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Copyrighting TikTok Dances: Choreography in the Internet Age

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COPYRIGHTING TIKTOK DANCES: CHOREOGRAPHY IN THE INTERNET AGE

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Abstract: TikTok is a video-sharing social media application that launched in 2018 and has grown wildly since its inception. Many users are drawn to the platform by "dance challenges"—short dance routines of varying complexity set to popular songs that are recreated by other users, eventually going "viral" (i.e., recreated on a massive scale by other users) on the app. Going viral can provide young dancers and choreographers an opportunity to break into the highly competitive entertainment industry. However, there is a problem: due to TikTok's interface and community practices, the original creators of a dance (who, significantly, are often young women of color) frequently do not receive credit, or the massive opportunities that come with such recognition. This Comment explores how intellectual property law may provide a framework to address this problem, while simultaneously acknowledging the troubled history between copyright and creators of color. It also situates the TikTok problem within a larger phenomenon: choreography is an increasingly important part of pop culture as video cements itself as the dominant communicative medium of the era. Accordingly, the challenges of asserting intellectual property rights over choreography (which have historically gone unsought and ignored) is a legal problem that will require renewed focus.

Part I of this Comment describes the global ascent of TikTok as a platform for sharing choreography, and how the app serves as a touchpoint for a bigger story of cultural appropriation in the United States. Part II discusses copyright law and choreography, focusing on the required features a piece of choreography must have to be entitled to copyright protection, and the increasing importance of copyright protection for choreography in the internet age. Part III addresses the recent litigation between a popular video game, Fortnite, and a cadre of celebrities who claim the game copied their "signature dance moves" without compensation. Specifically, this Part investigates how the outcomes of those cases inform analysis for legal protection of TikTok dances. Part IV argues that under the current copyright regime, many TikTok dances likely qualify for copyright protection. However, given the importance of widespread dissemination to the success of TikTok dances, copyright protection—which would inevitably have a chilling effect on a dance's dissemination—may not pave the appropriate path forward. This Part also presents potential solutions. These potential solutions include licensing schemes, as well as extralegal fixes TikTok could employ to meet the dual goals of allowing dissemination while simultaneously protecting the attribution rights of choreographers.

INTRODUCTION

In February 2020, a twenty second dance routine called the

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"Renegade"[1] was breaking the internet.[2] The complex but short dance routine, which incorporates popular moves such as "the woah," "the wave," and "the dab," originally gained popularity on TikTok, a social media application.[3] However, the "Renegade" quickly transcended the boundaries of any one app to become an influential part of the cultural zeitgeist—teenagers were "doing the dance in the halls of high schools, at pep rallies, and across the internet."[4] Recording artist Lizzo, reality television star Kourtney Kardashian, YouTuber David Dobrik, and members of the K-pop band Stray Kids all performed it.[5] But the one person who was not able to capitalize on the attention was Jalaiah Harmon, the Renegade's fourteen-year-old creator who had been training and competing in various dance styles for over four years.[6]

After spending months trying to get recognition for the hyper-popular dance, asking for credit from more popular TikTokkers who were closely associated with the routine, and making other online posts attempting to connect herself with the dance, Jalaiah eventually got the attention of the press.[7] Thanks to the media attention Jalaiah received, more effort has gone into making people aware that she created the dance. Jalaiah performed at the NBA All-Star game, Epic Games created a Renegade emote for Fortnite that accords her full credit, musician Sufjan Stevens asked her to star in a recent music video,[8] and the famed Dance411 studio invited her to teach other professional dancers.[9] But by then, she felt that the moment had passed.[10] The Renegade is just one of the dozens of viral

1. TikTok 2021, *Renegade Dance (K CAMP-Lottery)*, YOUTUBE (Dec. 28, 2019), https://www.youtube.com/watch?v=L2046dlkjQQ [https://perma.cc/6F2B-WRMH].

2. Taylor Lorenz, *The Original Renegade*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/02/13/style/the-original-renegade.html [https://perma.cc/C2TQ-HTDP].

3. Rebecca Jennings, *On TikTok, Who Owns a Viral Dance?*, VOX (Feb. 4, 2020, 8:20 AM), https://www.vox.com/the-goods/2020/2/4/21112444/renegade-tiktok-song-dance [https://perma.cc/46TP-XU4J].

4. Lorenz, *supra* note 2.

5. *Id.*

6. *Id.*; Jewel Wicker, *Renegade Creator Jalaiah Harmon on Reclaiming the Viral Dance*, TEEN VOGUE (Apr. 15, 2020), https://www.teenvogue.com/story/jalaiah-harmon-renegade-creator-viral-dance [https://perma.cc/E92V-ZJ75]; *see generally* Jalaiah Harmon (@jalaiahharmon), TIKTOK, https://www.tiktok.com/@jalaiahharmon? (last visited Aug. 23, 2021).

7. *See* Lorenz, *supra* note 2.

8. Julia Alexander, *Sufjan Stevens Teams Up with Renegade Creator Jalaiah Harmon for New Music Video*, VERGE (Aug. 13, 2020, 1:23 PM), https://www.theverge.com/2020/8/13/21366555/sufjan-stevens-music-video-jalaiah-harmon-renegade-dance-fortnite-emote (last visited Aug. 23, 2021).

9. Wicker, *supra* note 6.

10. Lorenz, *supra* note 2 ("I think I could have gotten money for it, promos for it, I could have

internet dances that have taken over the world while the choreographer responsible for its creation has gone largely unacknowledged.

The rapid growth of TikTok and its emphasis on "dance challenges"—short pieces of choreography that are replicated and posted by other users—point to a larger phenomenon: the increasing importance of choreography in pop culture in an era defined by video communication. While the potential power and benefits of creating a successful TikTok dance are apparent, it is not always easy to determine the original creator of a dance or ensure that the right person receives credit.[11] The challenges of proper attribution often end up burdening young creators of color, as more mainstream—often white—TikTok stars frequently perform the choreography without crediting the creator.[12] These TikTok stars then become associated with the dance routines and benefit from the popularity of the choreography while the original creator often remains unknown.[13] This attribution problem on TikTok provides a microcosmic example of longstanding inequities and cycles of appropriation.[14]

This issue of appropriation has become increasingly amplified. During the summer of 2021, many Black creatives refused to create TikTok dance routines for "Thot Shit," the chart-topping summer single from recording artist Megan Thee Stallion, as a symbolic protest against the cycle of appropriation that has become so rampant on the application.[15] The

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gotten famous off it, get noticed," Harmon told the Times. "I don't think any of that stuff has happened for me because no one knows I made the dance.").

11. Dance challenges can explode so quickly on the app that it can be difficult to trace their origins, especially as many TikTokkers like to put their own spin on routines. In practice, this means that already-famous TikTokkers can often steal the limelight from lesser-known dancers. This has been particularly troubling for Black creators, like Harmon, who have frequently seen white TikTokkers get credit for their routines. *See* Lorenz, *supra* note 2.

12. *See, e.g.*, *id.* (discussing the cycle of appropriation that frequently saw TikTok stars performing dances originally created on Dubsmash, another dance video platform considered to be more on the cutting edge). As musical artist and YouTube star Kayla Nicole Jones stated, "TikTok is like a mainstream Dubsmash . . . . They take from Dubsmash and they run off with the sauce." *Id.*

13. *Id.*; Wicker, *supra* note 6. For example, TikTok announced its "Creator Fund" program in 2020, which promised two hundred million dollars to compensate creators for the videos they were making. However, eligibility for the program turned on the user's popularity with minimum requirements of 10,000 followers and at least 10,000 video views in the thirty days prior. *See* Vanessa Pappas, *Introducing the $200M TikTok Creator Fund*, TIKTOK (July 29, 2020), https://newsroom.tiktok.com/en-us/introducing-the-200-million-tiktok-creator-fund [https://perma.cc/A5U3-Q8MC].

14. *See infra* section I.C.

15. *See* Sharon Pruitt-Young, *Black TikTok Creators Are on Strike to Protest a Lack of Credit for Their Work*, NPR (July 1, 2021, 11:00 PM), https://www.npr.org/2021/07/01/1011899328/black-tiktok-creators-are-on-strike-to-protest-a-lack-of-credit-for-their-work [https://perma.cc/JQ6N-LNWG]; Taylor Lorenz & Laura Zornosa, *Are Black Creators Really on 'Strike' from TikTok?*, N.Y. TIMES (July 13, 2021), https://www.nytimes.com/2021/06/25/style/black-tiktok-strike.html

collective act of protest aimed to illuminate the centrality and essentialness of Black creators—particularly choreographers—to the app's success, and the lack of credit they currently receive despite their importance.[16]

This Comment discusses the possible copyright protections available to TikTok choreographers for their dance routines. The Copyright Act of 1976[17] recognizes choreography as a protected form of creative expression.[18] However, few choreographers have received legal protection for their work.[19] Accordingly, case law and registration decisions that shed light on what qualifies as copyrightable choreography are rare. This is in part because, historically, the dance community has been close-knit and able to police choreographic rights through community-established norms.[20] But times are changing. Global platforms such as TikTok not only expand the dance community exponentially—and massively raise the stakes for what can be gained from a successful routine[21]—they also ensure the increasing importance of protecting choreographic intellectual property.

Part I describes the global ascent of TikTok as a platform for sharing choreography, and how the app serves as a touchpoint for a bigger story of cultural appropriation in the United States. Part II discusses copyright law and choreography, focusing on the required features a piece of choreography must have to be entitled to copyright protection, and the increasing importance of copyright protection for choreography in the internet age. Part III addresses the recent Fortnite litigation, and how these cases' outcomes inform analysis around protection for TikTok dances. Part IV argues that under the current copyright regime many TikTok

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[https://perma.cc/XM87-JSF4]; Ruth Etiesit Samuel, *'Give Black People Credit': Black TikTok Stars Strike, Demand Credit for Their Work*, L.A. TIMES (July 2, 2021, 6:00 AM), https://www.latimes.com/entertainment-arts/story/2021-07-02/give-black-people-credit-black-tiktok-creator-are-on-strike-and-demand-change (last visited Aug. 23, 2021).

16. *See* Pruitt-Young, *supra* note 15; Lorenz & Zornosa, *supra* note 15; Samuel, *supra* note 15.

17. 17 U.S.C. § 102(a)(4).

18. *Id.*

19. *See, e.g.*, Lauren B. Cramer, Note, *Copyright Protection for Choreography: Can It Ever Be 'En Pointe'? Computerized Choreography or Amendment: Practical Problems of the 1976 U.S. Copyright Act and Choreography*, 1 SYRACUSE J. LEGIS. & POL'Y 145, 145–46 (1995) (describing the Copyright Act as a "paper tiger" when it comes to protecting choreography, and noting that only one case of copyright infringement has ever reached the courts).

20. *See infra* section II.B.

21. For example, nineteen-year-old Keara Wilson created a viral dance routine to Megan Thee Stallion's "Savage" in March of 2020. After the success of the dance, Wilson not only landed an agent, but also launched her own line of merchandise. *See* Amelia Tait, *Meet the Choreographers Behind Some of TikTok's Most Viral Dances*, WIRED (Aug. 18, 2020, 6:00 AM), https://www.wired.co.uk/article/tik-tok-dances [https://perma.cc/A4TP-YFLG].

dances likely qualify for copyright protection. However, given the importance of widespread dissemination to the success of TikTok dances, it is not clear that copyright protection—which would inevitably have a chilling effect on a dance's dissemination—is the appropriate path forward. This Part also presents potential solutions, including licensing schemes and extralegal fixes that TikTok could employ to meet the dual goals of allowing dissemination while simultaneously protecting the attribution rights of the choreographers.

I. TIKTOK AND THE RISE OF THE SIXTY SECOND DANCE PARTY

Since the early days of social media, viral video trends have cycled through the American experience—from Planking, to the Ice Bucket Challenge, to the Harlem Shake.[22] However, the introduction of TikTok, which centers viral "challenges"[23] on its platform, has put this practice into overdrive.[24] The app became widely known for its "dance challenges," which have been a significant factor in TikTok's ability to gain global attention and participation.[25] This Part introduces the TikTok application, discusses how the app approaches intellectual property rights in user-generated content, provides background on the platform's "dance challenge" craze, and addresses how the rise of TikTok dances fits into a broader cultural narrative of appropriation.

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22. These "viral videos" feature many users doing the same thing. For example, the Ice Bucket Challenge, which was created to spread awareness and encourage donations for research on amyotrophic lateral sclerosis (ALS), featured users getting a bucket of ice water dumped over their heads. *See* Lauren Frias, *60 Viral Moments that Delighted Us, Disappointed Us, and Defined the 2010s*, INSIDER (Dec. 16, 2019, 5:15 PM), https://www.insider.com/biggest-viral-moments-videos-memes-from-the-2010s [https://perma.cc/AK8M-ZHW6]; Taylor Lorenz, *Viral Challenges Are What's Keeping Us Occupied*, N.Y. TIMES (Mar. 26, 2020), https://www.nytimes.com/2020/03/26/style/viral-challenges-coronavirus.html [https://perma.cc/SQ79-37V4]; Kia Gregory, *It's a Worldwide Dance Craze, but It's Not the Real Harlem Shake*, N.Y. TIMES (Feb. 28, 2013), https://www.nytimes.com/2013/03/01/nyregion/behind-harlem-shake-craze-a-dance-thats-over-a-decade-old.html [https://perma.cc/65EP-WM7G].

23. A "challenge" on TikTok is when "many TikTok users will all make videos attempting to do the same thing, like the stair step challenge, where they would dance up a set of stairs in elaborate ways." Julia Alexander, *Your Guide to Using TikTok*, VERGE (Apr. 2, 2019, 10:20 AM), https://www.theverge.com/2019/4/2/18201898/tiktok-guide-for-you-challenge-creator-trend-algorithm-privacy [https://perma.cc/K7V5-V6PM].

24. Lorenz, *supra* note 22.

25. Makeda Easter, *It's Not Just Teens: We're All in the TikTok-Dance-Challenge Phase of Quarantine Now*, L.A. TIMES (Apr. 10, 2020, 12:11 PM), https://www.latimes.com/entertainment-arts/story/2020-04-10/coronavirus-tiktok-dance-challenge-age-debate (last visited Aug. 23, 2021).

A. What is TikTok?

TikTok is a video-sharing social media app that launched in the United States in 2018.[26] TikTok allows users to upload original videos of three to sixty seconds with accompanying music and audio-visual effects, as well as browse and view content uploaded by other users.[27] The platform's simple interface and seemingly endless supply of viral content has attracted nearly seven hundred million active monthly users globally.[28] Notably, as of 2020 the app had been downloaded more than two billion times worldwide.[29] TikTok is particularly popular with younger audiences. Many of its most-followed users are teenagers,[30] and data shows that 41% of TikTok users are between sixteen and twenty-four years old.[31]

B. TikTok Dance Challenges

"Dance challenges," or dance routines created by TikTok users that are shared, mimicked, and reposted by other users, eventually becoming

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26. Rita Liao & Catherine Shu, *TikTok's Epic Rise and Stumble*, TECHCRUNCH (Nov. 26, 2020, 1:11 AM), https://techcrunch.com/2020/11/26/tiktok-timeline/ [https://perma.cc/G7TG-NAVP].

27. Leslie Gornstein, *What Is TikTok? And What Does President Trump Have to Do with It?*, CBS NEWS (Oct. 1, 2020, 11:27 AM), https://www.cbsnews.com/news/what-is-tiktok/ [https://perma.cc/V8TS-HMYE].

28. Alex Sherman, *TikTok Reveals Detailed User Numbers for the First Time*, CNBC (Aug. 24, 2020, 6:33 PM), https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html [https://perma.cc/TS8K-28XX].

29. Gornstein, *supra* note 27. Additionally, research shows that children aged four to fifteen spend almost as much time on TikTok as they do watching videos on YouTube, which has long been regarded as one of the most popular apps among children. *See* Sarah Perez, *Kids Now Spend Nearly as Much Time Watching TikTok as YouTube in US, UK and Spain*, TECHCRUNCH (June 4, 2020, 12:34 PM), https://techcrunch.com/2020/06/04/kids-now-spend-nearly-as-much-time-watching-tiktok-as-youtube-in-u-s-u-k-and-spain/ [https://perma.cc/A8FA-W4CN].

TikTok's already hyper-successful existence has been bolstered by the COVID-19 pandemic and accompanying lockdowns. In the United States, the app saw downloads increase by 27% in the first three weeks of March 2020 (which marked the beginning of government-mandated lockdowns for many states). *See* Murray Stassen, *Coronavirus Quarantine Appears to Be Driving a Global TikTok Download Boom*, MUSIC BUS. WORLDWIDE (Mar. 24, 2020), https://www.musicbusinessworldwide.com/coronavirus-quarantine-appears-to-be-driving-a-global-tiktok-download-boom/ [https://perma.cc/34UR-4VJP]. In the U.K., downloads of the app increased by 34% during the first week of lockdown. *See* Sirin Kale, *How Coronavirus Helped TikTok Find Its Voice*, GUARDIAN (Apr. 26, 2020 3:00 PM), https://www.theguardian.com/technology/2020/apr/26/how-coronavirus-helped-tiktok-find-its-voice [https://perma.cc/KA2L-TUZC].

30. Raymond Zhong & Sheera Frenkel, *A Third of TikTok's Users May Be 14 or Under, Raising Safety Questions*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/08/14/technology/tiktok-underage-users-ftc.html [https://perma.cc/3F5M-HUBW].

31. *TikTok by the Numbers: Stats, Demographics, and Fun Facts*, OMNICORE (Jan. 6, 2021), https://www.omnicoreagency.com/tiktok-statistics/ [https://perma.cc/U4NC-SAAV].

"viral," dominate TikTok.[32] These dance challenges have been described as the primary "currency" on the app.[33] Indeed, many of the app's most-followed creators built their following through dance and lip-sync content.[34]

Not surprisingly, the platform has become synonymous with dance culture, and moreover, superstardom.[35] Consider Haley Sharpe, a sixteen-year-old in Huntsville, Alabama.[36] She created a viral dance to recording artist Doja Cat's "Say So" in December 2019, which consequently skyrocketed her profile past one million followers.[37] She has since been able to go to Los Angeles and meet with fellow TikTok-famous teens, and was hired to dance in a show on the Instagram platform IGTV.[38] Perhaps even more significantly, her dance routine was featured in the official music video for "Say So," the song that her viral video helped push to the top of the charts.[39] Further, Sharpe herself received a cameo in the music video.[40]

But TikTok's almost open-source content sharing design[41] means that

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32. The phrase "gone viral" has been used for years to describe something "that becomes wildly popular on the internet." *See* Abby Ohlheiser, *Maybe It's Time to Retire the Idea of "Going Viral"*, MIT TECH. REV. (May 17, 2020), https://www.technologyreview.com/2020/05/17/1001809/maybe-its-time-to-retire-the-idea-of-going-viral/ [https://perma.cc/83AP-N3MS].

33. Performing and creating dance challenges is one of the primary ways TikTok users gain followers and become well-known users. *See* Sarah Spellings, *10 TikTok Dances to Learn at Home*, CUT (Mar. 19, 2020), https://www.thecut.com/2020/03/tiktok-dances-to-learn.html [https://perma.cc/BH53-8NYV]; Cady Lang, *The Best Tiktok Dances of 2020 So Far*, TIME (Aug. 29, 2020, 11:00 AM), https://time.com/5880779/best-tiktok-dances-2020/ [https://perma.cc/9WYL-QQGD]; Lauren Strapagiel, *These Are the Most Viral Dances on TikTok for 2020 So Far*, BUZZFEED NEWS (Oct. 26, 2020, 9:30 AM), https://www.buzzfeednews.com/article/laurenstrapagiel/most-viral-tiktok-dances-of-2020 [https://perma.cc/Q5K7-FSUA].

34. Paige Leskin & Palmer Haasch, *Charli D'Amelio Has Taken over as TikTok's Biggest Star. These Are the 40 Most Popular Creators on the Viral Video App*, Bus. INSIDER (Dec. 24, 2020, 11:42 AM), https://www.businessinsider.com/tiktok-most-popular-stars-gen-z-influencers-social-media-app-2019-6 [https://perma.cc/KS7E-E2C2].

35. *See id.*; Lauren Strapagiel, *A TikTok Dance Has Made the Jump to an Actual Music Video*, BUZZFEED NEWS (Feb. 27, 2020, 2:40 PM), https://www.buzzfeednews.com/article/laurenstrapagiel/doja-cat-say-so-tiktok-dance-haley-sharpe [https://perma.cc/T28E-35WK].

36. *See* Strapagiel, *supra* note 35; Haley Sharpe (@yodelinghaley), TIKTOK, https://www.tiktok.com/@yodelinghaley?lang=en (last visited Aug. 23, 2021).

37. *Id.*

38. Jennings, *supra* note 3.

39. Strapahiel, *supra* note 35.

40. *Id.*

41. "Open source" is an idea that comes from software development and means that, although one person may be the originator of a piece of software, everyone in the open-source community has the "rights to use, study, change, and share the software in modified and unmodified form." OPEN SOURCE INITIATIVE, https://opensource.org [https://perma.cc/7MT2-FM5Q]. Thus, the romantic idea of a singular owner or author is replaced by a more collaborative and free perspective on intellectual property.

those who create the viral dances are not necessarily the ones that benefit from the dance's success. One of the notable examples of this is Jalaiah Harmon, the creator of the "Renegade"[42] dance.[43] As aforementioned, the challenges Jalaiah faced in seeking credit for her choreography lie partly in the way TikTok is set up. For viewers, it is very difficult to determine whose video came first on the platform; the feed is not chronological, timestamps are not included with videos, and hashtags are sorted by popularity, not time. That means that if someone with more followers steals your dance, it is likely theirs will be the one that goes viral. Musical artists, on the other hand, have made fortunes after going viral on TikTok.[44] This is in part because TikTok's ability to add and save sounds generally makes it clear whose song is in the background.[45] As a result of these technological features, as well as the newness of the platform, norms—particularly around credit—are still being established.[46]

C. TikTok as a Touchpoint for Cultural Appropriation

The story behind the meteoric rise of the "Renegade" dance routine—created by Jalaiah but made famous by mostly white performers who were already part of the mainstream—is unfortunately all too familiar for creatives of color and specifically Black creatives in America, where cultural appropriation[47] has been a longstanding practice.[48] While many art forms rely on inspiration from other artists, the conversation around inspiration versus appropriation is "fraught with the pain of larger wounds inflicted by systemic practices stemming from the colonialist mindset,

42. TikTok 2021, *supra* note 1.

43. *See supra* Part I.

44. Elias Leight, *TikTok Proved It Can Make Hits—Its Next Test Is Creating Stars*, ROLLING STONE (June 6, 2019, 11:19 AM), https://www.rollingstone.com/music/music-features/tiktok-viral-hits-record-deals-flo-milli-sueco-the-child-843750/ [https://perma.cc/D4XJ-DP44].

45. Jennings, *supra* note 3.

46. Lorenz, *supra* note 2.

47. While cultural appropriation has many definitions, one that is helpful in this context comes from Michelle Heffner Hayes, a professor at the University of Kansas Department of Theatre & Dance, who has studied the legacy of cultural appropriation in dance as part of her work. She states cultural appropriation is "taking the external trappings of cultural traditions and using them as decorations on your own history without developing mutually supporting relationships in the community that you're taking from." Brian Schaefer, *At What Point Does Appreciation Become Appropriation?*, DANCE MAG. (Aug. 19, 2019), https://www.dancemagazine.com/cultural-appropriation-in-dance-2639820032.html [https://perma.cc/WZJ4-S2W8].

48. Notably, TikTok users have also been lambasted for "whitewashing" Black music—specifically the Jersey club genre. *See* Sheldon Pearce, *The Whitewashing of Black Music on TikTok*, NEW YORKER (Sept. 9, 2020), https://www.newyorker.com/culture/cultural-comment/the-whitewashing-of-black-music-on-tiktok [https://perma.cc/SBQ4-W78H].

constituting a virulent form of intellectual and cultural theft."[49] Truly understanding the unique challenge presented by cultural appropriation requires confronting the historical power dynamics that shape cultural appropriation and the resulting impact the practice has on social and economic outcomes. A thorough discussion of this vast and critically important topic is outside the scope of this Comment,[50] which focuses more narrowly on cultural appropriation in the realm of choreography.

The history of the appropriation of Black culture in the United States is particularly relevant to TikTok choreography. Black artistic creativity has been at the forefront of American culture since the country's founding.[51] For equally as long, the labor and creations of Black artists have routinely been repackaged for mainstream, white audiences without recognition or compensation.[52]

Dance has long been a locus for this phenomenon. One example is the "Black Bottom"—a dance that gained massive popularity in the United States and abroad during the 1920s.[53] Rooted in Black vernacular dance tradition of the time, the dance required moving on the off-beat and involved "slapping your hips and hopping forward and back, touching the

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49. *See* Miss Rosen, *Cultural Appropriation Is Bad, but We Wouldn't Have Hip Hop Without It*, DOCUMENT (Mar. 6, 2020), https://www.documentjournal.com/2020/03/cultural-appropriation-is-bad-but-we-wouldnt-have-hip-hop-without-it/ [https://perma.cc/J8TZ-6QST] ("'The area where appropriation becomes an issue is when you look at the imbalance in power in society and start to observe who gets to call claim to a certain intellectual property, who gets to be credited for things that they make or innovate, and who doesn't,' Jackson says. 'The problem isn't appropriation; the problem is the de facto inequality that suffuses the American landscape and a global context as well.'").

50. For additional reading on this topic, see *infra* note 52.

51. K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1186–87 (2008) [hereinafter Greene, *Copynorms*].

52. *Id.* at 1190–94; *see also* Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing,* Porgy and Bess, *and Unfair Use*, 37 RUTGERS L.J. 277 (2006) (discussing the inequity of musical borrowing under copyright law); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMMC'NS & ENT. L.J. 339, 367–71 (1999) [hereinafter Greene, *Legacy*] (exploring how Black music artists, as a group, were routinely deprived of legal protection for creative works under the copyright regime); ANTHEA KRAUT, CHOREOGRAPHING COPYRIGHT: RACE, GENDER, AND INTELLECTUAL PROPERTY RIGHTS IN AMERICAN DANCE (2015) (arguing that choreographic copyright has been a site for reinforcing gendered white privilege, as well as challenging it). As legal scholar Kimberlé Crenshaw notes, discussing the appropriation of rap music in the 1990s: "[t]he crossover of rap is not the problem; instead, it is the tendency . . . to reject the cultural origins of language and practices which are disturbing. This is part of an overall pattern of cultural appropriation that predates the rap controversy. Most starkly illustrated in music and dance, cultural trailblazers like Little Richard and James Brown have been squeezed out of their place in popular consciousness to make room for Elvis Presley, Mick Jagger, and others." Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1288 n.161 (1991).

53. KRAUT, *supra* note 52, at 143.

ground, and letting your backbone slide from side to side."[54] In 1926, white dancer Ann Pennington performed the dance in Broadway producer George White's annual Broadway review, *Scandals*, introducing the dance to a much broader audience and kickstarting its mainstream popularity.[55] The Broadway show's advertisement in *The New York Times* read, "The Dance Black Bottom was invented and staged by George White and the Black Bottom can be seen only at George White's *Scandals*."[56] Both Black blues singer Alberta Hunter (who, according to newspaper reports at the time, claimed she had copyrighted the dance[57]) and famed Black composer Will Marion Cook contested this erroneous claim.[58] Cook wrote a letter to the editor, published in *The New York Times*, stating "I have the greatest respect for Mr. White, his genius as an organizer and producer of reviews; but why do an injustice to the [B]lack folk of America by taking from them the credit of creating new and characteristic dances?"[59] Despite protests from the Black community, *Scandals* went on to have a 424-performance run at the Apollo Theatre on Broadway, and its weekly box office receipts topped $40,000.[60]

Subsequent decades saw similar practices, with swing dances like the "Lindy Hop" originating in Black communities and quickly being copied and popularized by white dancers.[61] Even in the midst of desegregation, shows such as American Bandstand would use tactics such as specific dress codes and identification cards to prevent Black dancers from participating, and specifically told white dancers who performed that they "weren't allowed to say that [B]lack people taught [them]."[62] More recently, the international explosion of hip-hop dance has left many of its originators without access to the economic benefits of its popularity.[63]

Historically, cultural appropriation has effectively excluded many creators of color, especially Black creatives, from the protection of

54. *Id.* at 144 (noting that there is no consensus on the origins of the Black Bottom, as many African American communities laid claim to its genesis).

55. *Id.* at 149.

56. *Id.* at 146.

57. *Id.* at 145 (noting that there is no copyright registration for the dance—likely Hunt's claim was merely rhetorical, or her registration was denied by the Copyright Office).

58. *Id.* at 145–49.

59. *Id.* at 147.

60. *Id.* at 146–49.

61. Yussef Cole, *Fortnite's Appropriation Issue Isn't About Copyright Law, It's About Ethics*, VICE (Feb. 11, 2019, 11:55 AM), https://www.vice.com/en_us/article/a3bkgj/fortnite-fortnight-black-appropriation-dance-emote [https://perma.cc/9UFM-VBCM].

62. *Id.*

63. Schaefer, *supra* note 47.

intellectual property laws.[64] However, modern creators have begun using copyright law as a way to vindicate their rights and ensure ownership over their work.[65] In the summer of 2020, JaQuel Knight—one of the music industry's most sought-after choreographers—successfully copyrighted the choreography for Beyoncé's "Single Ladies" music video.[66] This makes Knight one of the first commercial choreographers in pop music to successfully secure legal intellectual property protection for his work.[67] Knight is already in the final stages of registering six other pieces, including his choreography for recording artists Cardi B and Megan Thee Stallion's 2020 collaboration, "WAP," and "plans to register his entire catalog."[68] In discussing Knight's achievement, Terrica Carrington, VP Legal Policy and Copyright Counsel at the Copyright Alliance, noted that "[c]opyright ownership is essential for Black creators to ensure authentic representation and to protect cultural output."[69]

In the summer of 2021, Knight took his quest for copyright protection a step further, partnering with Swiss computer hardware company

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64. Greene, *Copynorms*, *supra* note 51, at 1194–1204; Greene, *Legacy*, *supra* note 52, at 371–83; KRAUT, *supra* note 52, at 27 ("[B]lack dancers in the United States have faced institutional discrimination, entrenched patterns of appropriation, and insidious stereotypes that refuse to recognize them as artists or authors, all of which have contributed to an unequal allocation of intellectual property rights.").

65. For example, Chuck Berry received a songwriting credit and ownership of the Beach Boys' song "Surfin' U.S.A." after Berry threated to bring a copyright infringement suit over the song's similarity to Berry's "Sweet Little Sixteen." *See* Joseph McCombs, *You Didn't Write That: A Brief Guide to (Alleged) Pop Plagiarism*, TIME (Nov. 5, 2012), http://entertainment.time.com/2012/11/08/you-didnt-write-that-a-brief-guide-to-alleged-pop-plagiarism/slide/the-beach-boys-surfin-u-s-a/ [https://perma.cc/3PPK-U49M]; see also Randy Lewis, *After 'Blurred Lines' Verdict, Brian Wilson Talks Chuck Berry and 'Surfin' U.S.A.'*, L.A. TIMES (Mar. 12, 2015, 4:49 PM), http://www.latimes.com/entertainment/music/posts/la-et-ms-brian-wilson-talks-blurred-lines-chuck-berry-and-surfin-usa-20150312-story.html (last visited Aug. 25, 2021) (discussing how writing credit and publishing royalties for "Surfin' USA" were signed over to Chuck Berry after he accused Brian Wilson of plagiarizing his song, and how Wilson continues to pay homage to Berry today). Additionally, Ray Charles successfully negotiated back the ownership of his masters after parting ways with Atlantic Records in order to have copyright control over his work. *See* Gail Mitchell, *Ray Charles Innovated in Business as Well as Music*, REUTERS (Sept. 17, 2010, 7:56 PM), https://www.reuters.com/article/us-charles/ray-charles-innovated-in-business-as-well-as-music-idUSTRE68H0FI20100918 [https://perma.cc/FQH6-KPF3].

66. Rebecca Milzoff, *Inside 'Single Ladies' Choreographer JaQuel Knight's Quest to Copyright His Dances*, BILLBOARD (Nov. 5, 2020), https://www.billboard.com/articles/business/9477613/jaquel-knight-beyonce-megan-thee-stallion-billboard-cover-story-interview-2020 [https://perma.cc/SXT5-9K2L].

67. *See id.* This distinction is particularly important because courts have historically been much more hostile to, and skeptical of, copyright claims from commercial artists. *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903) (Harlan, J., dissenting) (finding that a work "must have some connection with the fine arts to give it intrinsic value" to be protected by copyright).

68. *See* Milzoff, *supra* note 66.

69. *Id.*

Logitech to help ten BIPOC (Black, Indigenous, and People of Color) creators secure copyright of their choreography.[70] Of the first six recipients announced in July 2021, three will seek copyright protection for choreographed pieces that first went viral as dance challenges on TikTok.[71] The program is specifically designed to "highlight the work of Black creators who originate the dances that trend on social media" and thus "put the power back in the artists' hands."[72]

Thus, while it is important to understand that marginalized groups have historically been excluded from the legal benefits of copyright, it is also key to recognize that as social and cultural norms continue to evolve, these legal tools could potentially be used to prevent the cycle of abusive appropriation from continuing.

D. TikTok's Stance on Copyright Protection for User-Generated Content

In considering the legal protections that may be available to the choreographers behind TikTok's most viral dances, it is critical to note that any rights claimed by these choreographers may be severely hobbled by the app's terms of service. While this Comment focuses on the copyright law issues that TikTok choreographers will face in seeking legal protection, the limits that the application's terms of service place on a user's intellectual property rights are an additional hurdle that must be acknowledged.

Like many social media sites, TikTok uses a "browsewrap" approach to its terms of service agreement, whereby a user agrees to be bound by the agreement simply by viewing, using, or navigating to the website.[73] This means that TikTok's terms of service recognizes users' copyright

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70. Press Release, Logitech, Logitech and Visionary Choreographer JaQuel Knight Drive Change for BIPOC Creators Through Copyright Protection and New Film (July 29, 2021), https://news.logitech.com/press-releases/news-details/2021/Logitech-and-Visionary-Choreographer-JaQuel-Knight-Drive-Change-For-BIPOC-Creators-Through-Copyright-Protection-and-New-Film/default.aspx [https://perma.cc/ZUZ6-W7KV].

71. *Id.*; Lauren Rearick, *"Savage," "Up" TikTok Dance Creators May Soon Own Copyrights to Their Work*, TEEN VOGUE (July 30, 2021), https://www.teenvogue.com/story/savage-up-tiktok-dance-creators-will-soon-own-copyrights-to-their-work [https://perma.cc/2HYJ-K8NP].

72. Steven Vargas, *Choreographer JaQuel Knight, Logitech Partner to Help BIPOC Dance Creators Copyright Their Moves*, USA TODAY (Aug. 3, 2021, 7:09 PM), https://www.usatoday.com/story/tech/2021/08/03/jaquel-knight-and-logitech-help-bipoc-dance-creators-copyright-dances/5464726001/ [https://perma.cc/NM9H-2V5H].

73. *See generally* Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 35–36 (2013) (discussing the increased use of "browsewrap" contracts, under which Internet users enter into binding contracts online by merely browsing webpages).

ownership in "User Content" uploaded onto the TikTok platform.[74] However, the agreement also provides that by submitting content, the user grants TikTok, its "affiliates, agents, services providers, partners and other connected third parties," and "other users of the Services," an "unconditional irrevocable, non-exclusive, royalty-free, perpetual worldwide licen[s]e to use, modify, adapt, reproduce, make derivative works of, download, publish and/or transmit, and/or distribute . . . User Content in any format and on any platform, either now known or hereinafter invented."[75] This means that while the user who created the video uploaded onto TikTok maintains intellectual property rights in their creation, by uploading the video, they grant TikTok the ability to use the video in a myriad of ways (including licensing its use to other parties) without infringing on the aforementioned intellectual property rights of the creator. The agreement does specify that other users are only granted this license "for the purpose of generating other User Content or viewing your User Content for entertainment or other private, non-commercial purposes."[76]

While in-depth discussion of the effects and efficacy of TikTok's terms of service exceeds the scope of this Comment, three key points are important to keep in mind when exploring a user's rights to their uploaded creations. First, it is possible that a court would narrowly construe the language of the contract, so that "User Content" is limited to the video actually uploaded and does not extend to the intellectual property, such as choreography, expressed in the video. Looking at the language in the agreement, "format" and "platform" both appear to be referencing video-specific terms.[77] Thus, one could make the argument that TikTok's claimed license in the terms of service agreement relates only to the posted video and does not capture the underlying creative expression (i.e., the choreography itself). Second, while this broad license is typical of social media sites that house user-generated content,[78] the enforceability of these

74. *Terms of Service*, TIKTOK (Feb. 2019), https://www.tiktok.com/legal/terms-of-use?lang=en [https://perma.cc/MCP5-5SWZ] ("[Y]ou or your licensors will own any User Content (as defined below) you upload or transmit through the Services.").

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Will Clark, Copyright, Ownership, and Control of User-Generated Content on Social Media Websites 10–13 (Dec. 21, 2009) (unpublished student paper) (on file with Chicago-Kent College of Law), http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright%2C%20Ownership%2C%20and%20Control%20of%20User-Generated%20Content%20on%20Social%20Media%20Websites.pdf [https://perma.cc/5XP6-XP94] (discussing Facebook and YouTube's terms of service agreements).

agreements has not been seriously tested.[79] Scholarly work has questioned whether these contracts of adhesion[80] would be enforceable in the United States and abroad, given basic principles of contract interpretation.[81] Third, social media platforms are often affected by public opinion and have altered their terms of service agreements in response to public outcry in the past.[82] Perhaps most famously, in 2012, Instagram proposed a revision to its terms of use in which it claimed that it owned intellectual property rights to user-generated content and proposed a term that would allow the app to share a user's photos with Facebook and marketing affiliates to create paid advertisements (with the revenues going to Instagram rather than the photo owner).[83] The proposed change sparked a massive public outcry. Professional photographers and publishers were outraged that Instagram would use and profit from their photos, legal nonprofits pointed out the significant privacy concerns raised by the new terms, and many users—including public figures—threatened to delete their accounts.[84] In response, Instagram backtracked, deleting the language about displaying photos without compensation.[85]

Thus, while TikTok's terms of service present additional stumbling blocks for choreographers seeking to protect their work, it is unclear at this point how much of an impediment the terms of service will be. Unfortunately, the murkiness of creators' intellectual property rights on

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79. *Id.* at 14 ("Meanwhile, the question remains—are these broad licenses enforceable? The issue has been litigated very infrequently in the context of social media.").

80. A contract of adhesion is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (citation omitted).

81. For example, some courts will find contracts of adhesion unenforceable where they are "unconscionable." This is not a well-defined area of the law, and courts have found contracts "unconscionable" where the terms "shock the conscience" or the contract has elements of "unfair surprise." Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUT. & HIGH TECH. L.J. 829, 832–44 (2008); *see also* Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1499 (2014) (conducting a study that demonstrated that although the "European Union's Consumer Rights Directive requires that all distance contracts be drafted 'in plain and intelligible language,'" terms of use agreements from "social media providers did not give consumers sufficiently clear and readable information as to what rights they were foreclosing when they register, browse, or click . . . and . . . the information they conveyed was incomprehensible for many users").

82. Rustad & Koenig, *supra* note 81, at 1431–35; Anita Ramasastry, *Instagram's Terms of Service Revision: Why It Strained the Bounds of Fair Contracting*, VERDICT (Dec. 21, 2012), https://verdict.justia.com/2012/12/21/instagrams-terms-of-service-revision [https://perma.cc/5TGK-ZUGM].

83. *See* Rustad & Koenig, *supra* note 81, at 1431–35; Ramasastry, *supra* note 82.

84. *See* Ramasastry, *supra* note 82.

85. *See* Rustad & Koenig, *supra* note 81, at 1431–35; Ramasastry, *supra* note 82.

the TikTok platform is only further compounded by the lack of clarity surrounding the copyrightability of choreography.

II. COPYRIGHT LAW & CHOREOGRAPHY

In contrast to other art forms, such as visual art or musical composition, choreography has had a somewhat fraught relationship with copyright law. Applying copyright law to choreographic works remains a significant gray area for intellectual property law.[86] This Part introduces copyright law, provides background on how choreography came to be protected under the Copyright Act of 1976, discusses the requirements that a piece of choreography must meet to secure copyright protection, and analyzes the increasing importance of legal protection for choreographic works in the internet age.

A. Purpose of Copyright Law

Copyright is a form of intellectual property law that protects original works of authorship, "including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture."[87] Importantly, copyright protection does not cover ideas—instead, it simply protects the *expression* of ideas.[88] The justifications and theories behind copyright law and its application to the expression of ideas can generally be split into two camps—the incentives-based utilitarian theory and the rights-based deontic theory.[89]

The incentives-based utilitarian theory rests on the belief that "by maintaining adequate incentives to engage in the production of new artistic and literary works," copyright contributes to the "progress of [s]cience."[90] Because creating new works costs so much more than simply copying an existing work, legal protection provides a way to guard authors' initial investment and incentivize others to create new works

86. *See infra* section II.C.

87. *Copyright in General*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/help/faq/faq-general.html [https://perma.cc/DFV4-DKGA]. Copyright law and protection finds its source in the Intellectual Property Clause of the Constitution, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

88. *Copyright in General*, *supra* note 87; *see also* Baker v. Selden, 101 U.S. 99 (1879) (holding that if a person came up with a new system of accounting, the idea for the system would not be protected by copyright, but a book explaining the system could be protected because that would be an expression of the idea).

89. JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, COPYRIGHT LAW: CASES AND MATERIALS 9–16 (2021).

90. *Id.* at 10 (citing U.S. CONST. art. I, § 8, cl. 8).

from which society can benefit.[91]

The rights-based deontic theory offers two justifications for copyright. The first "identifies the individual's contribution of labor as the mechanism by which objects are reduced to property, and . . . focuses on the harm—in terms of fairness rather than wealth maximization—when another deprives the owner of the fruits of that labor."[92] The second justification posits that because "original expression reflects and embodies an author's personality, respect for creators' autonomy requires the recognition of property rights in creative works."[93] This theory focuses on protecting the personal rather than the economic interests of an author. Oftentimes, these rights include the right of attribution (also called the right of paternity), "the right to publish a work anonymously or pseudonymously, and the right to preserve a work's integrity (that is, the right to prevent revision, alteration, distortion, or destruction of a work)."[94]

While the utilitarian theory is far more dominant in the United States, the rights-based theory has had, and continues to have, significant influence on copyright systems in other countries (including many European countries).[95] Despite their varying levels of influence in different jurisdictions, both justifications are critical for thinking about the purpose and application of copyright protection. In particular, choreographers have long emphasized the importance of certain moral rights—notably the right of attribution—as key to their professional and artistic success.[96]

B. History of Copyright's Protection of Choreography

Choreography has had a complex and rocky road when it comes to

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91. *Id.* As the Supreme Court said, "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" Mazer v. Stein, 347 U.S. 201, 219 (1954).

92. FROMER & SPRIGMAN, *supra* note 89, at 13.

93. *Id.* at 15.

94. *Id.* at 317.

95. *Id.* at 16.

96. *See* Barbara A. Singer, *In Search of Adequate Protection for Choreographic Works: Legislative and Judicial Alternatives vs. The Custom of the Dance Community*, 38 U. MIAMI L. REV. 287, 308–09 (1984); Krystina Lopez de Quintana, Comment, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 VILL. SPORTS & ENT. L.J. 139, 168–70 (2004); Bethany M. Forcucci, Note, *Dancing Around the Issues of Choreography & Copyright: Protecting Choreographers After* Martha Graham School and Dance Foundation, Inc. v. Martha Graham Center of Contemporary Dance, Inc., 24 QUINNIPIAC L. REV. 931, 966–68 (2006).

copyright protection. While performing arts such as music and drama have long benefitted from copyright protection,[97] both Congress and the courts have eschewed choreography, considering it an art form with dubious moral worth, unworthy of protection.[98] As dance scholar Anthea Kraut writes, "[t]he campaign for choreographic copyright in the United States was also a campaign against deep-rooted tendencies to see dance as immoral and sexualized, feminized and racialized, and devoid of meaning. Copyright represented a means of putting dance on equal footing with more 'respectable' forms, such as music, drama and literature."[99]

The Copyright Act of 1909[100] offered minimal protection to dance—which was not specifically named as a protected category but fell under the umbrella of "dramatic works."[101] Thus, many pieces of choreography, including abstract dances, were not subject to copyright protection.[102]

Many choreographers were deeply frustrated by the inability to secure legal protection for their choreographic works.[103] Notably, famed dancer and choreographer Agnes de Mille, who served as one of the more notable proponents of adding choreography protection to the Copyright Act of 1976,[104] illustrated this inequity by discussing her role in the musical *Oklahoma!*[105] De Mille, the choreographer for the musical, received $15,000 from the producers for her work, but was not entitled to any long-term royalties or licensing fees from future productions of the show that leveraged her choreographic work.[106] In stark contrast, the estates of

97. "Musical compositions were first recognized under the Copyright Revision Act of 1831," and "[d]ramatic works were first recognized under the Copyright Revision Act of 1856." Singer, *supra* note 96, at 288 n.1.

98. *See, e.g.*, Martinetti v. Maguire, 16 F. Cas. 920, 922 (C.C.D. Cal. 1867) (No. 9,173) (refusing to protect a series of ballet tableaux because the production was "indecent" and "corrupt").

99. KRAUT, *supra* note 52, at 9–10. Significantly, in the 1880s and 1890s, "theatrical dancing . . . was seen primarily as 'a form of female erotic display performed by women of questionable moral status'; even 'ballet girls' were morally suspect." *See id.* at 50 (quoting ROBERT CLYDE ALLEN, HORRIBLE PRETTINESS: BURLESQUE AND AMERICAN CULTURE 96 (1991); AMY KORITZ, GENDERING BODIES/PERFORMING ART: DANCE AND LITERATURE IN EARLY-TWENTIETH-CENTURY BRITISH CULTURE 2 (1995)).

100. Pub. L. No 60-349, 35 Stat. 1075.

101. Lopez de Quintana, *supra* note 96, at 147–49.

102. For example, in an oft-quoted decision by Judge Lacombe, the New York Circuit Court held that modern dance pioneer Loïe Fuller's "The Serpentine Dance" choreography did not warrant copyright protection because it lacked "narrative" or "dramatic" content. Fuller v. Bemis, 50 F. 926, 928 (S.D.N.Y. 1892).

103. *See* KRAUT, *supra* note 52, at 192–210.

104. *See* Singer, *supra* note 96, at 289 n.9.

105. Adaline J. Hilgard, Note, *Can Choreography and Copyright Waltz Together in the Wake of* Horgan v. Macmillan, Inc.*?*, 27 U.C. DAVIS L. REV. 757, 759 (1994).

106. *Id.*

Richard Rodgers and Oscar Hammerstein II, the musical composers of the show, still receive royalties every time a piece from the musical is played.[107] The seeming unfairness of this situation inspired de Mille to begin a "vigorous campaign to establish intellectual property rights for choreographers: organizing her peers, writing at length on the topic, and lobbying Congress."[108]

The Copyright Act of 1976 finally provided choreography with statutory copyright protection.[109] Section 102 of the Act lists various categories of copyrightable subject matter, including "pantomimes and choreographic works."[110] Legislative history of the Act suggests that this formal recognition stemmed from a broader shift in dance culture legitimizing abstract choreography, the importance of protecting and compensating choreographers for their work, and the belief that choreography would more easily meet the practical requirement of "fixation" thanks to technological advances.[111]

C. Copyright Requirements

The Copyright Act of 1976 provides copyright protection for "original works of authorship fixed in any tangible medium of expression."[112] These underlying requirements—work of authorship, originality, and fixation—apply to all copyrightable works, but present some unique challenges for choreography.

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107. *See id.* Notably, it's questionable how much official recognition of choreography in the Copyright Act of 1976 has changed things. When asked why he sought copyright protection for his work, choreographer JaQuel Knight referenced his work on Beyoncé's iconic 2016 music video "Formation," which helped generate hundreds of millions of views on YouTube. *See* Milzoff, *supra* note 66. Yet, he noted "Mike WiLL Made-It is making millions, *millions* [as producer of] 'Formation' . . . [while] I'm still here on a weekly rate?" *Id.* (emphasis in original). Knight's concern that his compensation reflected his status as a temporary hire, rather than an author and owner in his own right, is remarkably aligned with De Mille's complaint from decades earlier. *Id.*

108. KRAUT, *supra* note 52, at 167.

109. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541, 2545 (codified as amended at 17 U.S.C. § 102(a)(4)). In the context of this Comment, it is important to note that there is a strong argument that the "campaigns for choreographic copyright that played out on and around Broadway at mid-century depended fundamentally on the fortification of class- and race-based artistic hierarchies." KRAUT, *supra* note 52, at 209. For an in-depth discussion of how race, gender, and class affect and underlie intellectual property rights in American dance, see KRAUT, *supra* note 52.

110. 17 U.S.C. § 102(a)(4). "Pantomime" is "distinct from choreography" and "is the art of imitating or acting out situations, characters, or other events." *Pantomimes and Choreographic Works*, U.S. COPYRIGHT OFF., https://www.copyright.gov/register/pa-pantomime.html [https://perma.cc/CJ2M-EJGY].

111. *See* STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REP. OF THE REGISTER OF COPYRIGHTS ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW 10, 17 (Comm. Print 1961).

112. 17 U.S.C. § 102(a).

Because of minimal case law addressing the copyrightability of choreography, much of the guidance for those seeking copyright protection comes from the Copyright Office.[113] The Copyright Office's interpretations, which are put forth in its *Compendium of Copyright Office Practices* ("*Compendium*"),[114] do not carry the force and effect of law.[115] However, a recent United States Supreme Court decision addressing the requirement that a work be "registered" with the Copyright Office prior to filing an infringement suit held that "registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright."[116] Thus, although courts are not bound by the *Compendium* definitions or registration decisions of the Copyright Office,[117] litigants have a better chance of success if their copyright is considered valid by the Copyright Office.

1. Work of Authorship

To receive copyright protection, a work must be a work of "authorship."[118] In the world of dance, this means that a dance must qualify as a "choreographic work[]" under the Act.[119] As noted above, choreography is the only copyrightable form not statutorily defined in the Copyright Act,[120] as both houses of Congress considered the term fairly settled.[121] However, legislative history does provide some insight by providing a "negative" definition—i.e., what choreography is not.[122] Congress sought to exclude "social dance steps" and "simple routines" from the definition,[123] finding them "too common or basic to merit

113. FROMER & SPRIGMAN, *supra* note 89, at 4–5.

114. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES (3d ed. 2021), https://www.copyright.gov/comp3/docs/compendium.pdf [https://perma.cc/3KKB-RHL7] [hereinafter COPYRIGHT COMPENDIUM].

115. FROMER & SPRIGMAN, *supra* note 89, at 5.

116. Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. ___, 139 S. Ct. 881, 886 (2019).

117. *See* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 478–79 (6th Cir. 2015) (collecting cases and noting that the Copyright Office's Compendium, registration decisions, and circulars are usually afforded only Skidmore deference), *aff'd*, 137 S. Ct. 1002 (2017); *see also* FROMER & SPRIGMAN, *supra* note 89, at 5.

118. 17 U.S.C. § 102(a).

119. *Id.* § 102(a)(4).

120. Lopez de Quintana, *supra* note 96, at 152.

121. Evie Whiting, Note, *Square Dance: Fitting the Square Peg of Fixation into the Round Hole of Choreographic Works*, 65 VAND. L. REV. 1261, 1274 (2012).

122. Leslie E. Wallis, Comment, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1452 (1986).

123. Horgan v. MacMillan, Inc., 789 F.2d 157, 161 (2d Cir. 1986).

copyright protection" and thus imbuing the definition with a "minimum level of difficulty."[124]

Lacking guidance in the statute, both the courts[125] and those seeking copyright protection have looked to the definition put forth in the *Compendium*.[126] The most recent *Compendium* features the following definition of "choreography:"

> The word "choreography" is derived from the Greek words "choreia," meaning "dance," and "*graphikos*," meaning "to write." A dance is the static and kinetic succession of bodily movements in certain rhythmic and spatial relationships. . . . [C]horeography [i]s the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole. . . . [C]horeography is not synonymous with dance.[127]

Further, the Copyright Office notes that choreographic works typically contain one or more of the following elements: (1) "[r]hythmic [m]ovement in a [d]efined [s]pace"; (2) "[c]ompositional [a]rrangement"; (3) "[m]usical or [t]extual [a]ccompaniment"; (4) "[d]ramatic [c]ontent"; (5) "[p]resentation [b]efore an [a]udience"; and (6) "[e]xecution by [s]killed [p]erformers."[128] The Office recognizes that "[t]he dividing line between copyrightable choreography and uncopyrightable dance is a continuum, rather than a bright line," noting that while "ballets, modern dances, and other complex works" mark one end of the spectrum, "social dances, simple routines, and other uncopyrightable movements" fall at the other end.[129] For the many works that fall in between, the Office relies on the above "objective criteria" to determine whether copyright protection is warranted.[130]

For example, the Copyright Office denied registration of a dance routine by world-renowned modern dance company Pilobolus entitled "Five-Petal Flower," finding that the fourteen-second routine did not "contain an amount of choreographic authorship substantial enough to

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124. Singer, *supra* note 96, at 297–98.

125. *See Horgan*, 789 F.2d at 161 (adopting the Copyright Office's definition of choreography).

126. The United States Copyright Office is a department within the legislative branch of the U.S. government. *See* FROMER & SPRIGMAN, *supra* note 89, at 4. It was created by an act of Congress in 1897. *Id.* Its primary function is to register claims of copyright. *Id.*

127. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.1 (emphasis in original) (internal citations omitted).

128. *Id.* § 805.2; §§ 805.2(A)–(F).

129. *Id.* § 805.5(B).

130. *Id.* § 805.4(A).

warrant a claim to copyright in choreography."[131] The work, which featured "bodily movements and the largely static combination of several bodies into the shape of a flower," was comprised of "simple gestures and movements" such that "[to allow] copyright protection for these elements would impede rather than foster creative expression."[132] Despite Pilobolus's argument that its work is "widely recognized as an original and never-before-seen form of dance expression," the Office found that "viewed as a whole, the collection and arrangement of these simple movements are insufficient to enable copyright registration."[133]

Significantly, the Copyright Office has declared some categories of dance are per se uncopyrightable, including: individual dance moves, short routines and "social dances."[134]

a. Individual Dance Moves & Short Routines

The Copyright Office has stated that individual movements or dance steps by themselves, such as the "basic waltz step, the hustle step, the grapevine, or the second position in classical ballet" are uncopyrightable.[135] Because individual dance moves are "building blocks" of choreographic expression, removing them from the public domain would stunt rather than encourage creative expression and the creation of new works and thus undermine the overall purpose of copyright.[136]

Copyright law cannot protect the individual elements of a dance for the same reason that it cannot protect individual words, numbers, notes,

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131. The Copyright Office described the video submitted with Pilobolus's application for registration as follows:

> On the left-hand side is the silhouette of a woman facing the right side of the screen. On the right-hand side several people quickly tumble onto the stage, forming the silhouette of a five-petal flower with their intertwined bodies. Simultaneously, the silhouette of a giant hand moves from the left to the right side of the screen, and appears to pull at the top of the five-petal flower. The hand then points at the flower formation in a common gesture that means "stay put." The flower formation stays still for the remainder of the video. The hand moves back to the left side of the screen and appears to pluck off the head of the woman, who shrugs her arms and slightly kicks her legs outward as if stunned. Her hands reach for the headless top of her body to feel for the head, and then return to her sides. The giant hand moves over the woman's body and her head reappears; the hand moves again and most of her body disappears underneath the hand. The woman remains near-motionless before the video abruptly ends.

Letter from Regan A. Smith, Copyright Off. Rev. Bd., U.S. Copyright Off. To Puo-I "Bonnie" Lee, Bryan Cave LLP (July 14, 2016), https://www.copyright.gov/rulings-filings/review-board/docs/five-petal-flower.pdf [https://perma.cc/E9VY-DC6M].

132. *Id.*

133. *Id.*

134. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.5(B).

135. *Id.* § 805.5(A).

136. *Id.*

colors, or shapes. This is one area where the dance community and copyright law are aligned—the dance world has long understood the importance of building off of one another's work and keeping foundational movements in the public domain.[137]

Similarly, the Copyright Office also "cannot register short dance routines consisting of only a few movements or steps with minor linear or spatial variations, even if the routine is novel or distinctive."[138] For example, the Office denied copyright protection to a perennial classic—the "YMCA" dance routine, which consists of using one's arms to spell out the letters Y-M-C-A—because of this limitation on copyright protection.[139]

b. Social Dances

The Copyright Office also categorically denies protections to "social dances," such as ballroom dances, folk dances, line dances, square dances, swing dances, and break dances.[140] To determine whether a choreographic work qualifies as a "social dance," the Office generally looks to the purpose of the dance. While protected choreographic works tend to be "performed by skilled dancers . . . for the enjoyment of an audience, . . . social dances are intended to be performed by members of the general public for their own personal enjoyment."[141] Much like the moratorium on protection of individual steps, keeping social dances in the public domain serves public interest by ensuring that long-established dance routines performed for a social rather than an artistic function are accessible to all and free to be performed.[142]

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137. Whiting, *supra* note 121, at 1282–83.

138. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.5(A).

139. Regan A. Smith, *Curious Cases of Copyrightability Before the Copyright Office*, 43 COLUM. J.L. & ARTS 343, 352 (2020).

140. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.5(B)(2).

141. *Id.*

142. Shanti Sadtler, Note, *Preservation and Protection in Dance Licensing: How Choreographers Use Contract to Fill in the Gaps of Copyright and Custom*, 35 COLUM. J.L. & ARTS 253, 262 (2012). Barring protection for social dances and individual steps aligns the protection of choreographic works with longstanding copyright principles, including the merger doctrine, scènes à faire, and de minimis copying. The merger doctrine restricts copyright protection when there is only one way (or a very limited number of ways) to express an idea. Oracle America, Inc. v. Google Inc., 750 F.3d 1339, 1360 (Fed. Cir. 2014) ("Under the merger doctrine, a court will not protect a copyrighted work from infringement if the idea contained therein can be expressed in only one way."). Because copyright only protects expression and not the underlying idea, providing protection to works where the idea and expression are inseparable would be tantamount to protecting the idea (which is disallowed under the copyright regime). Scènes à faire is the idea that expressions that are standard, stock, or common to a particular subject matter or medium are not protectable (for example, a shot of a tumbleweed

2. Originality

In addition to qualifying as a "choreographic work" under the Copyright Act, a baseline requirement for copyright protection is originality.[143] Originality requires that a work is "independently created by the author (as opposed to copied from other works), and . . . possesses at least some minimal degree of creativity."[144] Notably, neither uniqueness nor novelty is needed to satisfy the originality requirement. Indeed, the "independent creation" doctrine holds that if an author independently creates a work, it will still meet the threshold of originality, even if it is highly similar or the same as a preceding work.[145] Thus, while one need not to be the first person to come up with an original work, one must come up with it independently in order to qualify for copyright protection.

The amount of creativity needed to meet the originality requirement is fairly minimal. In a seminal case dealing with the originality requirement of copyright protection, the United States Supreme Court stated that "the requisite level of creativity is extremely low; even a slight amount will suffice" and that "[t]he vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[146]

For example, JaQuel Knight's "Single Ladies" is a piece of choreography that was similar to a preceding work, but still possessed the requisite "spark" of creativity needed to qualify as original.[147] The choreography, according to both Knight and Beyoncé herself, was directly inspired by a routine created by Bob Fosse—an American dancer, choreographer, and director who is credited with revolutionizing musicals

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rolling across a desert-like landscape in a Western film). *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979–80 (2d Cir. 1980). De minimis copying can be found when the defendant's copying is minimal in a legally salient way. *See* Gayle v. Home Box Office, Inc., No. 17-CV-5867, 2018 WL 2059657, at *2–3 (S.D.N.Y. May 1, 2018). It is evident that the rationale for denying copyright protection to both individual dance steps and social dances is grounded in these core doctrines of copyright law.

143. 17 U.S.C. § 102(a).

144. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

145. *See* Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (1936) ("If by some magic a man who had never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.").

146. *Feist Publ'ns*, 499 U.S. at 345 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.08[C][1] (1990)).

147. *Id.*

with his distinct dance style.[148] The routine, called "Mexican Breakfast," was featured on a 1969 episode of the "Ed Sullivan Show."[149] Much like Knight's work, the Fosse piece features three women dancing in a line on an otherwise bare stage. The "Single Ladies" dance even borrows some specific movements from the Fosse routine[150] (and in fact, received some blowback for what viewers perceived as "stealing" moves).[151] However, because Knight's work possessed new elements and creative expression, the Copyright Office found it qualified for copyright protection.[152]

As evidence of the low bar for originality, the Copyright Act offers copyright protection to compilation and derivative works. This protection covers "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship,"[153] meaning that works that combine elements of previous creations can often be put together in an original manner that warrants copyright protection. For example, an anthology of poems might receive copyright protection for the editor's thoughtful and original selection and arrangement of poems, even though the editor clearly did not author the actual poems included.

Courts have not yet considered the level of originality required for choreographic works, but using other art forms as guidance, commentors have suggested that "court[s] should consider the choreographer's treatment of rhythm, space, and movement in the work. As long as the dance bears the choreographer's individual stamp, it is irrelevant that [the] dance uses well-known or often-used steps."[154] However, choreographic compilations and derivative works are less likely to be granted copyright protection than compilations or derivative works in other fields. Unlike other categories of authorship such as literary works or musical works,

148. Emma Dibdin, *Who Was Bob Fosse? 6 Things to Know Before Watching* Foss/Verdon, HARPER'S BAZAAR (Apr. 9, 2019, 10:45 PM), https://www.harpersbazaar.com/culture/film-tv/a27056186/bob-fosse-facts-fosse-verdon/ [https://perma.cc/JS5B-QPTB].

149. Abigail Jones, *Beyonce's 'Single Ladies' Shows Us She Gets Her Ideas from the Internet Like the Rest of Us*, NEWSWEEK (May 19, 2017, 2:43 PM), https://www.newsweek.com/beyonce-gets-her-ideas-internet-rest-us-612785 [https://perma.cc/Q6E4-AVCL].

150. *Id.*; Brian Schaefer, *More Pelvis, Everybody!*, NEW YORKER (Apr. 22, 2019), https://www.newyorker.com/magazine/2019/04/29/more-pelvis-everybody [https://perma.cc/2N3U-Y4DW].

151. Erika Ramirez, *Op-Ed: When Beyonce's Inspiration Turns into Imitation*, BILLBOARD (May 1, 2013), https://www.billboard.com/articles/columns/the-juice/1560092/op-ed-when-beyonces-inspiration-turns-into-imitation [https://perma.cc/AKU8-8LWJ]; Schaefer, *supra* note 150.

152. Milzoff, *supra* note 66.

153. 17 U.S.C. § 101.

154. *See* Singer, *supra* note 96, at 300–01.

"the mere selection, coordination, and arrangement of bodily movements does not necessarily result in the creation of a choreographic work."[155] Indeed, "if the author's selection, coordination, and/or arrangement of steps or movements does not result in an expressive compositional whole, the compilation does not constitute copyrightable subject matter under Section 102(a)(4) of the Copyright Act, and as such, cannot be registered as a choreographic work."[156] However, most choreographic works are compilations, at least in the sense that they take pre-existing dance steps and combine or arrange them in a way that creates an original work. This is fairly intuitive if one thinks about something like a ballet, which is typically comprised of a series of well-known, foundational movements (e.g., a leap, a plié, a fouetté, a pirouette). The challenge then becomes ensuring that this compilation results in an expressive compositional whole rather than a series of unrelated movements.

It was for this reason that the Copyright Office rejected a claim for "Ode to the Endzone," a dance routine, created by a football fan, combining various famed end zone dance moves (celebratory dances that professional football players perform after a successful touchdown). The routine featured various individual end zone dance moves, "including the 'Heisman Trophy pose,' the 'California Quake,' and the 'Funky Chicken'" performed in succession. In assessing the routine, the Office first rejected the "copyrightability of the constituent dance moves for lack of originality," and eventually "rejected the full claim because, viewed as whole, *Ode to the Endzone* was a 'fairly haphazard collection of routines and dance steps' rather than a series of dance movements organized into a coherent whole."[157]

3. Fixation

The third prerequisite to copyright protection is fixation.[158] Under the Copyright Act, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[159] Because dance is an art form that exists primarily through performance rather than recordings, fixation poses a

155. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.7.

156. *Id.*

157. Smith, *supra* note 139, at 351–52.

158. 17 U.S.C. § 102(a).

159. 17 U.S.C. § 101.

unique challenge for many choreographers seeking protection.[160] Unlike the author of a literary work or a painting, who fixes their work as they create it, a choreographer must take extra steps to render their work fixed and thus subject to copyright protection. Importantly, protection under the act begins as soon as the author fixes a work.[161] The dearth of copyrighted choreographic works is likely connected to the fact that choreography lacks this automatic fixation (and thus the accompanying automatic protection).[162] Adding to this hurdle, the available modes of fixation for dance—primarily video recording, professional notation, and software[163]—all have significant drawbacks.

Video recording is by far the most accessible mode of fixation in modern times, given most people have easy access to a video recording device and the relative speed of recording a performance.[164] However, this accessibility is accompanied by serious flaws in preserving the choreographic work.[165] First, the accuracy of the video recording relies on the ability and precision of the dancer performing the piece—any mistakes or stylistic choices made by the dancer will be reflected in the fixed version.[166] Second, filmed versions of dance are limited because they fail to convey the three-dimensional nature of the dance and capture isolated movements (which may be key to reconstruction).[167] And third, varying camera angles make it very challenging for future choreographers to accurately understand the various stage formations (i.e., where dancers are on the stage).[168]

To avoid some of these problems, choreographers have also turned to

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160. *See* Singer, *supra* note 96, at 301.

161. 17 U.S.C. § 102(a).

162. *See* Singer, *supra* note 96, at 301 ("Because dance is, in essence, an intangible work of art that lives primarily through performance instead of through recordation, the fixation requirement creates a formidable obstacle to the registration of choreographic works.").

163. Katie M. Benton, Comment, *Can Copyright Law Perform the Perfect Fouetté?: Keeping Law and Choreography on Balance to Achieve the Purposes of the Copyright Clause*, 36 PEPP. L. REV. 59, 87–90 (2008); Lopez de Quintana, *supra* note 96, at 158–61; Singer, *supra* note 96, at 301–04; Joi Michelle Lakes, Note, *A Pas de Deux for Choreography and Copyright*, 80 N.Y.U. L. REV. 1829, 1851–57 (2005).

164. According to recent research, 85% of Americans now own smart phones, which typically possess video recording capabilities. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/2N87-29ML].

165. Benton, *supra* note 163, at 88–89; Lopez de Quintana, *supra* note 96, at 159–61; Singer, *supra* note 96, at 302–03; Lakes, *supra* note 163, at 1855.

166. Benton, *supra* note 163, at 88–89; Lopez de Quintana, *supra* note 96, at 159–61; Singer, *supra* note 96, at 302–03; Lakes, *supra* note 163, at 1855.

167. Singer, *supra* note 96, at 303.

168. Benton, *supra* note 163, at 88–89; Lopez de Quintana, *supra* note 96, at 159–61; Singer, *supra* note 96, at 302–03; Lakes, *supra* note 163, at 1855.

Laban Dance Notation[169] and notation software.[170] However, both approaches have their own challenges, such as cost[171] and time-consuming processes.[172]

D. Fair Use

Assuming a choreographic work meets the requirements of authorship, originality, and fixation, it has potential to be protected by copyright law. However, when considering the bounds of such copyright protection, it is then essential to consider what uses of protected work may still be permissible under the fair use defense. As part of the 1976 Copyright Act, Congress codified "fair use"—a complete defense to copyright infringement that had long been a core doctrine of common law copyright protection.[173] Recognizing that courts "must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry,"[174] the fair use defense allows the use of copyrighted works "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research."[175]

To determine whether something qualifies as fair use, the court considers four statutory factors:

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169. Laban Dance Notation (Labanotation) is a method of recording choreography symbolically. Somewhat akin to sheet music, Labanotation "uses vertical staffs (one per performer) and symbols indicating the body part, direction, length and intent for a movement." Milzoff, *supra* note 66. Significantly, the six choreographers currently seeking copyright protection under the stewardship of JaQuel Knight and Logitech have all received Labanotation recordings of their dances to submit to the Copyright Office. *See* Press Release, Logitech, *supra* note 70.

170. Software programs for notating choreography have emerged in recent years, most notably employed by famed modern dance choreographer Merce Cunningham. *See* Adrienne Bernhard, *4 Tech Tools that Could Transform the Dance World*, DANCE MAG. (Feb. 23, 2017), https://www.dancemagazine.com/36988-2307060178.html [https://perma.cc/75QB-Y5Y5]; Lakes, *supra* note 163, at 1855.

171. While it is the most accurate, Labanotation is remarkably inaccessible for most choreographers. It is an incredibly niche specialty, meaning not only is it challenging to identify professionals who can do the work, but those who do it charge a premium for their services. Lopez de Quintana, *supra* note 96, at 158–60 ("Notation is a dying art form, and the rare professional who understands it typically charges twelve hundred dollars to fourteen hundred dollars for roughly twenty minutes of ballet.").

172. Software programs typically require choreographers to first compose the dance on the computer, and then subsequently teach it to dancers in the studio. Likely because this software requires a different approach to the choreographic process (beginning with the computer and then moving to live dancers), and it is a "duplicative and time-consuming process," it has not been widely adopted by the dance community. Lakes, *supra* note 163, at 1855.

173. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 549 (1985).

174. Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964).

175. 17 U.S.C. § 107.

> (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.[176]

These four factors are considered to be a balancing test, meaning not all four factors must weigh in favor of one party.[177] All four must be explored, and the results weighed together, in light of the purposes of copyright.[178]

E. Copyrighting Choreography in the Internet Age

The Copyright Act provides significant rights to those who can copyright their work. In broad strokes, successfully copyrighting a choreographic work gives authors the right to (1) "reproduce" or make a copy of the dance work (for example, make a video recording of a dance performance); (2) "prepare derivative works" such as adaptations or new versions; (3) "distribute copies . . . to the public by sale or other transfer of ownership"; (4) "perform the . . . work publicly"; and (5) "display the . . . work publicly" (for example, show a video recording of a dance).[179]

However, although copyright protection for choreography has been statutorily provided for almost half a century, few choreographers have sought to invoke their legal rights. Of the more than 500,000 applications the Office receives each year, the number for choreographic works is typically fewer than twenty.[180] In fact, the Copyright Office's electronic system does not even have a separate label for choreographic works, still lumping them in with dramatic works.[181] Part of the reason for this is that historically, the dance community has been very small and close-knit.[182] As such, choreographers have been able to rely on professional norms and standards for licensing and protecting ownership of their work.[183] One

176. *Id.*

177. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

178. *Id.*

179. 17 U.S.C. § 106; *see also* Adelaide Saucier, *Dance and Copyright: Legal "Steps" for Performers*, CTR. ART L. (Oct. 30, 2018), https://itsartlaw.org/2018/10/30/dance-and-copyright-legal-steps-for-performers/ [https://perma.cc/2WU9-HPPA] (discussing the rights choreographers can gain from seeking copyright protection for their work).

180. Milzoff, *supra* note 66.

181. *Id.*

182. Singer, *supra* note 96, at 291–92.

183. *See* Cramer, *supra* note 19, at 155–60.

reason for this interest in self-policing is to ensure that the balance between respecting artistic integrity and contribution and allowing the swapping of knowledge required to keep the art moving forward remained within the control of the dance community. In other words, other choreographers would be free to innovate on building blocks provided by those who came before without fear of legal action.[184]

While previous communities of professional dancers thrived in a world where professional norms trumped copyright protection,[185] the dance world is swiftly changing. Accessible technology and internet culture have created more opportunities for choreography-centered content to reach global audiences, and many more opportunities for the creators behind these works to benefit economically. As a result, the norms-based policing of choreographic intellectual property no longer suffices to meet the needs of the choreographers.[186] Simultaneously, other rights—including display, distribution, and reproduction—take on increasing importance and may tip the scales in terms of the cost-benefit analysis for choreographers seeking legal protection.

Additionally, as visual media like video become more accessible, choreography has taken on increased centrality to a performer's identity.[187] As such, the intellectual property rights over such choreography have become increasingly valuable.[188] One example highlighting this phenomenon is a 2018 suit brought by Big Freedia—a New Orleans artist who is credited with bringing the city's "bounce" music to the mainstream[189]—against former choreographer Wilberto Dejarnetti.[190] Freedia sought a declaration of ownership for choreography

184. Whiting, *supra* note 121, at 1283.

185. Singer, *supra* note 96, at 291–96; KRAUT, *supra* note 52, at 127–65.

186. Whiting, *supra* note 121, at 1247–48; Milzoff, *supra* note 66 ("[A]s videos have moved from TV to YouTube and Instagram, the importance of visual spectacle has only grown—and choreography has become a more significant part of an artist's iconography. Some of the most memorable music videos of the past decade—think Sia's "Chandelier," Justin Bieber's "Sorry" or Kanye West's "Fade"—rely almost entirely on dance visuals.").

187. Milzoff, *supra* note 66.

188. Yola Robert, *JaQuel Knight Is Paving the Way for the Future of Copyrighting Dance*, FORBES (Nov. 23, 2020, 1:33 PM), https://www.forbes.com/sites/yolarobert1/2020/11/23/jaquel-knight-is-paving-the-way-for-the-future-of-copyrighting-dance/?sh=178119efe72e [https://perma.cc/D5Y2-CR4F] (discussing the value of copyrighting choreography in the era of social media).

189. Alison Fensterstock, *Big Freedia Is the 21st Century's Ambassador of Freedom*, NPR (Oct. 30, 2018, 10:00 AM), https://www.npr.org/2018/10/30/655851421/big-freedia-is-the-21st-centurys-ambassador-of-freedom [https://perma.cc/6YKW-6Z8G].

190. Dejarnetti was also a frequent guest on Big Freedia's reality show, "Queen of Bounce." *See* Travis M. Andrews, *A Lawsuit by Rapper Big Freedia Raises the Question Again: Can Dance Be Copyrighted?*, WASH. POST (Nov. 27, 2018, 12:34 PM), https://www.washingtonpost.com/arts-entertainment/2018/11/27/lawsuit-by-rapper-big-freedia-raises-question-again-can-dance-be-copyrighted/?noredirect=on&utm_term=.5c7ea31652ce [https://perma.cc/P5QB-KQGF].

and music from the time they worked together.[191] Dejarnetti asserted that Freedia "owe[d] him $500 per month to 'continue using' certain choreographed dances that he worked on" between 2014 and 2017.[192] Freedia argued that the choreography was "largely based on and derivative of traditional 'bounce' dance movements and other routines [Freedia] and [her] dancers had been employing for years," and that Dejarnetti had already been paid for his services.[193] As this example illustrates, the intellectual property rights surrounding choreography, while long ignored, are taking on newfound significance in the internet era.

Critically, choreographic works lack a centralized licensing scheme that would allow choreographers to easily capitalize on their increasing importance. Licensing systems like collective rights management organizations,[194] which govern music licensing practices,[195] have yet to be developed for choreography, although some attempts have recently begun.[196] However, in addition to these established approaches to licensing, new ways for copyright holders to vindicate their rights have emerged. One philosophy of protection is known as "copyleft."[197]

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191. *Big Freedia Sues Choreographer for Dance Routines*, ASSOCIATED PRESS (Nov. 26, 2018), https://apnews.com/article/5400cfb739fa41f4bd893b2154a78a80 (last visited Aug. 20, 2021); Andrews, *supra* note 190.

192. Andrews, *supra* note 190.

193. *Id.*

194. A collective rights management organization is a group that promotes the interests of copyright holders. "On behalf of those right holders, the [organization] negotiates tariffs with users, licenses the use of protected works, distributes the income from the exploitation of rights among its members, and supervises the manner in which the rights are used." Martijn van de Hel, Diederik Schrijvershof & Reshmi Rampersad, *Collective Management Organisations and Competition Law*, LEXOLOGY (Aug. 28, 2020), https://www.lexology.com/library/detail.aspx?g=afe0e3b6-7b3e-450f-b14f-f79b5422c08f [https://perma.cc/A4VX-JS4Y].

195. *Id.* Notably, music also differs from choreography in that musical compositions are subject to a "compulsory" license system, meaning that any artist wishing to make a "cover" version of a song that has previously been recorded and released by a properly authorized artist may do so, as long as they comply with the terms of a statutorily mandated compulsory mechanical license. *See* 17 U.S.C. § 115; *see also* Matt Kovac, *Copyright and Choreography: The Negative Costs of the Current Framework for Licensing Choreography and a Proposal for an Alternative Licensing Model*, 36 HASTINGS COMM. & ENT. L.J. 137, 143 (2014).

196. JaQuel Knight has announced the launch of Knight Choreography and Music Publishing Company, a rights management company that will oversee the licensing of his choreography, and "plans to represent rights for a diverse range of choreographers and creatives across all genres and mediums." Jazz Tangcay, *Beyonce and Megan Thee Stallion Choreographer JaQuel Knight Launches Company to Copyright Dance Moves*, VARIETY (Apr. 22, 2021, 9:05 AM), https://variety.com/2021/artisans/news/beyonce-choreographer-jaquel-knight-copyright-dance-moves-1234957578/ [https://perma.cc/NYD5-6XUJ].

197. *What Is Copyleft?*, GNU OPERATING SYS., https://www.gnu.org/licenses/copyleft.en.html [https://perma.cc/5XKM-BFFR].

Originally coming from software programmers, the copyleft approach believes that "an abundance of expressive material in the public domain is essential to a healthy society."[198] This philosophy is embodied in Creative Commons, "an organization founded in 2001 that embraces the idea of 'some rights reserved' and provides tools by which authors can give others 'the right to share, use, and even build upon' their work."[199] Licensing one's work on Creative Commons provides a way to maintain copyright ownership over it, as well as "a free, simple, and standardized way to grant copyright permissions for creative and academic works [and] ensure proper attribution."[200]

When a creator—in this case a choreographer—uses a Creative Commons license, they are giving permission to anyone to use their material "for the full duration of the applicable copyright."[201] Licensors can choose among six different versions of the licenses, each of which grants a different set of permissions.[202] The licenses range in scope.[203] The most accommodating license is the "Attribution" license (coded as "CC BY"), which allows others to "distribute, remix, adapt, and build upon your work, even commercially, as long as they credit you for the original creation."[204] The most restrictive license is the "Attribution-NonCommercial-NoDerivs" license (coded as "CC BY-NC-ND"), which "only allow[s] others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially."[205] Both licensors and licensees benefit from an approach like Creative Commons, as it replaces individual negotiations for specific rights with a system that employs standardized licenses for

198. KRAUT, *supra* note 52, at 9.

199. *What We Do*, CREATIVE COMMONS, http://creativecommons.org/about [https://perma.cc/D7YW-CLCU] (explaining the Creative Commons' emphasis on "overcom[ing] legal obstacles to the sharing of knowledge and creativity").

200. *Id.* For example, on Flickr—a popular photo sharing site—users have the option of assigning a Creative Commons license to the photographs they upload; the option to select a Creative Commons license is embedded into the website. *See Explore: Creative Commons*, FLICKR, https://www.flickr.com/creativecommons/ [https://perma.cc/9GK9-96YN]; Ryan Merkley, *Big Flickr Announcement: All CC-Licensed Images Will Be Protected*, CREATIVE COMMONS (Mar. 8, 2019), https://creativecommons.org/2019/03/08/flickr-announcement/ [https://perma.cc/DB4J-7LGB].

201. *Frequently Asked Questions: What is Creative Commons and What Do You Do?*, CREATIVE COMMONS (June 15, 2021, 5:59 PM), https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do [https://perma.cc/2GEY-M8C6].

202. *About the Licenses*, CREATIVE COMMONS, https://creativecommons.org/licenses/ [https://perma.cc/99E2-8UR4].

203. *Id.*

204. *Id.*

205. *Id.*

common re-use cases, such as those where no commercial compensation is sought by the copyright owner.[206] Thus, the public licensing scheme provides a way to ensure proper attribution and credit for the choreographer, but eliminates much of the friction that copyright ownership can create in pursuing widespread dissemination of their works.

The 1998 Digital Millennium Copyright Act ("DMCA"),[207] which Congress enacted to address the large scale of user infringement occurring on online platforms, provides a newer method of protection.[208] The Act contains a notable "safe harbor" provision to platforms that house potentially infringing content, ensuring protection against a range of possible secondary infringement claims for sites that comply with the statutorily mandated guidelines.[209] As part of these guidelines, online service providers must comply with "notice and takedown"—a process by which a copyright owner may send a notice of alleged infringement to the service provider's designated agent.[210] A service provider that receives such a notice must respond "expeditiously to remove, or disable access to, the material that is claimed to be infringing" and have a policy for dealing with, and potentially removing, infringing users.[211] The process envisioned by the DMCA allows copyright holders to vindicate their rights without pursuing lengthy and costly litigation around every infringing use on the internet.

Given these new methods for protection, it is unsurprising that choreography is increasingly becoming the focus of legal battles.[212]

III. DANCE DANCE LITIGATION: FORTNITE AND THE INTERSECTION OF CHOREOGRAPHY AND COPYRIGHT

While case law regarding the copyrightability of choreography is scarce, a recent lawsuit and subsequent string of registration decisions from the Copyright Office provide unique insight as to how the copyright requirements for choreography play out in practice. In late 2018 and early 2019, five artists brought suit against the highly successful video game company, Epic Games, Inc., alleging copyright infringement of their

206. CREATIVE COMMONS, *supra* note 201.

207. Pub. L. No 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections in 17 U.S.C.).

208. FROMER & SPRIGMAN, *supra* note 89, at 614–16.

209. *See id.* at 527–30; 17 U.S.C. § 512.

210. FROMER & SPRIGMAN, *supra* note 89, at 529.

211. 17 U.S.C. § 512(c)–(j).

212. *See infra* Part III.

choreography.[213] Epic is best known for its video game, Fortnite, which was "the highest-earning game in 2019 at $1.8 billion."[214] Much of this revenue comes from in-game purchases that players make, including purchasable dance "emotes."[215] "Emotes" are dance moves that can be performed by a player's avatar.[216] The popularity of these "emotes" stems in large part from their familiarity and close connection with pop culture: they range from "generic acrobatic moves or fist pumps" to more specific and identifiable moves, such as "John Travolta's *Saturday Night Fever* dance or the 'Salt Bae' meme."[217]

Five performers, all of whom claim that they created an original dance that Epic later co-opted as an emote, brought suit in the Central District of California alleging infringement of their copyright in the dance move and their right of publicity.[218] Pursuant to a recent United States Supreme Court ruling,[219] which was decided after the complaints in the Epic Games litigation had been filed, the plaintiffs were required to register their dances with the Copyright Office before beginning litigation. Accordingly, the plaintiffs withdrew their complaints while they pursued registration.[220] The Copyright Office has responded to three of the requests for registration thus far, each discussed in this Part: the "Carlton," the "Milly Rock," and the "Floss."[221] These lawsuits represent one of the few instances of creators bringing copyright claims for infringement of their choreographic works, and thus shed invaluable light on how a claim of copyright protection for a TikTok dance might fare. While the scenarios are not exactly analogous, the Copyright Office's disparate treatment of

213. Keith Stuart, *Can You Really Sue Fortnite for 'Stealing' Your Dance Moves?*, GUARDIAN (Dec. 20, 2018, 8:47 AM), https://www.theguardian.com/games/2018/dec/20/can-you-really-sue-fortnite-for-stealing-your-dance-moves [https://perma.cc/CWY8-5NBN]; Anne Friedman, Andrew Deutsch & Ric Flaggert, *Fortnite, Copyright and the Legal Precedent That Could Still Mean Trouble for Epic Games*, TECHCRUNCH (Mar. 25, 2019, 6:31 AM), https://techcrunch.com/2019/03/25/fortnite-copyright-and-the-legal-precedent-that-could-still-mean-trouble-for-epic-games/ [https://perma.cc/463R-EUAB].

214. Meaghan H. Kent & Calvin R. Nelson, *Gaming Emote Litigation: Battle Royale Ensues over Fortnite Emotes with Plaintiffs Testing Different Causes of Action*, VENABLE LLP (Apr. 21, 2020), https://www.venable.com/insights/publications/2020/04/gaming-emote-litigation-battle-royale-ensues-over [https://perma.cc/PL9Y-469L].

215. Adi Robertson, *Fortnite Dance Lawsuits Are Bad for Copyright and Bad for Culture*, VERGE (Feb. 27, 2019, 5:52 PM), https://www.theverge.com/2019/2/27/18242899/fortnite-dance-move-copyright-lawsuit-carlton-milly-rock-epic-games (last visited Aug. 16, 2021).

216. *Id.*

217. *Id.*

218. Friedman et al., *supra* note 213.

219. Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC, 586 U.S. ___, 139 S. Ct. 881, 886 (2019).

220. Robertson, *supra* note 215; Friedman et al., *supra* note 213.

221. Friedman et al., *supra* note 213.

these claims for copyright protection and the underlying cultural appropriation fueling the claims of infringement not only illuminate the legal hurdles TikTok choreographers may face, but also illustrates the increased appetite for bringing legal action to ensure the protection of creative works.

A. The "Carlton"

Alfonso Ribeiro sought to register a copyright for the dance routine he performed as the character Carlton Banks in the 1990s television series *The Fresh Prince of Bel-Air* after Fortnite used "The Carlton" as an emote.[222] Ribeiro filed a copyright application for "The Carlton" as well as two other variations of the routine with the U.S. Copyright Office in December of 2018.[223] As described by the supervisory registration specialist who reviewed Ribeiro's application, to perform "The Carlton," "[t]he dancer sways their hips as they step from side to side, while swinging their arms in an exaggerated manner. In the second dance step, the dancer takes two steps to each side while opening and closing their legs and their arms in unison. In the final step, the dancer's feet are still and they lower one hand from above their head to the middle of their chest while fluttering their fingers."[224]

The Copyright Office rejected registration of one of the three variations of the dance routine—specifically, "The Dance by Alfonso Ribeiro—Variation B"[225]—claiming it was "'a simple routine made up of three dance steps' and 'is not registrable as a choreographic work.'"[226] In coming to this conclusion, the Copyright Office reiterated that individual dance moves are not copyrightable, and that a work can only be registered "if it contains a sufficient amount of choreographic authorship."[227] Moreover, the Office noted that "[t]he fact that a dance or movement may contain more than a trivial amount of original authorship is irrelevant to

222. Notably, the emote was somewhat obtusely named "So Fresh" by Epic Games. *See* Tom Kulik, *Do the Hustle? A Cautionary Tale of Copyright, Choreography, and 'The Carlton'*, ABOVE THE LAW (Feb. 19, 2019, 11:17 AM), https:/abovethelaw.com/2019/02/do-the-hustle-a-cautionary-tale-of-copyright-choreography-and-the-carlton (last visited Aug. 16, 2021); Robertson, *supra* note 215.

223. Kulik, *supra* note 222.

224. Defendant's Motion to Dismiss, Exhibit M at 7–8, Ribeiro v. Epic Games, Inc., No. 2:18-cv-10417-RGK-AS (C.D. Cal. Dec. 17, 2018) (available at https://assets.documentcloud.org/documents/5742333/No-copyright2.pdf).

225. Kulik, *supra* note 222.

226. Friedman et al., *supra* note 213 (quoting Defendant's Motion to Dismiss, *supra* note 224, at 8).

227. Defendant's Motion to Dismiss, *supra* note 224, at 7–8.

this determination."[228] Because "The Carlton" was a "simple routine," it could not qualify as a "choreographic work" under the Copyright Act, and accordingly "cannot be registered, even if [it] contain[s] a substantial amount of original, creative expression."[229]

Notably, the Copyright Office did not address whether "The Carlton" possessed sufficient originality. It instead rested its decision on the fact that a "simple routine" cannot be protected by copyright, regardless of its originality. However, commentators opined that the originality requirement could be another stumbling block for Ribeiro in his quest for copyright protection.[230] Pragmatically, another reason for denying copyright protection to individual dance moves or short routines is that "it is difficult to prove ownership of a dance because so many components may have been drawn from, or heavily inspired by, previous works; this is an artform littered with the appropriation and reinterpretation of specific expressive movements."[231] Significantly, Ribeiro himself has credited various sources of inspiration for "The Carlton"—including a similar dance by comedian Eddie Murphy and actress Courtney Cox's performance in Bruce Springsteen's "Dancing in the Dark" music video.[232]

B. The "Milly Rock"

The rapper 2 Milly, given name Terrence Ferguson, is another plaintiff in the Epic Games litigation. 2 Milly popularized his signature dance move, the "Milly Rock," in 2014 when he released a music video for the eponymously titled song.[233] The dance, which features a two-step movement coupled with swinging both arms in a circular motion, had reached superstar status in the hip-hop community across the country long before Epic took notice.[234] However, after Epic captured the dance as the

228. *Id.*

229. *Id.*

230. Nick Statt, *Fortnite Keeps Stealing Dances—and No One Knows If It's Illegal*, VERGE (Dec. 20, 2018, 8:55 AM), https://www.theverge.com/2018/12/20/18149869/fortnite-dance-emote-lawsuit-milly-rock-floss-carlton [https://perma.cc/3N5C-Z6ET].

231. Stuart, *supra* note 213.

232. Nick Reilly, *Did Alfonso Ribeiro Steal the Carlton Dance from Courtney Cox and Eddie Murphy?*, NME (Dec. 19, 2018), https://www.nme.com/news/film/did-alfonso-ribiero-steal-the-carlton-dance-from-courtney-cox-and-eddie-murphy-2423041 [https://perma.cc/M53S-VYKP].

233. *See* Born2WinProductions, *Milly Rock x 2 Milly*, YOUTUBE (Aug. 31, 2014), https://www.youtube.com/watch?v=PMzDoFuVgRg (last visited Aug. 20, 2021).

234. Eric Diep, *The 'Milly Rock' Remains New York Rap Dance Royalty*, VULTURE (Sept. 18, 2020), https://www.vulture.com/article/milly-rock-explainer.html [https://perma.cc/9NPG-8YSK].

"Swipe It" emote, 2 Milly brought suit for copyright infringement.[235] The "Milly Rock" faced the same treatment as "The Carlton" however, and 2 Milly was forced to drop the lawsuit after two rejected attempts to register his choreographic work with the Copyright Office.[236]

Notably, in his quest for compensation, 2 Milly did not shy away from pointing out an important power dynamic underlying his suit: many of the dances that Epic Games was profiting off of were created and made popular by Black artists.[237] In his complaint, he alleged that Epic had "unfairly profited from exploiting [his] protected creative expression" and has "consistently sought to exploit African-American talent . . . by copying their dances and movements."[238] Importantly, 2 Milly also stated that he would have worked alongside Epic Games if the company had reached out and expressed interest in using the "Milly Rock" with full credit in the game.[239]

C. The "Floss"

Surprisingly, the least famous litigant has been the most successful out of the plaintiffs going up against Epic Games. Russell "Backpack Kid" Horning rose to fame overnight in 2014 after the then twelve-year-old posted a video of himself performing the "Floss"—a rhythmic swinging of one's straightened arms and hips.[240] The dance, and Horning, officially became mainstream in May of 2017, when he performed alongside popstar Katy Perry on the season finale of *Saturday Night Live*.[241] The

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235. Meagan Flynn, *Is Fortnite Stealing Black Dance Culture? The Creator of the 'Milly Rock' Argues Yes in a New Lawsuit*, WASH. POST (Dec. 6, 2018, 3:55 AM), https://www.washingtonpost.com/nation/2018/12/06/is-fortnite-stealing-black-dance-culture-creator-milly-rock-argues-yes-new-lawsuit/ [https://perma.cc/LBW5-74XK].

236. Diep, *supra* note 234; Friedman et al., *supra* note 213.

237. Flynn, *supra* note 235.

238. Complaint at ¶¶ 1, 27, Ferguson v. Epic Games, No. 2:18-cv-10110-AS (C.D. Cal. Dec. 17, 2018).

239. Ethan Gach, *What Fortnite's Dance Emotes May Owe to the Black Artists Who Created Them*, KOTAKU (July 20, 2018, 4:40 PM), https://kotaku.com/what-fortnites-dance-emotes-may-owe-to-the-black-artist-1827760523 (last visited Aug. 16, 2021).

240. Stacey Vanek Smith & Shane McKeon, *Backpack Kid Sues Fortnite for Stealing 'the Floss' Dance*, NPR (Feb. 20, 2019, 4:53 PM), https://www.npr.org/2019/02/20/696413611/backpack-kid-sues-fortnite-for-stealing-the-floss-dance [https://perma.cc/NF8F-YWSL] [hereinafter Vanek Smith & McKeon, *Backpack Kid Sues*]; Stacey Vanek Smith & Shane McKeon, *Fortnite vs. Backpack Kid: Dance Battle Royale*, NPR (Feb. 12, 2019, 4:16 PM), https://www.npr.org/sections/money/2019/02/12/694033450/fortnite-vs-backpack-kid-dance-battle-royale [https://perma.cc/2GPK-XBSU].

241. *See* Inside Edition, *Meet the Dancing 'Backpack Kid' Who Stole Katy Perry's Spotlight on 'SNL'*, YOUTUBE (May 22, 2017), https://www.youtube.com/watch?v=6X6b19ukfTA (last visited Aug. 20, 2021).

exposure not only helped jump-start Horning's burgeoning rap career, but also secured him endorsement deals with athletic apparel companies New Balance, Under Armour, and the backpack maker Sprayground.[242] Unlike Ferguson and Ribeiro, Horning saw success with the Copyright Office. The Office accepted registration for a long "variant" of the Floss dance, although the registration included a note from the Office specifying that "[r]egistration does not extend to individual dance steps."[243]

IV. TIKTOK DANCES ARE COPYRIGHTABLE, AND PROTECTION WILL LIKELY BE SOUGHT

While many TikTok dances likely qualify for copyright protection,[244] copyright law may not offer the most straightforward path towards achieving choreographers' goals of attribution and recognition. Although copyright law is a highly effective method of safeguarding intellectual property rights, the threat of enforcement could result in a chilling effect on the widespread dissemination of a choreographer's routine. This consequence is at odds with the choreographer's goal of exposure. While the fair use defense could allay some of these concerns, it is likely that a licensing scheme or an extralegal solution would be the most effective way to protect a choreographer's attribution rights while simultaneously facilitating the widespread sharing and "viral" nature of the current dance challenge model.

A. Many TikTok Dances Likely Qualify for Copyright Protection

While the lack of case law addressing the copyrightability of choreography makes any prediction uncertain, using the *Compendium* and Fortnite litigation as guidelines, it is likely that at least some of the dance routines created by TikTok users would qualify for copyright protection. Specifically, the more complicated routines—such as Jalaiah's "Renegade"—meet the requirements of choreographic work, originality and fixation.

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242. Vanek Smith & McKeon, *Backpack Kid Sues*, *supra* note 240; Friedman et al., *supra* note 213; Christina Lee, *Can a Dance Sensation's Viral Moment Last Forever?*, TOPIC (June 2019), https://www.topic.com/can-a-dance-sensation-s-viral-moment-last-forever [https://perma.cc/GMU6-DHCC].

243. Kent & Nelson, *supra* note 214.

244. Note that this analysis of copyrightability does not address the potential constraints imposed by TikTok's terms of service agreement. For a brief explanation and discussion of that issue, see *supra* section I.D.

1. Many TikTok Dances Qualify as "Choreographic Works"

Many TikTok dance routines would likely qualify as a "work[] of authorship"[245] under the current copyright regime. Most TikTok dances are easily recognizable as "[r]hythmic [m]ovement in a [d]efined [s]pace"[246]—many of the dances use familiar or recognizable dance steps from contemporary and hip-hop dance genres. Unlike more avant-garde performances such as Pilobolus's "Five-Petal Flower,"[247] TikTok routines generally represent "dance" in the traditional sense. Additionally, the routines typically flow seamlessly from one move to the next, indicating a certain level of "[c]ompositional [a]rrangement."[248] Furthermore, TikTok choreographers typically compose dances to specific songs,[249] thus meeting the "[m]usical . . . [a]ccompaniment" factor.[250] Finally, it is notable that many successful TikTokkers in the dance video genre have significant formal training,[251] thus their routines are being executed by "skilled performers" (i.e., themselves).[252]

The *Compendium* acknowledges that choreographic works fall on a broad spectrum, with multi-hour classical ballets on one end, and single, simple dance moves at the other.[253] TikTok dance challenges mirror this range—while some routines are quite complex, longer, and difficult to execute for an average person, others are short, incredibly simple, and may only feature a single dance move. Thus, the copyrightability of a specific dance routine will be a fact-intensive inquiry, looking at the specific choreographic work and how it stacks up against the outlined factors.[254]

While the Copyright Office clearly states that "social dances" and "simple routines" cannot receive copyright protection, the Office has been less forthcoming on exactly where that line is drawn.[255] As seen in the

245. *See* 17 U.S.C. § 102(a).

246. *See* COPYRIGHT COMPENDIUM, *supra* note 114, § 805.2(A).

247. *See supra* section II.C.1.

248. *See* COPYRIGHT COMPENDIUM, *supra* note 114, § 805.2(B).

249. In fact, many artists have benefitted greatly from having a viral dance routine choreographed to their song. *See* Leight, *supra* note 44.

250. *See* COPYRIGHT COMPENDIUM, *supra* note 114, § 805.2(C).

251. For example, both Jalaiah and Haley have extensive dance training. *See* Strapagiel, *supra* note 35; Wicker, *supra* note 6; *see also* Siobhan Burke, *Some Pros Let It Go on TikTok: 'Is This the Future?'*, N.Y. TIMES (Apr. 29, 2020), https://www.nytimes.com/2020/04/29/arts/dance/tiktok-dance-challenges.html [https://perma.cc/7YYR-TAQK].

252. *See supra* section II.C.1.

253. *See id.*

254. *See supra* section II.C.

255. *See* COPYRIGHT COMPENDIUM, *supra* note 114, § 805.5(B); *supra* section II.C.1.

Fortnite decisions, Alberto Ribeiro's "Carlton" dance was deemed ineligible for copyright protection because it was a "simple routine" comprised of only three dance steps.[256] However, Russel Horning was able to successfully register a thirty-second "variant" of the "Floss" dance.[257] While the Copyright Office failed to provide clear reasoning for this distinction, two factors that may have contributed to these differing outcomes may be the length of the routine and the level of originality.[258]

Perhaps the most challenging hurdle TikTok dances have to overcome to be recognized as choreographic works is their potential to be seen as "social dances," which are categorically barred from receiving copyright protection.[259] To determine whether a choreographic work qualifies as a "social dance," the Office generally looks to the purpose of the dance.[260] While protected choreographic works tend to be "performed by skilled dancers . . . for the enjoyment of an audience," social dances are intended to be performed "by members of the general public for their own personal enjoyment."[261] While some TikTok dances will inevitably fall into this category—particularly those with less choreographic complexity—it is not a given that every TikTok dance will be categorized as a social dance. As discussed above, many TikTok creators are "skilled dancers" with formal dance training.[262] Indeed, for many of the more complex dance routines shared on the app, the dance seems to "go viral" primarily within a community of creators who have formal dance training and a high level of proficiency.[263] Furthermore, one could argue that these dances are very much performed "for the enjoyment of an audience,"[264] given TikTok's format as a social media app structured around user entertainment. Furthermore, TikTok creators are gaining serious socio-economic capital from captivating their followers with their choreographic endeavors. While the idea of a "viral" dance suggests that *everyone* on the platform is recreating the choreography, the reality is that most users are

256. *See supra* Part III.

257. Elizabeth A. Harris, *Carlton Dance Not Eligible for Copyright, Government Says*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html [https://perma.cc/N4HR-JEGF].

258. *See supra* Part III.

259. *See supra* section II.C.1.

260. *See supra* section II.C.

261. COPYRIGHT COMPENDIUM, *supra* note 114, at § 805.5(B)(2).

262. *See* Strapagiel, *supra* note 35; Wicker, *supra* note 6.

263. *See* Strapagiel, *supra* note 35; Wicker, *supra* note 6; Burke, *supra* note 251.

264. In fact, the performance element of TikTok is one that is more directly apparent than other social media platforms. As one professional dancer who joined TikTok in the midst of the COVID-19 pandemic noted, "[t]his is about me performing for you, and I don't have to pretend that I'm not." Burke, *supra* note 251 (quoting Emma Lutz-Higgins).

experiencing the "viral" trend as audience members rather than participants. Rather than serving the social function of widely familiar choreography[265] that is routinely danced at events like weddings, bar mitzvahs, school dances, etc., TikTok choreographers direct their routines at a virtual audience that experiences the choreography by watching a skilled dancer perform it, rather than taking part in the "performance" themselves.

2. Many TikTok Dances Qualify as Original

Many TikTok dances would likely satisfy the "originality" requirement, as the unique combination of foundational dance moves qualifies as compilations that are eligible for copyright protection. TikTok dances often share basic steps—usually pulled from hip-hop and contemporary dance—but the moves are sequenced, combined, and set to music in a way that makes the routine unique and engaging. As previously discussed, there is minimal guidance from the courts or the Copyright Office to help identify when such compilations meet the originality requirement. However, analyzing past Copyright Office decisions can shed some light on the issue.[266]

On one end of the spectrum, we have the "Ode to the Endzone" dance, which the Copyright Office found lacked the requisite originality.[267] As discussed in section II.C.ii, this dance was comprised of individual endzone "celebration" dances done in succession. The Copyright Office found that the individual dance moves lacked originality, and merely performing the moves in succession did not elevate the routine into a "coherent whole."[268] Because the piece was a disjointed combination of discrete moves—each of which lacked copyright protection on their own—the piece did not possess the required originality to gain copyright protection.

On the other end of the spectrum is JaQuel Knight's "Single Ladies" choreography, for which he recently secured copyright protection.[269] While the "Single Ladies" routine obviously takes direct inspiration from the Fosse routine and incorporates other well-known steps and elements of ballet, majorette, hip-hop, and contemporary dance, the Copyright Office found that the creator combined these steps in an original enough

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265. Think of something like the Macarena, or a particular line dance that is well known within a particular community.

266. *See supra* Part II.

267. *See supra* section II.C.2.

268. COPYRIGHT COMPENDIUM, *supra* note 114, § 805.7.

269. *See supra* section II.C.2.

way to warrant copyright protection.[270]

Much like the analysis of whether a routine qualifies as a "choreographic work," whether a TikTok routine possesses sufficient "originality" will be a fact-intensive inquiry that could come down either way.[271] However, many TikTok dances likely possess the "creative spark"[272] needed. For example, Jalaiah Harmon's "Renegade" dance used many well-known dance moves, including the "the woah," "the wave," and "the dab,"[273] but combined them in a cohesive and fresh way. Thus, despite the fact that she was using well-known building blocks, Jalaiah's compilation of these dance steps into something new would likely meet the originality requirement.

3. TikTok Dances Are Inherently "Fixed" for Purposes of Copyright

The final requirement for copyright protection is that the work must be fixed. Because the Copyright Office has recognized video as one of the permissible formats to fix a choreographic work, it seems that any dance captured on video and uploaded to TikTok would meet this requirement. Thus, it follows that any dance on TikTok that qualifies as a choreographic work and possesses the requisite originality is subject to copyright protection.

B. Broader Consequences of TikTok Creators Seeking Copyright Protection for Their Works

While the Copyright Office will likely be asked to make a decision on whether TikTok choreography is copyrightable in the coming months,[274] as of now there is no decision from either the Copyright Office or the courts on this issue.[275] However, as TikTok becomes a legitimate platform for performers to launch their careers, choreographers may begin to seek protection for their works. Moreover, the issue of copyright protection for

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270. *See supra* section II.C.2.

271. *See* 17 U.S.C. § 102.

272. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

273. *See* Jennings, *supra* note 3.

274. Choreographer JaQuel Knight and Logitech are currently helping the creators of three dances that first gained attention as TikTok dance challenges seek copyright protection for their choreography. *See* Press Release, Logitech, *supra* note 70; Rearick, *supra* note 71.

275. Claire Chalmers, *From Copycat Dances to Unlicensed Music: Is TikTok a Copyright Lawsuit Waiting to Happen?*, FASHION LAW (May 20, 2020), https://www.thefashionlaw.com/is-tiktok-a-copyright-lawsuit-waiting-to-happen/ (last visited Aug. 16, 2021) (noting that while TikTok has faced legal consequences for the use of unlicensed music on the platform, the copycat dance issues have thus far been "a fight for the court of public opinion and not the court room").

choreography is an increasingly important legal question.[276] As the potential revenue streams for choreography continue to grow and expand as technological channels open new avenues for choreography to be debuted, ownership of this art form will be more valuable and accordingly more contested.[277]

On the one hand, for choreographers whose work qualifies, securing copyright protection could be a way to help break the centuries-old cycle of cultural appropriation that has long plagued choreographers of color. The need for creators of color—particularly Black artists—to exercise control and authority over their work has long been evident.[278] JaQuel Knight's determination to copyright his choreographic works and the Fortnite litigants' willingness to sue for infringement of their creative works are two examples of this interest in and need for greater legal protections for Black artists. These artists are particularly at risk of their work being co-opted or used without compensation or recognition.[279]

TikTok artists are especially susceptible to this kind of appropriation, due in large part to their relative obscurity and youth, as well as the technological restrictions of the platform (i.e., there is no clear way to give someone credit or acknowledge the source of a dance).[280] Accordingly, securing legal protection over their works could be a powerful way to help ensure that those creating the work are also benefitting from it—thus fulfilling the primary underlying goal of copyright law.

However, using copyright protection as a tool for securing ownership rights for TikTok choreographers also poses significant concerns. First and foremost, intellectual property issues are extremely expensive to litigate, meaning that while registering a copyright might be affordable,[281] creators are unlikely to enforce their rights given the cost and uncertainty of bringing an infringement action.[282] This is especially true for "people in marginalized communities who are making all the great content, that are making things go viral, that are making things hot"—who often lack the resources and legal expertise needed.[283] Thus, on a pragmatic level,

276. *See supra* section II.E; *supra* Part III.

277. *See* Strapagiel, *supra* note 35; ASSOCIATED PRESS, *supra* note 191.

278. Greene, *Copynorms*, *supra* note 51.

279. Shamira Ibrahim, *How the Internet Became a Playground for Exploiting Black Creators*, VICE (Feb. 4, 2019, 10:31 AM), https://www.vice.com/en/article/yw8pvx/fornite-suit-dance-moves-black-artists [https://perma.cc/3BZ5-V9XZ].

280. *See supra* section I.B.

281. Copyright Office registration fees can range from $45 to $500 depending on the number of authors and type of work. *See Fees*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/fees.html [https://perma.cc/T6XB-Y7G2].

282. *See* Ibrahim, *supra* note 279.

283. *Id.* (quoting Bärí A. Williams).

copyright law is still inaccessible for many of the people most in need of its protection. Furthermore, TikTok creators who seek to assert ownership over their choreography find themselves in a bit of a catch-22: while they need the dance to be associated with them to reap the benefits of their creation, they also need the dance to be widely disseminated and reproduced in order for any benefit to exist. While choreographers could choose not to bring enforcement actions, there is still likely to be a chilling effect on both users[284] and the platforms that house the content[285] if the threat of enforcement existed.

Finally, from a broader scope, society benefits from having access to things in the public domain.[286] With dance playing such a central role in celebrations, personal expression, and everyday life, there is a real cost to providing individuals with enforcement mechanisms against performing dances—especially those that have gained a central role in public consciousness.[287]

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284. Scholars observe that third parties' risk aversion with respect to copyright infringement can cause both copyright protection to grow and fair use to shrink over time. As James Gibson explains, due to risk aversion, "copyright users . . . seek licenses even when they have a good fair use claim . . . . This practice of unneeded licensing feeds back into doctrine because . . . the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users." James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007). Recent studies have shown that DMCA takedown notices have a similar effect of expanding the de facto scope of copyright protection. *See* Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUT. & HIGH TECH. L.J. 621, 629, 687–88 (2006); CASEY FIESLER, JESSICA FEUSTON & AMY S. BRUCKMAN, UNDERSTANDING COPYRIGHT LAW IN ONLINE CREATIVE COMMUNITIES (2015), https://cfiesler.files.wordpress.com/2014/10/fiesler_cscw2015.pdf [https://perma.cc/N3LZ-BPDY].

285. For example, JaQuel Knight and Hecht (his attorney) say "they don't want to use copyright to police regular folk who love dance—say, a flash mob performing the 'Single Ladies' choreography—and just want to collect a licensing fee when his choreography is used for commercial gain (say, livestreams of tours using his choreography). 'But that won't be a comfort to YouTube,' says one intellectual property attorney who works in the music industry. 'JaQuel may be temperate in enforcement, but [another choreographer] may say, "Take every flash mob down."' A platform like YouTube might 'want the courts to render a populist opinion where it's not enforceable in the first place,' the attorney continues, 'or else they can be abused by copyright holders.'" Milzoff, *supra* note 66.

286. *See, e.g.*, *Why the Public Domain Matters*, CTR. STUD. PUB. DOMAIN, https://web.law.duke.edu/cspd/publicdomainday/2012/why/ [https://perma.cc/3PCW-ELUL] (providing examples of how society benefits from a robust public domain).

287. The negative effects of copyright enforcement for choreography can clearly be seen through the example of Richard Silver, the alleged creator of the "Electric Slide." *See* Daniel Terdiman, *The Copyright Buzz from the 'Electric Slide'*, CNET (June 4, 2007, 10:04 AM), https://www.cnet.com/news/the-copyright-buzz-from-the-electric-slide/ [https://perma.cc/GN7S-HBX3]; Renee Montagne, *Creator Seeks to Preserve 'Electric Slide'*, NPR (Feb. 20, 2007, 6:00 AM), https://www.npr.org/templates/story/story.php?storyId=7492263 [https://perma.cc/JE8Y-L6J2].

C. Possible Solutions

In grappling with the costs and benefits of extending copyright protection to TikTok choreography, a number of potential solutions—both within the realm of intellectual property law and outside it—should be considered. Given the broad range of players in this space, solutions will look different for each group, depending on their goals and interests. This Part outlines solutions for young choreographers creating TikTok dances and advocates for extralegal solutions that TikTok as a platform could implement. For TikTokkers, who are primarily concerned with receiving credit and recognition for their creative output, there are a number of possibilities. First, the choreographers could seek traditional copyright protection for their work, relying on the current fair use regime to deal with the potential problems raised in the previous section. Second, choreographers could explore alternate licensing systems, such as the Creative Commons, which would allow for widespread use of their work with proper accreditation. Finally, as for TikTok itself, the platform could take a cue from the European concept of "moral rights," and provide easy ways to credit original creators through its technology or expand on its existing "Creators Fund" to better compensate choreographers.

1. Traditional Copyright Registration & Fair Use Defense

As discussed, at least some TikTok dances would likely qualify for

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While the famous line dance was denied copyright protection in 2010, prior to this ruling from the Copyright Office, Silver—who claims he choreographed the dance in 1976—asserted that he owned a copyright in the dance. *See* Erik Bartley, *The Value of Motion and the Copyrightability of a Dance*, AM. UNIV. J. GENDER, SOC. POL'Y & L. (Mar. 26, 2019), http://www.jgspl.org/the-value-of-motion-and-the-copyrightability-of-a-dance/ [https://perma.cc/6GYU-VCAK]. Relying on this assertion, Silver began a legal brigade against any public performance without his consent, or any public performance that got the choreography "wrong" in his estimation. *See* Terdiman, *supra*; Montagne, *supra*. While Silver went after some big names (including *The Ellen DeGeneres Show*), his undoing was sending a takedown notice, via the DMCA, to Kyle Machulis, a software engineer who had included a ten-second clip of a crowd attempting to perform the "Electric Slide" in a five-minute video of a concert he posted on YouTube. *See Electric Slide Creator Filing Copyright Infringement Suits Left and Right and . . .*, WIRED (Feb. 5, 2007, 2:29 PM), https://www.wired.com/2007/02/electric-slide-3/ [https://perma.cc/DC2V-AXVS]; *Electric Slide Litigation*, ELEC. FRONTIER FOUND., https://www.eff.org/cases/electric-slide-litigation [https://perma.cc/7PR7-4367]; Terdiman, *supra*.

Machulis, backed by the Electronic Frontier Foundation, filed a lawsuit against Silver, alleging that he did not hold a valid copyright in the choreography and that even if he did, Machulis's video did not constitute infringement. *See* ELEC. FRONTIER FOUND., *supra*. The case settled out of court. *Id.* As one of the terms of the settlement agreement, Silver agreed to license the "Electric Slide" under a Creative Commons license—allowing the "performance display reproduction or distribution of any recorded performance of the dance in any medium for non-commercial purposes." *Id.* While Silver's efforts were ultimately unsuccessful, the potential chilling effect—magnified by the ease of takedown requests through the DMCA—illustrates the risks of over-granting copyright protection.

copyright protection. However, choreographers who seek legal protection may stymie the "virality" of their choreography, as users abstain from sharing or using the choreography for fear of a potential infringement suit or enforcement action. Within current intellectual property law, the most significant tool users have to combat the potential chilling effect of granting copyright protection is the fair use defense. While other users on the TikTok platform already have a license to use the videos that are posted on the platform to "generate other User Content,"[288] one can see from the example of Jalaiah's "Renegade" dance that these routines often have a robust life outside the platform—performed at school pep rallies, weddings, and even in official music videos and professional performances.[289] Fair use analysis would likely result in the non-commercial performances of routines being permitted, while the commercial performances would more likely constitute infringement.

While pursuing traditional copyright registration and relying on fair use to deal with the potential chilling effect is one possible solution, there are significant drawbacks to this approach. For one, successfully registering one's copyrighted work is still a significant endeavor, requiring the choreographer to jump through significant bureaucratic hoops in order to receive protection.[290] Given the youth and relative inexperience of many of these choreographers, this may be a significant stumbling block for many. Relatedly, relying on the fair use defense as a safeguard against the chilling effect of copyright protection rests on the assumption that TikTokkers are familiar with this relatively obscure legal doctrine and its specific contours. While that may be true for famous celebrities or corporations, not everyone has access to legal counsel or understands the nuances of the fair use defense. Thus, considering the complexities of copyright law and the fair use defense, it is likely that both bringing an infringement claim and defending against one would be out of reach for most TikTokkers, particularly those who already come from marginalized communities.

2. Licensing & Creative Commons

Another potential solution that could address some of the chilling concerns raised by relying on fair use alone is licensing schemes for choreography. There are two main licensing schemes that could benefit

288. TIKTOK, *supra* note 74.

289. Lorenz, *supra* note 4.

290. *See, e.g.*, *Registering a Work*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq/faq-register.html#register [https://perma.cc/WX73-GZN2] (guiding potential registrants through seventeen complex FAQs).

TikTokkers: compulsory and public licensing.

Compulsory licensing, as of now, is most commonly associated with the music industry. Artists wishing to cover a song written or performed by someone else have an easy way of doing so within the existing copyright framework: since 1909, musical compositions have been subject to a "compulsory" license system.[291] That means that any artist wishing to make a "cover" version of a song that has previously been recorded and released by a properly authorized artist may do so as long as they comply with the terms of a statutorily mandated compulsory mechanical license.[292] In practice, this generally entails contracting with the copyright owner, or, more often, a central managing agency like the Harry Fox Agency,[293] and paying them royalties. As commercial choreography becomes increasingly important, considering a similar system—complete with a collective rights management organization[294]—could be a viable way to avoid the chilling effects of copyrighting choreography by providing an easy way to acquire licenses while still ensuring that choreographers get the benefit and recognition they seek.[295] While no collective rights management organizations in the U.S. currently manage choreographic rights, several across Europe do.[296] In fact, these European collective rights management organizations currently manage commercial choreography, such as dances appearing in music videos.[297] The increasing importance of commercial choreography means that not only is this a viable option—it may be a lucrative one in the U.S. as well. Embedding choreography into the compulsory licensing scheme that governs musical compositions would be a significant step towards securing choreographic works the legal protections that mid-century choreographers like Agnes de Mille originally fought for.[298]

The problem with a compulsory licensing scheme is that, as discussed with covers of songs, they usually involve getting permission from the copyright owner. Because TikTok choreographers are generally keen to see widespread dissemination of their work, having a licensing model that

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291. Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 215–17 (2009).

292. 17 U.S.C. § 115; *see also* Kovac, *supra* note 195, at 140–41.

293. Abrams, *supra* note 291, at 238–40.

294. *See* van de Hel et al., *supra* note 194.

295. As legal scholar Paul Goldstein notes, "[a] collecting society does two very compelling things for creators: It creates a scale whereby they can collect revenues, and it's a force for creative people—a political force and an economic one . . . . It would be wonderful if choreographers could band together with some collectivity to get what they deserve." Milzoff, *supra* note 66.

296. *Id.*

297. *Id.*

298. KRAUT, *supra* note 52, at 167.

requires every single dance to be approved before it is uploaded might burden the potential virality of the platform's dance challenges. Accordingly, a public licensing model, such as the Creative Commons license, could provide another avenue for maintaining ownership over choreographic works while still permitting widespread non-commercial use.

Notably, other content-sharing websites have already adopted Creative Commons licensing models. For example, on Flickr—a popular photo sharing site—users have the option of assigning a Creative Commons license to the photographs they upload; the option to select a Creative Commons license is embedded into the website.[299] TikTok could take a similar approach by importing the Creative Commons licensing scheme—or something similar—into its platform.

As the primary concerns voiced by TikTok creators seem to be receiving credit for their work and having access to the business opportunities generated by their content,[300] the Creative Commons license—or something similar—could be another solution.

3. Extralegal Solutions

Finally, solutions outside the legal system may offer the most effective and efficient way to rectify this issue. As discussed in section IV.B, if TikTok choreographers suddenly decided to begin pursuing copyright registration, the potential ramifications for TikTok's business model could be huge. With that in mind, there are a number of ways that TikTok could address the issue of attribution and credit on the platform—thus solving the problem without creators resorting to legal action.

While moral rights are not a major part of the United States copyright scheme, given the importance of proper attribution to TikTok choreographers TikTok should take a cue from European legal systems and prioritize providing these so-called "moral rights"[301] through its platform. Namely, TikTok could emphasize the right of paternity, which includes "the right to be known publicly as the author of a work" and "the right to prevent someone else from claiming authorship of that work."[302] For choreographers, a paternity right would include the right to be credited whenever their choreography is performed.

While TikTok is currently designed in a way that makes such moral rights quite difficult to provide (given that videos are not dated and there

299. FLICKR, *supra* note 200; Merkley, *supra* note 200.

300. *See* Lorenz, *supra* note 5.

301. FROMER & SPRIGMAN, *supra* note 89, at 308; *see also supra* section II.A.

302. Singer, *supra* note 96, at 308.

is no clear way to tag another user to provide them credit), some small changes to the app's user interface could go a long way in addressing the concerns of many TikTok creators. For example, using the DMCA good faith requirements and takedown request system as inspiration,[303] TikTok should implement an "attribution right" request, wherein creators who want to receive credit for their original choreography could submit a request and receive platform-level verification[304] as the originator. Based on that initial verification, there are a number of ways that TikTok could tag or credit the original choreographer in the subsequent uses of their choreography to ensure attribution.

While these protections would exist solely within the walled garden of TikTok—and thus would not necessarily be helpful to a choreographer whose work was used in a professional music video or performance—it is clear from Jalaiah's experience that simply receiving proper credit and attribution on the app can have a massive impact on the doors that open in the future.[305] Thus, practically speaking, a technical fix may be the simplest method for ensuring that these opportunities are going to the choreographers without massively disrupting the current TikTok ecosystem.

Another possible fix could come from the TikTok Creators Fund—a program the platform announced in July 2020 that promised two hundred million dollars[306] to compensate creators for the videos they were making.[307] To be eligible for the Creator Fund, TikTok users must be at least eighteen years old, have a minimum of ten thousand followers, and have accrued at least ten thousand video views in the previous thirty days before they apply.[308] Despite the initial excitement that the fund stoked

303. The DMCA requires that anyone submitting a takedown notice provide good-faith assurance that they hold a valid copyright in the work that is allegedly being infringed by the work subject to the takedown notice. *See* 17 U.S.C. § 512(c)(3)(A)(v).

304. This verification process would operate much like Instagram's current verification service, which demonstrates that the platform has officially confirmed that an account is the authentic presence of the public figure, celebrity, or global brand it represents. *Verified Badges*, INSTAGRAM, https://www.facebook.com/help/instagram/854227311295302 [https://perma.cc/TGT7-6XLH].

305. *See supra* Part I.

306. Due to the overwhelmingly positive response to the Creators Fund, TikTok later promised that the fund would grow to $1 billion in the U.S. over the next three years, and double that globally. *See* Louise Matsakis, *TikTok Is Paying Creators. Not All of Them Are Happy*, WIRED (Sept. 10, 2020, 7:00 AM), https://www.wired.com/story/tiktok-creators-fund-revenue-sharing-complaints/ [https://perma.cc/D7MQ-YBP2].

307. Vanessa Pappas, *Introducing the $200M TikTok Creator Fund*, TIKTOK (July 22, 2020), https://newsroom.tiktok.com/en-us/introducing-the-200-million-tiktok-creator-fund [https://perma.cc/A5U3-Q8MC].

308. *Id.*

among creators, its rollout has received a mixed reaction at best.[309] Many creators were surprised that they earned only a few dollars a day, even if their videos racked up tens of thousands or even hundreds of thousands of views.[310] Furthermore, some creators found that the number of views they received on videos dropped noticeably after joining the program—so much so that several creators chose to leave the program, as they felt the small payout was not worth the dip in viewership.[311] Thus, while revenue-sharing programs have increasingly gained steam on social media platforms in recent years, their success has been mixed in terms of incentivizing, compensating, and recognizing creators.[312]

While the Creators Fund has not seen significant success, reimagining the fund in conjunction with the technical, attribution-oriented changes discussed above could help both solutions triumph. By tying the Creators Fund payouts to the success of original content identified through the verification and tagging system described above, TikTokkers could gain not only the attribution that they desire, but also some level of compensation for the creative content they bring to the platform.

CONCLUSION

The intellectual property rights in choreography are primed to take center stage. Given the hyper-visual mediums of modern media, choreography is increasingly central to pop culture and celebrity persona. As a result, questions around the intellectual property rights in dance are likely to become important legal issues in the coming years. This Comment provides a detailed look into one notable example of where these rights are implicated: TikTok choreography.

A successful TikTok dance can be a massive launchpad for a career in the entertainment industry, work as a choreographer, lucrative endorsement deals, and more. However, to reap these benefits, choreographers need to do more than just create the dance—they need to own it as well. Copyright law is based on the idea that we must incentivize

309. Dan Whateley, *TikTok Influencers Reveal How Much Money They're Getting Paid from Its $1 Billion Creator Fund—And It's Pennies Per Thousand Views*, BUS. INSIDER (Aug. 26, 2020, 8:07 PM), https://www.businessinsider.com/tiktok-influencer-earnings-for-views-compared-to-youtube-creator-fund-2020-8 [https://perma.cc/EJ42-9LFD]; Matsakis, *supra* note 306.

310. Whateley, *supra* note 309; Matsakis, *supra* note 306.

311. Matsakis, *supra* note 306; Kaitlyn Wylde, *How the TikTok Creator Fund Works, According to Users*, BUSTLE (Oct. 23, 2020), https://www.bustle.com/life/how-tiktok-creator-fund-works-users [https://perma.cc/Q763-RGDJ].

312. "YouTube is one of only a few platforms that have long shared ad money with creators, and it has faced many of the same controversies over monetization and view counts that are now plaguing TikTok." Matsakis, *supra* note 306. Instagram only began sharing ad revenue for some videos earlier this year. *See id.*

creative endeavors because it is a much harder, longer, costlier process to create something new rather than simply replicate another's original work. However, creators who are putting time, passion, and energy into creating these cultural touchpoints on TikTok are being pushed to the side while already established stars benefit from their creativity,[313] continuing a longstanding cycle of cultural appropriation.[314] The goals of copyright law—incentivizing and rewarding original works—are thus not being fulfilled by the current regime. Many TikTok dances likely possess the requisite choreographic sophistication, originality, and fixation needed to gain copyright protection. Thus, choreographers could look to copyright law for protection from appropriation. However, pursuing copyright protection may run counter to the perhaps more significant goals of maximum exposure and dissemination of the choreography. To rectify the current issues of attribution while simultaneously maintaining the current "viral" dance challenge model, choreographers and the TikTok platform should consider implementing public licensing schemas, like the Creative Commons, or adopting technological, extralegal fixes, such as a "verification" system that guarantees recognition of creators' moral rights within the application.

313. Looking back to the beginning of this Comment, we can see exactly that happening with the "Renegade" which was created by Jalaiah Harmon, but commonly associated with TikTok's biggest star, Charli D'Amelio. *See* Wicker, *supra* note 6.

314. *See supra* section I.C.