm

The fourth factor of the fair use doctrine examines “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>149</sup> The Supreme Court declared that the fourth element is “the single most important element of fair use.”<sup>150</sup> This is because when a work is no longer exclusively controlled by the copyright holder, there is a “‘substantially adverse impact on the potential market’ for the original.”<sup>151</sup> This means that courts must consider harm to “not only the primary market for the copyrighted work, but the current and potential market for derivative works” as well.<sup>152</sup> Thus, the fourth factor limits copying to that which does not materially impair the potential marketability, future and present, of that which is copied.<sup>153</sup>

In the *Twin Peaks* case, the fourth factor was found to favor the alleged infringer because the infringing work had “filled a market niche that the plaintiff simply had

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<sup>144</sup> *Campbell*, 510 U.S. at 1175.

<sup>145</sup> *Seltzer*, 725 F.3d at 1178.

<sup>146</sup> *Kelly*, 336 F.3d at 821.

<sup>147</sup> *RATATOUILLE: THE TIKTOK MUSICAL* (Seaview Productions Holdings, 2021).

<sup>148</sup> *Perfect 10*, 508 F.3d at 1167-68; *Bill Graham Archives*, 448 F.3d at 613; *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

<sup>149</sup> 17 U.S.C.A. § 107(4) (West).

<sup>150</sup> *Harper*, 471 U.S. at 566.

<sup>151</sup> *Campbell*, 510 at 590 (quoting 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (1993)).

<sup>152</sup> *Twin Peaks*, 996 F.2d at 1377 (finding that fourth factor favored plaintiff where book about television series “may interfere with the primary market for the copyrighted works and almost certainly interferes with legitimate markets for derivative works”); see also *Harper & Row*, 471 U.S. at 568, 105 S.Ct. 2218.

<sup>153</sup> See generally *Harper*, 471 U.S. at 566.

no interest in occupying.”<sup>154</sup> The court did note however, that it is a “safe generalization” that copyright holders often “wish to continue to sell the copyrighted work and may also wish to prepare or license such derivative works.”<sup>155</sup> So, while an animated movie is not the same as a musical performed live, it can certainly interfere “with legitimate markets for derivative works.”<sup>156</sup> Just as in *Twin Peaks*, it is possible a person who had never seen the original “Ratatouille” may find the “Ratatousical” an “adequate substitute.”<sup>157</sup> Significantly, in the derivative market for musicals, Disney has produced seventeen theatrical productions based on intellectual property they own, and even have an entire section of their company, Disney Theatrical Productions, devoted to live performance musicals.<sup>158</sup> Though the “Ratatousical” creators could correctly argue that “works like theirs provide helpful publicity and thereby tend to confer an economic benefit on the copyright holder,” an unlicensed musical directly competes in markets in which Disney has a legitimate interest.<sup>159</sup> Further, even if Disney seemingly disavowed any intention of creating a Ratatouille musical,<sup>160</sup> this does not lessen the need to assess the impact of another creator putting forth a “Ratatouille” musical on the market.<sup>161</sup> Thus, because Disney is clearly in the market of creating musicals, regardless of the fact that the “Ratatousical” was a nonprofit production, the fourth factor must at least slightly favor Disney.

### *C. Scene 3: The Implications of a Fair Use Finding*

While three of the four fair use factors at least slightly favor Disney, due to how highly courts regard the “nonprofit character of an activity,” an unlicensed “Ratatousical” production could still be found to be a fair use.<sup>162</sup> Furthermore, when a derivative work is found to be a fair use, a new copyright is confirmed, and this derivative work is afforded all the protections of copyright law.<sup>163</sup>

Therein lies the danger: if an unlicensed “Ratatousical” is found to be a fair use and afforded the protections of copyright law, a subsequent Disney production of a “Ratatouille” musical, drawing upon the same characters, structure, and style, could be found to be infringing on “Ratatousical.” And this is no remote fear: lawsuits have been filed, and won, for the similarity of 8-notes in musical composition, the

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<sup>154</sup> *Twin Peaks*, 996 F.2d at 1377.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*; See also *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir.1977) (defendant's abstracts filled demand for plaintiff's financial reports).

<sup>158</sup> *Disney Theatrical Productions*, PLAYBILL, <https://www.playbill.com/person/disney-theatrical-productions-vault-0000013975>.

<sup>159</sup> See *Twin Peaks*, 996 F.2d at 1377.

<sup>160</sup> Note, Disney did seemingly disavow their intentions. See note 85.

<sup>161</sup> See *Salinger v. Colting*, 641 F. Supp. 2d 250, 263 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

<sup>162</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (quoting H.R. Rep. No. 94-1476, at 66 (U.S. Code Cong. & Admin. News 1976, at 5679).

<sup>163</sup> See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); see also *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

use of 29 seconds of a song, and infringement upon a musical style.<sup>164</sup> Consequently, if a substantially similar derivative work that copies characters, plot, dialogue, and design, is found to be a protected fair use, the creators of the derivative work can effectively appropriate a copyright before its term of protection expires. This runs afoul of the foundations of copyright law that secures protection “for limited times to authors and inventors the exclusive right to their respective writings and discoveries” to “promote Progress of Science and useful Arts.”<sup>165</sup> Thus, it is clear that current copyright law is no longer serving its foundational purpose, and the law must now reckon with this lest “copyright protection” becomes a misnomer.

### III. ACT THREE: THE FAILURES OF THE PREVAILING ANALYSIS, OR THE FUTURE OF COPYRIGHT LAW

#### *A. Scene 1: How TikTok Complicates Things*

While TikTok has been the center of legal controversy due to privacy concerns,<sup>166</sup> the “Ratatousical” and trends in TikTok musicals now make clear that the legal complications the app poses must continue to be viewed through a lens of copyright law.

Many videos posted to TikTok easily fall under the safeguard of fair use, being posted for the purpose of “criticism, comment, news reporting, teaching, scholarship, or research.”<sup>167</sup> While the exercise in determining fair use for the hypothetically unlicensed “Ratatousical” exposed the issues regarding a fair use determination for fan works falling outside clear use parameters, this exercise is not without weaknesses. Ultimately, the “Ratatousical” left the platform and became a production that, if an infringement claim were brought against it, would likely be safeguarded under Factor One of a fair use defense because of its charitable purpose. However, the final production pulled only a few songs, dances, and designs from a few creators, sweeping under the rug the thousands of other creators that created derivative works without the permission of Disney. Most, if not all, of these videos remain online and continue to be eligible to earn money from the Creators Fund.<sup>168</sup> But is that not contrary to fair use? Without the charitable purpose, the fair use defense for the “Ratatousical” is sunk. As a further complication, not all of these creators reside in America and are thus not bound by American copyright law.

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<sup>164</sup> See, e.g., *Gray v. Perry*, No. 215CV05642CASJCX, 2020 WL 1275136 (C.D. Cal. Mar. 16, 2020), *opinion amended and superseded*, No. 215CV05642CASJCX, 2020 WL 1275221 (C.D. Cal. Mar. 16, 2020); *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016); *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016) (Smith, J., concurring in part and dissenting in part).

<sup>165</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>166</sup> Bobby Allen, *Class-Action Lawsuit Claims TikTok Steals Kids' Data And Sends It To China*, NPR (August 4, 2020, 1:39 PM EST), <https://www.npr.org/2020/08/04/898836158/class-action-lawsuit-claims-tiktok-steals-kids-data-and-sends-it-to-china>.

<sup>167</sup> 17 U.S.C.A. § 107 (West).

<sup>168</sup> *Supra* note 56.

Perhaps looking towards the creators is a false lead; according to the TikTok user agreement, even if a creator is paid, when original work is posted on TikTok many exclusive rights are licensed to the app.<sup>169</sup> This means that TikTok is responsible for these possibly infringing works. However, TikTok is incorporated in the Cayman Islands and is not bound by American copyright law. So, what are American copyright holders to do if their work becomes the next trend? What are they to do if an American creator or TikTok itself uses their copyrighted work for profit? Is there nothing to do if their copyright is appropriated? Is litigation the only way to get a remedy? It is clear that America's current copyright protections are not sophisticated enough to address the modern copyright issues posed by new technology, nor is the law able to keep up with the speed of current technical and creative progress. TikTok and its trends have exposed this gaping hole in copyright protection.

*B. Scene 2: The Door that Cannot Be Closed*

Between incongruous corporate responses, current precedent and statutory schemes, and the challenges of advancing technologies and creative outlets, the parameters of what constitutes a legal "fair use" is increasingly opaque. As seen with the "Ratatousical" case study, due to the viral, interactive nature of new creative platforms, companies are quick to "hop on trend" and then twist the trend in a way that promotes their image.<sup>170</sup> This has sent a false message to consumers that they need not ask permission from original creators and the holders of a copyright to create derivative works; rather, consumers need only seek approval from the court of public opinion.<sup>171</sup> The approach seems to be "Success first, permission later."<sup>172</sup> And in this quick effort to monetize, media giants have backed themselves into a corner of allowing unfettered derivative works, a trend that will harm not only themselves, but also smaller creator. So, for the everyday consumer that does not go viral, that does not possess the acumen or funds to broker a licensing deal, nor realized that the only way to confirm that a work is a fair use is through litigation, their creative joy could quickly turn to legal sorrow as large copyright holders attempt to reverse this movement and reclaim their intellectual property. Meanwhile, smaller creators are left without the power to litigate to

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<sup>169</sup> "By submitting User Content via the Services, you hereby grant (i) to [TikTok] ... an unconditional irrevocable, non-exclusive, royalty-free, fully transferable ...perpetual worldwide license to use, modify, adapt, reproduce, make derivative works of... your User Content in any format and on any platform." *Terms of Service*, TikTok, <https://www.tiktok.com/legal/terms-of-use?lang=en> (last visited Jan. 4, 2022).

<sup>170</sup> Kat Vaughn, *TikTok is Taking Over the World— Here's How Brands + Businesses are Hopping Onboard*, METTER MEDIA (April 28, 2020), <https://www.mettermedia.com/tiktok-is-taking-over-the-world-heres-how-brands-businesses-are-hopping-onboard/>.

<sup>171</sup> After all, a "single Tweet has the power to plummet share prices." Kian Bakhtiari, *Why Brands Need To Pay Attention To Cancel Culture*, FORBES (Sep. 29, 2020), <https://www.forbes.com/sites/kianbakhtiari/2020/09/29/why-brands-need-to-pay-attention-to-cancel-culture/?sh=fafcc59645e8>.

<sup>172</sup> Remember the Unofficial Bridgerton Musical? *Supra* note 102.

determine if an infringing work is a fair use may never see a remedy.

So where do we go from here? What does this mean for the future of copyright? How can the law keep up with the speed at which technology and creative expression evolves? How do we address derivative works in the same vein as the Ratatousical? Some scholars suggest an amendment to the Copyright Act that creates a derivative work right,<sup>173</sup> while others believe the current derivative work doctrine is already too broad.<sup>174</sup> Also, creating a derivative work right would likely upset licensees who acquire licenses, and creators that license their work, specifically to produce derivative works.<sup>175</sup> Another statutory solution could be to add a creative work exception to the existing fair use exceptions of education, criticism, and parody.<sup>176</sup> As one scholar remarked, this could “provide a safe haven for fan activities and encourage creative appropriation.”<sup>177</sup> However, this would seem to run afoul of previously noted cases, such as *Penguin Random House* and *Salinger*,<sup>178</sup> which protected authors from unwanted derivative works, regardless of the level of creativity or whether the creator was a fan of the original work.<sup>179</sup> Another option could be to institute and expand compulsory licensing to all forms of expression, instead of limiting it to just music covers,<sup>180</sup> as sampling from other artists has been proven to increase music sales.<sup>181</sup> However, due to the pervasive nature of remix culture across all methods of expression and communication, this may be hard to control or monitor.

No one solution seems to satisfy both participants in remix culture and original authors. Absent clear guidance, authors of unlicensed derivative works and fan communities will continue to justify their creations as “fair use” without any clear understanding of whether there is any truth in that assertion.<sup>182</sup> Thus, one thing is clear: copyright law must evolve to reckon with new technology, and media giants

<sup>173</sup> See, e.g., Romanenkova, *supra* note 46, at 204.

<sup>174</sup> *Id.* at 205 (citing Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1264 (1997) (“Numerous legal scholars have noted that the derivative works doctrine is too broad and hinders more creativity than it encourages.”))

<sup>175</sup> *Id.* at 206.

<sup>176</sup> 17 U.S.C.A. § 107 (West) (2012) (“[N]otwithstanding the provisions of § 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

<sup>177</sup> *Supra* note 46.

<sup>178</sup> *Supra* note 38; *supra* note 37.

<sup>179</sup> There is also anxiety over lewd material being created based on juvenile work. See Don Tresca, “Spellbound- An Analysis of Adult-Oriented *Harry Potter* Fanfiction,” *Fan CULTure: Essays on Participatory Fandom in the 21st Century* at 36 (Kristin M. Barton ed, Jonathan Malcolm Lampley ed.) (2013).

<sup>180</sup> 17 U.S.C. § 115.

<sup>181</sup> See Mike Schuster et. al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177 (2019).

<sup>182</sup> *Supra* note 158 (citing *Frequently Asked Questions, Archive of Our Own*, <http://transformativeworks.org/faq-page#t456n22> (last visited Jan. 7, 2022)).

must adopt new, precedential best practices if they wish to maintain control over their intellectual property.

#### THE FINALE

After journeying through the copyright twilight zone, we are left at a crossroads: more and more of our lives are conducted online yet the intellectual property implications of our new culture have yet to be fully thought through.

While there may be more questions than answers, the story of the “Ratatousical” and its progeny illustrates this: the fair use analysis, the only protection against derivative works, cannot adequately reckon with modern culture. The nature of the TikTok platform gave space for innovative, collaborative creativity during the COVID-19 pandemic. Yes, by providing the stage to launch creators of unlicensed derivative works into financial success overnight, TikTok is pulling at the seams of copyright law. Should IP giants such as Netflix and Disney continue to acquiesce to fan-made musicals and not enforce their intellectual property rights, allowing the unregulated use of copyrighted material in efforts to not alienate their fans, they may lose the very power they hold.

Let this be a cautionary tale. New best practices must be adopted. Should copyright law remain unchanged and not address the complications posed by new technologies and trending culture, copyright holders will have to work harder than ever to protect their intellectual property—an effort that may be in vain due to the very precedent the largest copyright holders have set for themselves.