

TikTok, Copyright, and Justice

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ABSTRACT

In 2019, the Copyright Office refused registration for two "dances" that were highly recognizable and traceable to specific individuals. The "Carlton" was refused because it is a "simple routine that is not registrable as a choreographic work." The "Milly Rock" was also refused registration on the same grounds. Epic Games was selling the dances as an add-on to its wildly popular video game, Fortnite, which primarily derives profits from microtransactions. The app TikTok is experiencing an analogous problem. In July 2021, Black Creators were on strike from the app.¹ They alleged that the original dances they created for the app were being pushed down in the algorithm while non-Black creators recreating their dances were being promoted. With Carlton and 2 Milly, two famous persons, their path forward was clear; they needed protection to profit from their work. With TikTok creators, the path is less clear. The TikTok content creators need people to recreate their work for promotional purposes. These dances are wildly popular, but as they rise in popularity and make debuts on television programs, they are rarely performed by the choreographer and instead by "TikTok Stars." Complicating matters is that the dances themselves are worth relatively little. The value comes from the exposure and opportunities as a recognizable and marketable personality. For instance, Addison Rae (88.5 million followers as of August 2022) makes only a fraction of her income from TikTok, with the bulk of her net worth coming from brand deals, modeling, and a record deal.² This paper explores the novel situation in which copyright protection seems to be counterproductive to the artist's goals and proposes data-driven solutions that may help Black creators reap the benefits of their contributions while simultaneously helping "New Social Media" companies navigate the digital content creators' values.

¹ As of July 2021, see Sharon Kimathi, *Dance Off: Why are Black TikTok Creators Going on Strike?*, THOMSON REUTERS FOUNDATION (July 6, 2021, 4:45 PM), <https://news.trust.org/item/20210706164539-owzht/> [<https://perma.cc/9EQS-DX8B>].

² Carolyn Twersky & Nitya Rao, *Addison Rae's Net Worth Comes From So Much More Than Her TikTok Fame*, SEVENTEEN, <https://www.seventeen.com/celebrity/a37329511/addison-rae-net-worth/> [<https://perma.cc/MW7N-8QSK>] (Aug. 1, 2022).

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INTRODUCTION

During the 2020 pandemic, many young people that were stuck at home began working on side jobs that they were previously passionate about but lacked time and money to pursue. With nothing but time and a lack of work, many began pursuing their passions. Keara “keke” Wilson worked on becoming a choreographer.³ Putting her choreography on TikTok as “challenges” to encourage other users to recreate her work and go viral.⁴ Wilson created the “Savage” dance.⁵ This was a complicated series of steps to the song “Savage,” which eventually caught the attention of the song’s author, Megan thee Stallion. The dance was animated and ultimately featured in the lyric music video.⁶ From there, the song caught the attention of award-winning musician Beyoncé.⁷ The two women worked on a remix, and the song eventually became Megan's breakout hit.⁸

While it is impossible to determine how much the dance contributed to the song's success, there is little doubt about the cultural impact that the dance created for the song on TikTok. The dance was performed by some of the biggest TikTok stars. This story works out well for everyone. The problem is not that everyone benefitted—a high tide raises all ships after all—but how that benefit was ultimately distributed. As of February 2024, Keara Wilson (keke.janajah) has 3.7 million followers on the platform.⁹ Those who performed her original work have many more followers in total. Megan Thee Stallion became an overnight queen of rap, and TikTok was able to cement itself as the pandemic

³ THE BUZZ, *Keara Wilson Talks Creating 'The Savage Challenge' and Capitalizing on Her Notoriety*, YOUTUBE (Jul. 13, 2022), https://www.youtube.com/watch?v=H3oYOTBXdi0&ab_channel=THEBUZZ [<https://perma.cc/N3PB-QMWM>].

⁴ *Id.*

⁵ Megan Uy, *An Interview with Keara Wilson, the 19-Year-Old Dancer Behind the “Savage” TikTok Choreo*, COSMOPOLITAN (Aug. 5, 2020, 4:01 PM), <https://www.cosmopolitan.com/lifestyle/a33471157/keara-wilson-tiktok-savage-dance-creator/> [<https://perma.cc/376D-6GM8>].

⁶ For the animated Savage dance see Megan Thee Stallion, *Savage [Lyric Video]*, YOUTUBE (Apr. 6, 2020), https://www.youtube.com/watch?v=EOxj2ROIxok&ab_channel=MeganTheeStallion [<https://perma.cc/GMJ8-8C2D>].

⁷ Dayna Haffenden, *Megan Thee Stallion Details How Beyoncé Landed on “Savage (Remix)” Track*, REVOLT (May 31, 2020), <https://www.revolt.tv/article/2020-05-31/75860/megan-thee-stallion-details-how-beyonce-landed-on-savage-remix-track> [<https://perma.cc/KE82-VCEL>].

⁸ *Id.*

⁹ KEKE JANAJAH 🍷 (@keke.janajah), TIKTOK, <https://www.tiktok.com/@keke.janajah?t=8kAOCc6OG0E&r=1> [<https://perma.cc/8ADH-T7K9>] (last visited Feb. 27, 2024).

hobby. The lack of equitable distribution of success led Wilson to file for copyright registration of the dance that should have made her famous.¹⁰ With copyright registration having previously been denied to shorter dances, Wilson faced an uphill battle.

Many legal scholars have written on the 2019 controversy involving two short dances, the "Milly Rock" and "The Carlton."¹¹ The two dances were being sold as an add-on in a wildly popular video game, Fortnite.¹² The controversy spilled over into the national news, with many outlets covering the lawsuit. Why did a relatively dry copyright lawsuit that most legal scholars speculated (correctly) was dead on arrival attract so much attention from laypersons? First, the case was emblematic of a long unnamed American problem, cultural appropriation. The uncomfortable truth has been spoken aloud for several decades, but the conversation has worked its way into the mainstream. Secondly, the notion of profiting off another's work (especially the 300 million dollars that Fortnite was making a month¹³), which the lawyer might call "unjust enrichment," feels inherently un-American and offensive to tightly held values of property and creation.

Most legal scholars correctly predicted that the case would go nowhere. The Supreme Court had recently handed down a decision that clarified that a work must be "registered" with the Copyright Office before a lawsuit could be filed.¹⁴ The Supreme Court explained that registration meant the Office must accept the work for registration.¹⁵ The *Milly Rock et al.* were refused registration and ultimately withdrew their cases.¹⁶ If the *Milly Rock et al.* dances were clearly on the side of not being copyrightable, social media has brought us a new question. The latest series of TikTok dances have obviated many of the justifications for rejecting *Milly Rock et al.* for registration.

Content creation on social media is a new type of media which has created a complex framework of values and norms that extend beyond the platform itself. This is partially

¹⁰ Paige Skinner, *The TikTokker who Created the Viral "Savage" Dance is Copyrighting the Moves*, BUZZFEED: BUZZFEED NEWS (Aug. 2, 2021, 2:19 PM), <https://www.buzzfeednews.com/article/paigeskinner/savage-dance-copyrighted> [<https://perma.cc/T4Z5-2T9D>].

¹¹ Chandler Martin, *Whose Dance is it Anyway?: Carving Out Protection for Short Dances in the Fast-Paced Digital Era*, 98 N.C. L. REV. 1001, 1001 (2020).

¹² *Id.* at 1004,

¹³ *Id.*

¹⁴ Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 887 (2019).

¹⁵ *Id.*

¹⁶ Ali Johnson, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV. 1225, 1257 (2021).

because many of the works produced are not themselves generating income for the creator. Instead, the creator leverages their popularity, infamy, notoriety, etc. (“clout”) into deals with companies. Because the works themselves are not necessarily the valuable part of content creation, the copyright office has fallen by the wayside, only becoming relevant when we feel that companies are unfairly treating creators. Simultaneously, Black creators find that the dances they create are being reproduced by non-Black creators and promoted by the algorithm over the original. The promotion of reproductions over the original creates an opportunity gap that is disproportionately affecting Black creators. The dances being choreographed on TikTok are much more than simple steps and, by the Copyright Office's standards, should be treated as copyrightable. However, even though these dances are copyrightable, the bundle of rights does very little to close the opportunity gap. To address the gap, this paper proposes several adaptations of existing copyright policies and new policies that social media platforms may adopt to ensure that the content originators do not flee for other platforms. These solutions will firstly benefit creators. By making strides to decrease the opportunity gap, creators who produce original content will be moving to parity with the reproducers. Secondly, these changes will benefit the public, including the recreators, and promote innovation. When law and policy are out of sync with what people think the law and policies are, it creates confusion and discourages creation. It is also a social benefit to bring copyright protection and attribution in line with the values of content creators and consumers.

I. BACKGROUND

A. *Copyright law & Choreography*

One of the more recent additions to the categories of works that the copyright office protects was separating choreography from dramatic works to its own class.¹⁷ Why did dance take so long to be recognized as a protected category, and what are some of the consequences of the delay?

Dance has not always been a respected art form, as evidenced by the delay in protection. Attitudes around American dance have largely been that American dance is a type of

¹⁷ Krystina L. de Quintana, *The Balancing Act: How Copyright and Customary Practices Protect Large Dance Companies over Pioneering Choreographers*, 11 JEFFREY S. MOORAD SPORTS L.J. 139, 147–48 (2004).

“folk” experience and dance created in Europe much more professional in nature.¹⁸ Dances could gain some form of protection through “dramatic works.”¹⁹ For the work to fall into this category, they must have some storyline altogether, leaving behind abstract dance.²⁰ Because dance was ubiquitous, something everyone could do absent a storyline, it was viewed as potentially causing problems and uncertainty for people who dance for enjoyment. This is because one of the rights included in copyright is the right to publicly perform the copyrighted work.²¹

1. The Challenge of Fixation

A second challenge to copyright and choreography is that for a work to be copyrighted, it must be fixed in a “tangible medium of expression.”²² For dance, there are two common means of achieving this fixation. The first is notation, and the second is a/v recording.²³ Notation of dance is highly complicated.²⁴ So complicated that very few choreographers are familiar with notation at all. Getting dance transcribed into notation requires a specialist and can also be quite expensive.²⁵ This instantly leaves out choreographers who lack the funds for such work.²⁶ It also leaves behind novice and amateur dancers who are unaware that this type of fixation is possible.²⁷ The second option for choreographers is making an A/V recording of the dance.²⁸ This option has become much more accessible to

¹⁸ Luke C. Kahlich, *Dance*, JOHN HOPKINS UNIVERSITY PRESS: ENCYCLOPEDIA OF AMERICAN STUDIES (Dec. 28, 2011), <https://eas-ref.press.jhu.edu/dance.html> [<https://perma.cc/3H4X-E9RA>]. See Nicholas Arcomano, *The Copyright Law and Dance*, N.Y. TIMES (Jan. 11, 1981), <https://www.nytimes.com/1981/01/11/arts/the-copyright-law-and-dance.html> [<https://perma.cc/5ADQ-53WF>]. See also KC Ifeanyi, *Will Dancers in the Digital Age Ever Be Able to Protect Their Moves?*, FAST CO. (Mar. 10, 2022), <https://www.fastcompany.com/90728570/will-dancers-in-the-digital-age-ever-be-able-to-protect-their-moves> [<https://perma.cc/VN3C-QJNQ>].

¹⁹ 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, 288–303 (1984).

²⁰ *Id.*

²¹ Forsgren Fisher McCalmont DeMarea Tysver LLP, *Rights Granted Under Copyright Law*, BITLAW, <https://www.bitlaw.com/copyright/scope.html> [<https://perma.cc/2HX8-HC2E>].

²² Singer, *supra* note 19.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Senta Driver, *How Much Does It Cost to Notate a Piece?*, DANCE NOTATION BUREAU, (Apr. 5, 2006), dancenotation.org/notating/frame0.html [perma.cc/UK7G-EUJW].

²⁷ *Dance Notation*, BRITANNICA, <https://www.britannica.com/art/dance/Dance-notation> [perma.cc/3P5Q-MSLT].

²⁸ Singer, *supra* note 19.

the general public. (in fact, the subjects of this paper have all fixed their I.P. by virtue of recording the dance on TikTok²⁹). But a 2-D recording of a 3-D performance will never capture all that needs to be captured.

2. The Problems of Social Dances

As mentioned above, one of the challenges with copyright dances was that dancing was a ubiquitous activity that many people participated in for their own enjoyment. The idea that a person would be able to stop people from performing a dance in a private setting seemed to undermine peoples' privacy and autonomy. For this reason, the copyright Office gave detailed instructions and differentiations between mere steps (or the building blocks of dance), social dances and copyrightable choreography.³⁰

First, the copyright office refuses to register dance steps.³¹ Because the work being copyrighted is a collection of steps, it would not serve the public to have an entire step that could not be used in building choreography.³² Second, the copyright Office goes one step further, saying that even novel short arrangements of steps may also not be copyrightable.³³ The copyright office explicitly states that this would "impede rather than foster creative expression."³⁴

When choreography was adopted by Congress, the legislative history indicates an intention to specifically exclude social dance steps and simple routines. Social dances, as the copyright Office defines them are:

"Choreographic works are compositions that are intended to be performed by skilled dancers, typically for the enjoyment of an audience. By contrast, social dances are intended to be performed by members of the general public for their own personal enjoyment. In other words, "social dances are intended to be executed by the public, not to be performed for the public as audience. ... Performing a social dance is often a participatory, social experience, while the performance of a choreographic work is an expressive act that is typically intended to be performed

²⁹ Margaret Fuhrer, *TikTok Is Dead (Maybe)*. *Long Live TikTok Dance*, N.Y. TIMES (Apr. 7, 2023), <https://www.nytimes.com/2023/04/07/arts/dance/tiktok-dance-evolution.html> [<https://perma.cc/5YNH-BR2M>].

³⁰ COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES CHAPTER 800, (3d ed. 2014).

³¹ *Id.* at 161.

³² Singer, *supra* note 19.

³³ COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, *supra* note 30.

³⁴ *Id.* at 161.

for the enjoyment of others. Whereas social dances are generally capable of being performed by members of the public, choreographic works typically cannot. If a social dance could be considered a choreographic work under Section 102(a)(4) of the Copyright Act, every individual who performed that dance in public would infringe the rights of the copyright owner. Unlike singing a song in the shower or whistling a tune in a car (which would be considered a private performance), social dances are usually performed in public by members of the general public. In other words, these types of dances are typically performed at places that are open to the public or at social functions where a substantial number of people outside the normal circle of a family and its social acquaintances are gathered.³⁵

Unknowingly the copyright Office has set up perfectly the challenge of TikTok Dances, discussed further in “The Problems” section.

3. Existing Mechanisms for Protection Within the Community

Despite the protection afforded by copyright law to choreographers, the number of applications for registration of copyrightable works remains shockingly low.³⁶ There are many reasons for this.³⁷ First, as mentioned above, the requirement for fixation is a challenge for all creators.³⁸ Second, the business side of artistic creation, including the registration of copyright, may seem incredibly daunting to someone who is not well versed in the process.³⁹ Third, within the small community of choreographers there are norms, values, and customs that already exist and operate as enforcement mechanisms.⁴⁰ Fourth, the enforcement mechanisms referenced in the third point actually provide better for what the creators want than existing copyright are able to provide.⁴¹

B. *Social Media 1.0 v. 2.0 v. Professional Class of Creators*

Much has been made of Web 1.0 and Web 2.0. This was when there was a massive pivot from web usage in corporate media to social media, around the year that the Time Person

³⁵ 17 U.S.C. § 101 (definition of “perform or display a work ‘publicly’”).

³⁶ *Overview*, COPYRIGHT.GOV, <https://www.copyright.gov/about/> [perma.cc/P9QT-4DVF].

³⁷ Singer, *supra* note 19.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

of the Year was “You.”⁴² But less has been written about the distinction that this paper must draw between social media 1.0 and social media 2.0. In the early days of social media, much of the content was personal. From personal blogs hosted on sites like Live Journal and Xanga to the very early days of Facebook,⁴³ individuals created content for other individuals. Usually, people, they knew directly and personally. The rise of social media influencers began in places like MySpace.⁴⁴ Musicians and artists could create works and share them directly with their audience. In this way creators could by-pass industry standards (disruption) and build fan bases in an organic way. Soon, more established artists were using these social media platforms to directly communicate with their fans. Another shift came with the rise of professional content creators.⁴⁵ Platforms like Vine would pay popular creators based on how many views a creator would generate and would pay them from advertisement revenue on the platform.⁴⁶ Indeed, many YouTube stars had their beginning on Vine.⁴⁷ YouTube also allowed content creators to monetize their videos and receive money from their work.⁴⁸

⁴² Archive of Person of the Year by Times Magazine, *You*, TIMES MAGAZINE (Vol. 168 No. 26, December 25, 2006) <https://content.time.com/time/magazine/0,9263,7601061225,00.html> [<https://perma.cc/N94M-NP7G>].

⁴³ *History of Blogging*, NOTRE DAME OF MARYLAND UNIVERSITY COMMUNICATIONS <https://online.ndm.edu/news/communication/history-of-blogging/> [<https://perma.cc/U6R8-LWDD>] (last visited March 3, 2024).

⁴⁴ Amy Lee, *Myspace Collapse: How the Social Network Fell Apart*, HUFFPOST https://www.huffpost.com/entry/how-myspace-fell-apart_n_887853 [<https://perma.cc/Y9R4-EC9U>] (last visited March 3rd, 2024). (My Space was unique at that time because Facebook required you to have a university email address and MySpace did not. Circa 2005.)

⁴⁵ Drew Harwell & Taylor Lorenz, *Millions work as Content Creators. In Official Records, they Barely Exist*, WASHINGTON POST <https://www.washingtonpost.com/technology/2023/10/26/creator-economy-influencers-youtubers-social-media/> [<https://perma.cc/9CJW-79M>] (last visited March 3rd, 2024). There is some controversy around the term content creator, because in reality many of these people are in fact artist and authors of works. But the platforms prefer to view them as people who generate content for their platform.

⁴⁶ *Id.*

⁴⁷ *Viners and TikTokers to YouTube: The YouTube Migration*, NEOREACH <https://neoreach.com/viners-and-tiktokers-to-youtube/#:~:text=Although%20Lele%20Pons%20had%20created,Viners%20became%20full%2Dtime%20YoutuTubers> [<https://perma.cc/BEB5-549T>] (last visited March 3rd, 2024).

⁴⁸ Goldie Chan, *5 Ways Creators can Make Money on Social Media Platforms*, FORBES <https://www.forbes.com/sites/goldiechan/2023/06/02/5-ways-creators-can-make-money-on-social-platforms/?sh=4d2c529b6900> [<https://perma.cc/8EGU-CUCA>] (last visited March 3rd, 2024).

It is critical to draw a distinction between social media before and after the rise of the social media influencers. In addition to making money directly from the platforms, creators could count on endorsement deals for companies' products.⁴⁹ Creators were compensated by the company directly with paychecks and indirectly with product. For instance, a content creator who focuses on creates make-up videos on their YouTube channel could expect a check from YouTube based on the number of viewers, a check from a makeup company for using their products in the video, and affiliate pay.⁵⁰ Indirect compensation may include free products or paid-for vacations classified as training. This is a win-win for marketing departments and the creator. The cost of this advertising is much less than traditional advertisements. The FTC has recently started advising on newly minted creators guides on how and when these reviews must be disclosed to the audience.⁵¹ We can take this as evidence of the existence of a professional class of creators.

Potentially more valuable than the money from the platform, sponsored content and affiliate pay is the value of being a well-known personality with lots of followers who have formed parasocial attachments with the creator.⁵² Lastly, a move to traditional media, including music deals and development deals with studios can bring in more money to these creators.⁵³ A built in audience that has formed parasocial attachments with the creator is a safe bet for traditional media looking for new talent to invest in. Whether or not the end product is "good" or critically acclaimed, people will buy it.

⁴⁹ *Id.*

⁵⁰ *Id.* Generally affiliate pay works like this, A company will give you some type of code to give to your viewers. This code will be for some sort of incentive, an extra free book on audible, a 10% discount on all purchases, etc. When a viewer uses that code the company can see who directed the viewer to their products and the creator will then get some kind of compensation based on formula that accounts for number of users, amount spent etc. They can also use affiliate links, these are links that use cookies to track where the buyer came from. The compensation formulas are similar.

⁵¹ 16 C.F.R. § 255.0 (2023)

⁵² Delia Cristina Balaban, et al., *Parasocial Relations and Social Media Influencers' Persuasive Power. Exploring the Moderating Role of Product Involvement*, 230 ACTA PSYCHOLGICA (2022).

⁵³ See Marrianne Garvey, TikTok Star Addison Rae Signs Deal with Netflix, CNN (Sep. 9, 2021) <https://www.cnn.com/2021/09/09/entertainment/addison-rae-netflix/index.html> [<https://perma.cc/G9TK-U7KG>].

C. The Strike

On the Juneteenth holiday in 2021, a creator with the username “thericklouis” posted a TikTok to his account.⁵⁴ The video begins with him recording himself warming up to a song as if he was about to dance.⁵⁵ The song in question is Megan Thee Stallion’s “Thot Shit.”⁵⁶ The video then cuts to him raising his middle fingers to the camera and dancing side to side.⁵⁷ The superimposed text then reads “Sike. This app would be nothing without [Black] people.”⁵⁸ The caption for the fake out video reads as follows: “If y’all do the dance pls tag me 🙄 it’s my first dance on Tik tok and I don’t need nobody stealing/not crediting.”⁵⁹ In one thirteen second video and minimal text, a young man drew attention to a problem that many Black creators were experiencing: lack of credit. While the sentiments were already there, thericklouis crystalized the frustration and became one of the architects of the strike. The strike emerged organically through social media comment sections and twitter threads.⁶⁰

There were no penalties for Black creators that continued to create. Because of the specific nature of the strike and how it was formed there is very little in the way of specific demands however there is a much more general demand: black creators want credit for their creations.

⁵⁴ See Taylor Lorenz & Laura Zornosa, *Are Black Creators Really on ‘Strike’ from TikTok?*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/style/black-tiktok-strike.html> [<https://perma.cc/396M-Z4KE>] (citing Erick Louis (@thericklouis), TIKTOK, <https://www.tiktok.com/@thericklouis/video/6975379403282943237> (last visited Mar. 9, 2024)). The original TikTok post from @thericklouis has since been deleted.

⁵⁵ See *id.*

⁵⁶ See Moises Mendez II, *Some Black TikTokers Are Boycotting Megan Thee Stallion's 'Thot S---' to Call Out Appropriation on the App*, BUS. INSIDER (June 23, 2021, 5:29 PM), <https://www.businessinsider.com/black-tiktok-boycott-megan-thee-stallions-thot-shit-2021-6> [<https://perma.cc/AP6S-LPQ6>].

⁵⁷ See Lorenz & Zornosa, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Natachi Onwuamaegbu, *TikTok’s Black Dance Creators Are on Strike*, WASH. POST (June 25, 2021, 2:38 PM), <https://www.washingtonpost.com/lifestyle/2021/06/25/black-tiktok-strike/> [<https://perma.cc/2K2G-QA3>].

D. *The Registration of “Savage”*

In March 2020, at the beginning of the Covid-19 pandemic, Keara Wilson created a short TikTok dance to the song “Savage,” by Megan Thee Stallion.⁶¹ Anchored by the hashtag “#SavageChallenge,” the dance went viral, with the rapper herself making a cartoon dancer preforming the dance in the official lyric video version of the song on YouTube.⁶² The dance was performed by many TikTok stars and run of the mill celebrities.⁶³ It was also a huge breakthrough for Megan Thee Stallion, with 22 million views at that time.⁶⁴ TikTok influencers Charli D’amelio and Addison Rae, discussed previously, performed these dances to great interaction and financial incentive.⁶⁵ Meanwhile Ms. Wilson maintains 3.7 million followers,⁶⁶ in comparison to Charli D’Amelio’s 124.1 Million followers.⁶⁷ This is roughly 2.5%.

1. The Distinction Between Fortnite and TikTok Dances

Dance has presented a unique problem within copyright law. The copyright office has gone to great lengths to distinguish dance and choreography. Choreographic works are copyrightable, but mere dance steps and social dances are not.⁶⁸

⁶¹ See Keke Janajah, *supra* note 9.

⁶² See Stallion, *supra* note 6.

⁶³ See Kelsey Weekman, *Meet the Teenager Who Created TikTok’s Viral ‘Savage’ Dance*, YAHOO! (Apr. 20, 2020), <https://www.yahoo.com/lifestyle/2020-04-20-meet-the-teenager-who-created-tiktoks-viral-savage-dance-24049851.html> [<https://perma.cc/QGF6-X445>] (“Celebrities like Justin Bieber, Jennifer Lopez and Megan Thee Stallion herself shared their own versions.”).

⁶⁴ See Stallion, *supra* note 6. Stallion’s lyric video now has over 116 million views.

⁶⁵ See Charli D’Amelio (@charlidamelio), TIKTOK (Mar. 17, 2020), <https://www.tiktok.com/@charlidamelio/video/6805061326457670918> [<https://perma.cc/4BJM-Z579>]. See also Addison Rae (@addisonre), TIKTOK (Mar. 19, 2020), <https://www.tiktok.com/@addisonre/video/6806041088512609541?q=Addison%20rae%20savage%20dance&t=1708916792338> [<https://perma.cc/S3JZ-NB9X>]. D’Amelio and Rae’s TikTok dances garnered over 8 million and 3 million likes, respectively.

⁶⁶ See Keke Janajah, *supra* note 9. As of March 3, 2024, @kekejanajah has 3.7 million followers.

⁶⁷ See Charli D’Amelio (@charlidamelio), TIKTOK, <https://www.tiktok.com/search?q=charlidamelio&t=1708917393614> [<https://perma.cc/JB9K-K99A>]. As of March 3, 2024, @charlidamelio has 152 million followers.

⁶⁸ *What Types of Dances Are Copyrightable?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/what-type-of-dances-are-copyrightable/> [<https://perma.cc/SHK5-DLWG>] (last visited Mar. 2, 2024).

In August of 2021, Ms. Wilson obtained copyright protection for her Savage Challenge dance.⁶⁹ With the Copyright Office granting registration for the “Savage” dance and “Backpack Kid,”⁷⁰ but not for the Carlton or the Milly Rock,⁷¹ the reader might be wondering how the Copyright Office makes determinations as to what is a copyrightable dance and what is not. The copyright office in its compendium answers many of these questions:

Social Dances

For copyright purposes, choreographic works are a subset of dance and are not synonymous with dance. The drafters of the copyright law also made clear that choreographic works do not include social dance steps and simple routines. Registrable choreographic works are typically intended to be executed by skilled performers before an audience. By contrast, uncopyrightable social dances are generally intended to be performed by members of the public for the enjoyment of the dancers themselves. Social dances, ***simple routines***, and other uncopyrightable movements cannot be registered as separate and distinct works of authorship, even if they contain a substantial amount of creative expression. Examples of social dances not protected by copyright include

- Ballroom dances
- Folk dances
- Line dances
- Square dances
- Swing dances⁷²

⁶⁹ See Janice Rodrigues, *TikTok User Keara Wilson Granted Copyright to Her Viral #SavageChallenge Dance*, NAT’L NEWS (July 31, 2021), <https://www.thenationalnews.com/lifestyle/2021/07/31/tiktok-user-keara-wilson-granted-copyright-to-her-viral-savagechallenge-dance/> [<https://perma.cc/JRW6-XDHL>].

⁷⁰ See *id.* See also 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/B375-DPKY>].

⁷¹ See Harris, *supra* note 71.

⁷² U.S. COPYRIGHT OFF., CIRCULAR 52, COPYRIGHT REGISTRATION OF CHOREOGRAPHY AND PANTOMIME (2022).

2. What Distinctions Can Be Made Between the MillyRock et al. and Savage?

Arguably the *Millyrock et al.* are dance steps meant to be performed socially. It is not a significant amount of choreography meant to be performed by skilled dancers. More than that, we can see that both dances that were denied registration are building blocks of choreography. In contrast, the Savage Challenge was multiple movements combined by an aspiring choreographer. But what of the requirement that the dance typically be made to be performed by skilled dancers? The dance was clearly designed to be performed by amateurs and TikTok users.

II. ARGUMENT SECTION

A. *The Fundamental Tension in Copyright Law*

The notion of Intellectual Property was so important to the founders of the United States that Intellectual Property, specifically patents and copyrights, are enumerated as powers delegated to Congress in the U.S. constitution.⁷³ They are tasked with "promot[ing] the progress of science and useful arts" by granting "exclusive rights" for limited times.⁷⁴ At the core of the "limited times" on exclusive rights is the idea that we are all standing on the shoulders of giants.⁷⁵ We want to encourage innovation by granting exclusive rights to "authors and inventors."⁷⁶ Still, because we wish for future authors and inventors to build on the works of their predecessors, there must be a limit on the amount of time that these rights remain exclusive. This is the tension. The exclusive rights must be sufficiently long to allow authors to capitalize on their works to encourage innovation. Congress must balance this right against future authors' and inventors' desire and ability to build upon previous work. The balance is what promotes progress.

When the tension is out of balance either way, we will see stagnation.⁷⁷ While that stagnation in patents is much more obvious when people are waiting for new vaccines or cheaper drugs, the near limitless timeframe on copyrights does affect peoples' satisfaction of life. This effect, in dance particularly, is a fundamental reason that congress seems

⁷³ See U.S. CONST. art. I, § 8, cl. 8.

⁷⁴ *Id.*

⁷⁵ See Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Expression*, 68 CATH. U. L. REV. 33, 33–34 (2019).

⁷⁶ See *id.* at 33.

⁷⁷ See *id.*

resistant to providing protection in the first place.⁷⁸ Dance is not something done in isolation.⁷⁹ Dance is a social activity that people engage in.⁸⁰ There is a science behind this activity involving the brain.⁸¹ We love to mimic each other.⁸² It is the reason that full grown adults resort to baby talk with babies and the reason we subconsciously mimic the body posture of people that we are attracted to.⁸³ For these reasons, we do not want to apply a heavy hand in enforcement. It is also why that protection is limited to choreography and not just dance.

B. *When Values Misalign with the Law*

In the absence of copyright protection, a complicated system of morals, ethics, and values has been created by content creators in the digital age.⁸⁴ This is similar to what has come out of the choreography community. When those values conflict with the laws of Congress and the rules of the Copyright Office, it creates confusion. It creates urban legends and undermines trust in the system.⁸⁵

For instance, an old urban legend arose about copyright law where people claimed that mailing yourself a copy of your work enables you to prove the date. The so-called ‘poor man’s copyright’ has resurfaced with creators urging each other to deposit copies on various back-up platforms (some of which charge) to prove date.⁸⁶ This is unhelpful for a

⁷⁸ See KC Ifeanyi, *supra* note 18.

⁷⁹ See Rachel Rizzuto, *Teamwork Makes the Dream Work: Best Practices for Choreographic Collaboration*, DANCE MAG. (Sept. 9, 2021), <https://www.dancemagazine.com/choreographic-collaboration/> [<https://perma.cc/R8GY-CHTA>].

⁸⁰ See Marusa Pusnik, *Introduction: Dance as Social Life and Cultural Practice*, 16 ANTHROPOLOGICAL NOTEBOOKS 5, 5 (2010).

⁸¹ See Scott Edwards, *Dancing and the Brain*, HARV. MED. SCH. (2015), <https://hms.harvard.edu/news-events/publications-archive/brain/dancing-brain> [<https://perma.cc/KG62-4UDF>].

⁸² See Oliver Genschow et al., *Mimicking and Anticipating Others' Actions Is Linked to Social Information Processing*, PLOS ONE (Mar. 28, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0193743> [<https://perma.cc/GRY3-C2T2>].

⁸³ See *id.*

⁸⁴ See Carolyn Juarez, *TikTok, TickTock — Can You Claim Copyright on a Dance Move?*, MEDIUM (May 13, 2020), <https://medium.com/nod-ip-law/tiktok-ticktock-can-you-claim-copyright-on-a-dance-move-75325ca29650> [<https://perma.cc/GZ9R-K39U>].

⁸⁵ See *id.*

⁸⁶ See Rob Kasunic, *What Is a “Poor Man’s Copyright”?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/poor-mans-copyright/> [<https://perma.cc/E56R-9NEE>] (last visited Feb. 28, 2024).

few reasons. TikTok and other social media apps already keep detailed metadata about when the item was created, and even before that the item creating the fixation already likely creates a timestamp of creation.⁸⁷ Beyond that, copyright is not such that the first person is the only person with a copyright in the creation.⁸⁸ Two different people can have the same expression at different times and both have valid copyrights.⁸⁹ What matters is if one work inspired the creation of another.⁹⁰ This is not likely problematic when two people create the same dance with the same hashtag. Even so, it is not a herculean feat to find the reach of one TikTok to another.

When the law fails to protect communal interests, the legal system is undermined due to lack of confidence in the system.⁹¹ Responses from the community of creators—including response of non-Black creators—feeling like this is reason to provide proper credit.

Without a formal backing of the color of law and clear expectations, conflictual relations are created, which inhibit creation in different ways. And without clear expectations, the conflict within the community inhibits creation.⁹² This is also counterproductive to the creation of new media. In the absence of leadership on these micro issues in Congress, we must look to the platform itself to determine the consensus of the community and alter the policies and terms of services to be in sync with those values and norms. More directly in this case, we see a direct refusal by creators to continue creating.⁹³

Starting in 2016, YouTube saw a rise in the creation of channels that track and create videos regarding disputes between creators on the platform.⁹⁴ The channels would frequently report on creators copying each other on the platform.⁹⁵ We almost

⁸⁷ *Privacy Policy*, TIKTOK, <https://www.tiktok.com/legal/page/us/privacy-policy/en> [<https://perma.cc/8WCA-A3RK>] (Jan. 24, 2024).

⁸⁸ See U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, § 308.1 (2021).

⁸⁹ See *id.*

⁹⁰ *Definitions*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-definitions.html#:~:text=As%20a%20general%20matter%2C%20copyright,permission%20of%20the%20copyright%20owner> [<https://perma.cc/8VP5-GUJ4>] (Last visited Feb. 25, 2024).

⁹¹ See *Issue 2: Preserving Public Trust, Confidence, and Understanding*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust-confidence-and-understanding> [<https://perma.cc/E6CL-AGKV>] (Last visited Feb. 25, 2024).

⁹² See Ali Johnson, *Copyrighting TikTok Dances: Choreography in the Internet Age*, 96 WASH. L. REV., 1225, 1233 (2021).

⁹³ Onwuamaegbu, *supra* note 6.

⁹⁴ See, e.g., Danny Gonzalez, *The King Copycat of TikTok*, YOUTUBE (Apr. 30, 2021), <https://www.youtube.com/watch?v=B-lCoGkydCA> [<https://perma.cc/N3X2-8K6L>].

⁹⁵ *Id.*

immediately saw the mea culpa for being called out on the copying of another's idea was the crediting of the originator. Often, we rely on the assumption that creation will simply slow if protection is not adequate. We see this time and time again with extensions of copyright protection under the lobbying of groups like the MPAA and RIAA.⁹⁶ In this case, it is not necessary to look that far. Creators are directly saying that they do not want to create under such circumstances.⁹⁷

C. *Loss of Income Loss of Opportunity*

Many content creators on social media platforms are understandably upset about the loss of income from the apps they use to share their art and content. Similar to predominantly white content-creator houses on the west coast,⁹⁸ Atlanta has become a place for Black content creators to “set up shop” in a house to collaborate and cross-promote each other's work.⁹⁹ While many white creators have focused on creating more outlandish content, black creators' houses such as “Collab Crib,” have also focused on promoting civic involvement.¹⁰⁰ For example, the “Collab Crib” spent time campaigning in the Georgia Senate run-off elections.¹⁰¹

While the content is different, it does not explain why the opportunities are different between white and black content creators. Allegations of sexual assault, underage drinking, fighting,¹⁰² and even filming a suicide victim and posting it on the platform¹⁰³ would seem like they ought to scare away massive support. However, cancel culture is a myth. Logan Paul, the creator of the video that showed a suicide victims lifeless body,

⁹⁶ *TPP's Copyright Trap*, ELECTRIC FRONTIER FOUNDATION, <https://www.eff.org/issues/tpps-copyright-trap> [<https://perma.cc/4K6B-UFVT>] (Last visited Mar. 3, 2024).

⁹⁷ Onwuamaegbu, *supra* note 6.

⁹⁸ Taylor Lorenz, *Hype House and the Los Angeles TikTok Mansion Gold Rush*, NEW YORK TIMES (May 21, 2020), <https://www.nytimes.com/2020/01/03/style/hype-house-los-angeles-tik-tok.html> [<https://perma.cc/Y79U-3UCX>].

⁹⁹ Taylor Lorenz, *The New Influencer Capital of America*, NEW YORK TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/style/atlanta-black-tiktok-creators.html> [<https://perma.cc/R3KA-U2N3>].

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., *Logan Paul: Outrage over YouTuber's Japan Dead Man Video*, BBC (Jan. 2, 2018), <https://www.bbc.com/news/world-asia-42538495> [<https://perma.cc/7HU7-HXSF>].

¹⁰³ See, e.g., Taylor Lorenz, *Jake Paul Promised Them Fame. Was It Worth the Price?*, NEW YORK TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/style/jake-paul-team-10.html> [<https://perma.cc/M3LB-C7G7>].

later broadcasted a pay-per-view “wedding” with another YouTube celebrity, Tana Maugu,¹⁰⁴ and participated in a celebrity fight with Floyd Mayweather, with both events raking in massive income.¹⁰⁵

While many white creators can capitalize on their personality and parasocial relationships, this is much more difficult for black creators.

The black creators’ focus on social issues has further moved content down in visibility. With platforms wanting to appeal to the widest possible base of persons, there have been accusations of hashtags relating to “Black Lives Matter” being pushed further down in visibility.¹⁰⁶ It is well beyond the scope of this paper to discuss if and how a platform ought to promote social change, but it does raise questions about how popular content is promoted to a larger audience and when that lack of promotion might be a contributing factor to content duplication of black content by white creators. For example, if a creator makes a viral dance craze alongside a great deal of content focused on social issues, the creator might be penalized for posting content related to social issues.

D. *Discrimination Embedded in the Algorithm.*

One particular challenge affecting Black creators is the recognition of their skin color. The TikTok AI does not recognize darker skin as being human faces.¹⁰⁷ This is a problem across platforms. AI and machine learning encodes directly from user input and consequently reflects user bias.¹⁰⁸ Content moderation will increasingly be a problem with new media. Platforms such as YouTube will assign managers to popular content creators.

¹⁰⁴ Kat Tenbarge et. al., *Jake Paul's Biggest Controversies: How the Notorious YouTuber Found Fame Through Scandal*, BUSINESS INSIDER (Dec. 8, 2022), <https://www.businessinsider.com/jake-paul-controversies-timeline-looting-scandals-racist-slurs-drama-2020-6#paul-continues-to-stoke-controversy-and-backlash-in-2022-mainly-in-the-boxing-world-11> [<https://perma.cc/TR7C-D432>].

¹⁰⁵ Tim Daniels, *Floyd Mayweather: I Would've Knocked Logan Paul Out in 1st Round in a 'Real Fight'*, BLEACHER REPORT (Nov. 19, 2021), <https://bleacherreport.com/articles/10018639-floyd-mayweather-i-wouldve-knocked-logan-paul-out-in-1st-round-in-a-real-fight> [<https://perma.cc/9PPR-CFWW>].

¹⁰⁶ See Connor Murray, *TikTok Algorithm Error Sparks Allegations of Racial Bias*, NBC NEWS, (July 9, 2021), <https://www.nbcnews.com/news/us-news/tiktok-algorithm-prevents-user-declaring-support-black-lives-matter-n1273413> [<https://perma.cc/56RD-HAFC>].

¹⁰⁷ See Tom Simonite, *The Best Algorithms Struggle to Recognize Black Faces Equally*, WIRED, (July 22, 2019), <https://www.wired.com/story/best-algorithms-struggle-recognize-black-faces-equally/> [<https://perma.cc/N7UN-8DPS>].

¹⁰⁸ Manyika et al., *What Do We Do About the Biases in AI?*, HARV. BUS. REV. (Oct. 26, 2019), <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai> [<https://perma.cc/ZZ7E-ERV7>].

As a result of the strike, creators stopped making new content which cost them money from the fund, a loss in followers, and an overall decrease in user engagement, which put them further down in the recommended lists.¹⁰⁹ The strike evidences a failure of copyright law to protect creators. Without the protections of copyright law, new content will cease, and the public will suffer.

E. *The Broader Problem of Cultural Appropriation*

Cultural appropriation is a recognized problem, but its harms are widely debated. Generally cultural appropriation refers to a dominate culture's absorption of another culture's practice, dress, cuisine and to strip it of its cultural context.¹¹⁰ The harm of seeing your culture's practices stripped of meaning can harm members of the appropriated culture.¹¹¹ In fact, the founder of the black TikTok strike even mentioned a negative feeling to watching white creators dance and lipsynch to a particular line of a Nikki Minaj song that references being a "Black Barbie."¹¹²

Detractors argue that cultural appropriation is an overstated harm to communities. However, the US government recognizes cultural appropriation and its subsequent harms in through the Indian Arts and Crafts Act of 1990.¹¹³ This act protects Native American tribes from corporations and individuals profiting off their traditional arts.¹¹⁴ This law takes the form of a sort of "truth in advertising," and while it is framed as protecting the consumer from buying "non-authentic" arts and crafts, it equally prevents large corporations and others from profiting and selling replicants of those items.¹¹⁵ Regardless of who the Act intends to protect, the law demonstrates that there is a demand or at least a cultural expectation of "authenticity." While the expansion of the law to dances is

¹⁰⁹ Manyika et al., *What Do We Do About the Biases in AI?*, HARV. BUS. REV. (Oct. 26, 2019), <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai> [<https://perma.cc/ZZ7E-ERV7>].

¹¹⁰ *What is Cultural Appropriation?*, BRITANNICA, <https://www.britannica.com/story/what-is-cultural-appropriation> [<https://perma.cc/C5PA-ES38>] (last visited Mar. 3, 2024).

¹¹¹ Colleen Murphy, *What is Cultural Appropriation?*, HEALTH (last updated Oct. 25, 2024), <https://www.health.com/mind-body/health-diversity-inclusion/what-is-cultural-appropriation> [<https://perma.cc/7H8T-AWVA>].

¹¹² Natachi Onwuamaegbu, *TikTok's Black Dance Creators are on Strike*, WASH. POST (Jun. 25, 2021), <https://www.washingtonpost.com/lifestyle/2021/06/25/black-tiktok-strike/> [<https://perma.cc/H6T9-2AA7>].

¹¹³ *The Indian Arts and Crafts Act of 1990*, U.S. DEPT. OF THE INTERIOR (last visited Mar. 3, 2024), <https://www.doi.gov/iacb/act#:~:text=The%20Indian> [<https://perma.cc/AU6D-N5LU>].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

unquestionable, it is unclear that this expansion incorporates traditional dances of African-American communities.¹¹⁶ Why in this instance are the intellectual and cultural property of one community held at a different level of protection than the other?

F. *How to get TikTok Famous, or What Creators Want*

TikTok creators want credit for their dance. Why do creators want credit? The answer is simple: exposure. To become “TikTok Famous” and to reap the rewards mentioned in prior sections, a creator must get as many eyes on their content as possible. Individual people must interact with their content. “Like, subscribe, Comment, follow and share,” being a common refrain for most creators attempting to make a bigger name for themselves. A creator must follow trends and strategically use hashtags to “go viral.”¹¹⁷ Once the creation is being shared amongst platform users, the creator will often see benefits from their work. When other users are duplicating work without credit, the odds of the original author going viral decrease.

G. *Why Copyright Law Fails to Address the Problem*

In her 1984 paper, Barbara Singer discusses that despite the inclusion of choreography in the Copyright Act of 1976 as protected work, the choreographers were still finding better protection through their own customary rules.¹¹⁸ We can see the failures starkly in traditional choreographers sticking to what they know through social pressures. They have created a system that works for them.

Copyright offers limited remedies for infringement, either through money or injunctive relief.¹¹⁹ Of course, settlement can create the “moral rights” that most artists desire. But to compel the other party to negotiations the artists must first file an expensive lawsuit.

Damages are not an appropriate remedy because the amount of money at stake is minimal for actual damages. Statutory damages are a possible alternative. However, as mentioned above, statutory damages are limited to people who have registered their copyright.¹²⁰ This an extremely rare occurrence for choreography to have copyright registration.¹²¹

¹¹⁶ *Id.*

¹¹⁷ *What Does “Going Viral” Mean?*, BUFFER <https://buffer.com/social-media-terms/viral> [<https://perma.cc/7Y9T-SCR2>] (last visited Mar. 2, 2024).

¹¹⁸ Singer, *supra* note 19, at 319.

¹¹⁹ 17 U.S.C. § 502, 504.

¹²⁰ 17 U.S.C. § 504(c)(1).

¹²¹ Singer, *supra* note 19, at 288.

Secondly, statutory damages are particularly onerous for a reason. They are a deterrent.¹²² Statutory damages have an immediate chilling effect.¹²³ This is counterproductive to the goals of someone with a dance trying to go viral, since people reposting and reacting to their videos to gain more views.¹²⁴

In addition to having incentives that are counter to what copyright law offers, many of the remedies that traditional choreographers rely on are simply not solutions for a TikTok creator. First, the barrier to entry of being a traditional choreographer is high.¹²⁵ Choreographers are traditionally trained dancers who have been in the industry for a considerable amount of time.¹²⁶ Growing up in the industry promotes knowledge of the morals and customs of the profession.¹²⁷ The low barrier to video creation on TikTok is fantastic for the creation of new works, but not for establishing a standard of conduct within the dance industry.¹²⁸ Entrants to the industry come and go. Additionally, the enforcement mechanisms come less from fellow creators and more from secondary creators who report on people copying content creators' videos or audiences reacting to content-stealing creators.¹²⁹ But the audience is highly invested in these parasocial relationships, which means there will be an unstable, uncertain, and toxic enforcement mechanism for creators, which may ultimately curb creation.

¹²² Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, WIDENER UNIVERSITY SCHOOL OF LAW, https://law.depaul.edu/academics/centers-institutes-initiatives/center-for-intellectual-property-law-and-information-technology/programs/Documents/ipsc_2007/paper/Alan_GarfieldPaper.pdf [<https://perma.cc/S9S2-LHLE>].

¹²³ *Id.*

¹²⁴ Christina Newberry, *The Tiktok Algorithm Explained + Tips to Go Viral*, HOOTSUITE (Feb. 8, 2023), <https://blog.hootsuite.com/tiktok-algorithm/> [perma.cc/P7JU-9NK9].

¹²⁵ Suzy Woltmann, *How to Become a Choreographer*, BACKSTAGE (Oct. 14, 2022), <https://www.backstage.com/magazine/article/how-to-become-a-choreographer-75458/> [<https://perma.cc/4BEW-C5ND>].

¹²⁶ *Occupational Outlook Handbook, Dancers and Choreographers*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/ooh/entertainment-and-sports/dancers-and-choreographers.htm> [<https://perma.cc/RBN9-DASD>] (last modified Sep. 6, 2023).

¹²⁷ Woltmann, *supra* note 130.

¹²⁸ *The Power of Tiktok, Achieving Breakthrough Brand Building with Tiktok*, TIKTOK, <https://www.tiktok.com/business/library/the-power-of-tiktok.pdf> [<https://perma.cc/MP9R-RGCT>].

¹²⁹ *How TikTok has Influenced Different Dancing Styles*, WORLD CHAMPIONSHIP PROD. (Dec. 5, 2022), www.worldchampionproductions.com/2022/12/05/how-tiktok-has-influenced-different-dancing-styles/#:~:text=On%20TikTok%2C%20hip%2Dhop%20dance,come%20from%20hip%2Dhop%20dance [<https://perma.cc/FAQ6-J4QU>].

H. *How Do We Strike a Balance Between Protection and Promotion*

Content creators intuitively understand the problem they face but are woefully uninformed about the copyright process, frequently relying on allies within the platform to call out imitation. This form of social pressure has lead content creators like Addison Rae and Charli D’Amelio to credit content back to the original creator.¹³⁰

In this case, protection and promotion are not in the usual tension that we find within intellectual property, because the replication of the dance is not generating money for newer contribution and the original creator is disincentivized from going after those who copy their work. This is a rare instance where protection of the work would not interfere with the promotion of the work. In fact, the interest can be aligned so long as certain rules are followed.

1. Why Does This Matter?

A considerable number of commentators have seen the advent of new social media stars as an amateur hobby not worthy of any protection.¹³¹ This may be a result of the continued devaluation of art as something “anyone can do” and the continued request of major corporations exploiting artist and creators in the name of exposure. But the fact remains that TikTok is big business.¹³² ByteDance, TikTok’s parent company, is valued at \$250 billion, with TikTok itself being valued at \$75 billion¹³³ and the stars of the app are continually diversifying their earning opportunities.

While some stars are seen as trivial because their dancing is not valued as “serious art,” it remains a serious business with serious money. Charli D’Amelio is worth 20 million dollars and has 148 followers on TikTok.¹³⁴ Dixie D’Amelio, her sister, has a net worth of 10

¹³⁰ Mina Dragani, *These Are the Creators Behind TikTok’s Viral Dances*, L’OFFICIEL (April 13, 2021), <https://www.lofficielusa.com/pop-culture/tiktok-creators-viral-dances-charli-damelio-addison-rae> [<https://perma.cc/R67V-DAK7>].

¹³¹ Maryclaire M. Farrington, *Current Issues Blog, Viral for the Wrong Reasons: Credit or Copyright for Short Choreographic Works?*, WAKE FOREST L. REV. (Oct 29, 2021), <https://www.wakeforestlawreview.com/2021/10/viral-for-the-wrong-reasons-credit-or-copyright-for-short-choreographic-works/> [<https://perma.cc/387Z-SLWS>].

¹³² Monique Solomons, *95 Tiktok Statistics: Users, Revenue, and Spending*, LINEARITY (Dec. 13, 2023), <https://www.linearity.io/blog/tiktok-statistics/> [<https://perma.cc/LHU8-3LNK>].

¹³³ *Id.*

¹³⁴ Jasmine Washington, *Charli D’Amelio’s Massive Net Worth is Out of This World*, SEVENTEEN MAGAZINE (Jul. 29, 2022), <https://www.seventeen.com/celebrity/a38579794/charli-damelio-net-worth/> [<https://perma.cc/5LET-D7US>].

million dollars and 57.5 million followers.¹³⁵ Addison Rae has a net worth of 20 million dollars and 88 million followers.¹³⁶ Meanwhile, Epic Games has sold smaller dances associated with famous persons as microtransactions to the tune of several billion dollars.¹³⁷

III. PROPOSED SOLUTIONS

A. Moral Rights & The Berne Convention

Moral rights, at their core, are the right of the artist or creator to control their work post sale.¹³⁸ The rights can force certain actions from the purchaser to maintain certain actions. These rights are more common and widely accepted in Europe.¹³⁹ For the creator, these rights appear to be the best solution. Currently, the U.S. only recognizes moral rights for extremely specific works, such as visual works under 17 U.S.C. § 106A, also known as VARA protections.¹⁴⁰ However, these rights are not applicable to visual works captured in moving images.¹⁴¹ VARA protections are difficult to obtain. In *Scott v. Dixon* a district court in New York held that an artist must show not only the work's artistic merit but also that the work has been recognized as having such merit.¹⁴² This court would likely

¹³⁵ Catherine Esrey, *Turning Ten Minutes of Fame into a Lifetime*, THE CHRONICLE (Sep. 23, 2022), <https://www.dukechronicle.com/article/2022/09/charli-new-brand-empire-fame-catherine-esrey> [<https://perma.cc/RW67-T6YH>].

¹³⁶ Partizia Rizzo et al., *Addison's World How Old is Addison Rae and What's Her Net Worth?*, U.S. SUN (Aug. 18, 2023), <https://www.the-sun.com/entertainment/1067621/how-old-addison-rae-net-worth/> [<https://perma.cc/V8AZ-XSTH>].

¹³⁷ Akhilesh Ganti, *How Does Fortnite Make Money?*, INVESTOPEDIA (Sep. 10, 2020), <https://www.investopedia.com/tech/how-does-fortnite-make-money/#:~:text=%2Dof%2Dcharge%3F-While%20most%20console%20releases%20make%20money%20from%20selling%20a%20hard,which%20they%20have%20to%20purchase.> [<https://perma.cc/84WJ-HWAN>]. A micro transaction is a game that is free to play however, the game will charge small amounts of money (usually between .99\$ and 9.99\$) to get add-ons to the game, such as clothing or in this case a dance their character will do when they win.

¹³⁸ *Moral Rights: Protecting Your Reputation and Artwork*, DACS (2023), <https://test.dacs.org.uk/knowledge-base/factsheets/moral-rights> [<https://perma.cc/28T7-GDWJ>].

¹³⁹ *Id.*

¹⁴⁰ Brittany M. Elias & Bobby A. Ghajar, *Street Art: Growing Clarity on VARA's Applicability to Unsanctioned Street Art*, ABA, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/september-october/street-art-digital-feature/#ref2 [<https://perma.cc/7XQE-K8MD>] (last visited Mar. 3, 2024).

¹⁴¹ *Id.*

¹⁴² *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004).

find that short moving pictures would not qualify for VARA protections. More specifically, the choreography included in the video would not be protected under 17 U.S.C. § 106A. So what would adding in the protection for such moral rights provide online content creators look like?

B. *Paternity Rights*

Paternity rights are the right of an artist or creator to be known to the public as the creator of their work, also known as attribution.¹⁴³ This right is not sellable and is controlled by the artist, regardless of the artist's ability to profit from the work.¹⁴⁴

On the surface, this may seem to be an equitable solution to the issues regarding ownership for content posted on TikTok. However, the U.S. consistently resists incorporating these rights for artist or creators. Passing 17 U.S.C. § 106A is the only step U.S. legislators have taken to solve these issues and attempt to bring U.S. copyright policy in line with international laws concerning moral rights.¹⁴⁵

As they exist in the U.S., moral rights would not cover TikToks. First, moral rights only apply to visual works and specifically do not address choreography.¹⁴⁶ Second, even if moral rights were expanded to choreography, what would that look like for derivative works? On a book or a painting there exists a place for bylines or a signature. A work where there is a performance is not so easily attributable to a person. This is where platforms like TikTok and Instagram may be more progressive than traditional moving pictures. A TikTok post or Instagram reel has attribution to the author—much like a by line—and they also link back to the author.¹⁴⁷ Third, moral rights are not the correct fit for a medium, such as TikTok, where artists are motivated to reproduce visual works of other artists in their own posts. Even if moral rights could cover these works, platforms, if so motivated, could easily circumvent the need for attribution by including a disclaimer in the terms of service and requiring the user to sign away these rights.

¹⁴³ *Moral Rights in U.S. Copyright Law*, COPYRIGHTLAWS.COM (Mar. 3, 2024), <https://www.copyrightlaws.com/moral-rights-in-u-s-copyright-law/> [perma.cc/5GR4-J6VK].

¹⁴⁴ *Id.*

¹⁴⁵ U.S. COPYRIGHT OFF., *The Making Available Right in the United States: A Report of the Register of Copyrights*, at 2 (2016).

¹⁴⁶ *Id.* at 36.

¹⁴⁷ TIKTOK, *Crediting Creators*, <https://www.tiktok.com/creators/creator-portal/en-us/foundations-for-success/crediting-creators/> [https://perma.cc/GC8H-HVVS] (last visited March 10, 2024).

C. Integrity Rights

Integrity rights prevent a future purchaser from desecrating an artwork.¹⁴⁸ What might that look like with a TikTok? The app features a tool allowing a creator to combine two videos together. This is called stitching. Often, artists will stitch their video to a video created by someone else. But if moral rights existed for a TikTok, the practice of stitching and creating new work would be under attack from the originator. The originator would need to block stitching, which as previously discussed, is counterproductive to gaining more exposure.

D. Copyright + CC License

In 2008, Lawrence Lessig published the book *Remix*.¹⁴⁹ The book proposed a system for licensing a copyrighted work broadly to the public, giving people the right to share, use, and build upon that work.¹⁵⁰ This resulted in the Creative Commons. The Creative Commons asks artists a series of questions to establish what they want from their creation (including the rights of attribution).¹⁵¹ Artists can license their work via Creative Commons and post it to a platform like Flickr.¹⁵² Then, other artists may incorporate the original works within the terms of the Creative Commons license.¹⁵³ Courts are often willing to find most Creative Commons license enforceable.¹⁵⁴

The types of license that are available to a Creative Commons license are: free use, attribution, no derivative works, share alike, and non-commercial usage.¹⁵⁵ This article will discuss: free use (the artist does not designate terms on the license for how the work must

¹⁴⁸ *Id.*

¹⁴⁹ Fresh Air, *Lawrence Lessig's 'Remix' for the Hybrid Economy*, NPR (Dec. 22, 2008, 11:19 AM), <https://www.npr.org/2008/12/22/98591002/lawrence-lessigs-remix-for-the-hybrid-economy> [perma.cc/KBP7-294P].

¹⁵⁰ *See id.*

¹⁵¹ *About CC License*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/cclicenses/> [perma.cc/59QF-CKUK].

¹⁵² *Frequently Asked Questions*, CREATIVE COMMONS, <https://creativecommons.org/faq/> [perma.cc/H5Z9-LPXZ].

¹⁵³ Daxton Stewart, *Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry* (May 11, 2021).

¹⁵⁴ *Id.*

¹⁵⁵ *What Are the Different Types of Creative Commons Licenses*, BCCAMPUS, <https://pressbooks.bccampus.ca/posetest/chapter/what-are-the-different-types-of-creative-commons-licenses/> [perma.cc/XE6H-3CRP].

be used), Attribution (requires the contributor to give credit to the original creator) and Share Alike (the contributing creator cannot license the secondary work under more strict terms than the original license provided).¹⁵⁶ A creator for platforms such as TikTok would, by necessity, sign away the right of no derivation, and non-commercial, as they would need to at least license this to the platform.¹⁵⁷ A platform could default all licensing to free use and allow a creator to set attribution as an option. Share alike would become important if a derivative work were created then that author could not create terms more stringent than the original license.

Platforms like Tik-Tok should have a non-commercial usage license to use and post others' creative content. For example, Addison Rae performed several Tik-Tok dance trends on Jimmy Fallon's "Late Night Show."¹⁵⁸ Under a non-commercial usage license, Rae's performance of others' dances and her compensation for her performance could create a viable cause of action for the content creators.¹⁵⁹ Such an attribution system could be easily incorporated into social media platforms.

In addition to gutter credits—attribution posters in the margins of magazines, websites, and other print and media sources—social media platforms are also capable of attributing music posted alongside the photos and video. Nothing prohibits a secondary attribution to a creator of a dance as the dates of the creation and original choreographer are easy to discover. Anchoring hashtags from the original video help this process.

Works frequently use hashtags to identify a trend. For example, the viral dance to Megan Thee Stallion's "Savage," was uniformly tagged with the "#SavageChallenge."¹⁶⁰ Finding the hashtag's creator would be simple, however hashtags are frequently recycled.¹⁶¹ However, locating the hashtag coupled with the original video is possible.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ @celebrityparade, *Addison Rae Teaches Jimmy Eight TikTok Dances*, TIKTOK (July 21, 2022), <https://www.tiktok.com/@celebrityparade/video/6987884130851671301?lang=en>, [<https://perma.cc/4TEZ-UYCF>].

¹⁵⁹ Jaci Howard Bear, *What Is the Gutter in Publishing and Page Design?*, LIFEWIRE: TECH FOR HUMANS (Nov. 15, 2019), <https://www.lifewire.com/gutter-in-graphic-design-1074466>, [<https://perma.cc/SJ8P-6SWP>].

¹⁶⁰ *See #savagechallenge*, TIKTOK <https://www.tiktok.com/tag/savagechallenge?lang=en>, [<https://perma.cc/LXD9-6YCV>] (last visited Feb. 28, 2024).

¹⁶¹ Chloe West, *TikTok Hashtags: How to Use the Best Hashtags for More Views in 2024*, SPROUT SOCIAL (Jan. 17, 2024), <https://sproutsocial.com/insights/tiktok-hashtags/>, [<https://perma.cc/XED3-UXB3>].

But hashtags are also used in ways that do not identify the material content creators are posting. For instance, content creators seeking greater viewership may use a trending hashtag on their own post so that their content would appear in the feed of someone searching for that hashtag.¹⁶² These posts could complicate the attribution license by essentially forcing a monopoly on a hashtag that a creator may want to use. The creation of “metadata noise,” will likely cause some amount of frustration with users being asked or required to have a “gutter credit” to the originator. Imagine a creator using a hashtag to call attention to a supposedly problematic creator. The inauthentic crediting of the bad actor might silence those who genuinely call out actual bad actors. On the other hand, bad faith criticism may also bring a campaign of cyber-harassment. As previously mentioned, the parasocial aspect of new media has created devoted followers who can engage in incredibly distressing low-level harassment intensified by the sheer volume of persons engaging in the harassment.¹⁶³

Another drawback to this proposed system is a decrease in registration of a copyrighted work because creators might assume that the license is equivalent to registration. However, the United States Copyright Office requires a person who has created a copyrightable work to register before they file a lawsuit.¹⁶⁴ For example, if the creator of the “#SavageChallenge” had not given permission to Megan Thee Stallion to include her choreography in the Megan’s music video, copyright law would have required her to wait until registration was approved before she could file suit. However, like the registrations of the MillyRock and the Carlton, the #SavageChallenge dance would likely be denied registration.¹⁶⁵ This can also limit damages to actual damages.¹⁶⁶ In the case of the #SavageChallenge, the damages are not foreseeable.

¹⁶² *Id.*

¹⁶³ Daric L. Cottingham, *The Underbelly of Stan Culture: The Psychology, Legality, of the Stan Experience*, ESSENCE, <https://www.essence.com/of-the-essence/psychology-legality-stan-experience/#:~:text=These%20types%20of%20connections%20that,%2C%20influencers%2C%20etc> [<https://perma.cc/X4G3-DW4H>] (last visited February 28, 2024).

¹⁶⁴ *Copyright in General*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq/faq-general.html#:~:text=Copyright> [<https://perma.cc/A3BK-EWZ5>] (last visited Feb. 29, 2024).

¹⁶⁵ Elijah Hack, *Milly Rocking Through Copyright Law: Why the Law Should Expand to Recognize Dance Moves as a Protected Category*, 88 UNIV. CINCINNATI L. REV. 637, 648 (2020); see also Elizabeth A. Harris, *Carlton Dance Not Eligible for Copyright, Government Says*, NEW YORK TIMES (Feb. 15, 2019) <https://www.nytimes.com/2019/02/15/arts/dance/carlton-dance.html> [<https://perma.cc/B375-DPKY>].

¹⁶⁶ 17 U.S.C. § 504(b).

So, what can a platform do? The answer includes a combination of the above. First, we look to moral rights and apply the right to attribution. The platform must offer the option of attribution to the originator of the dance and must give attribution when using a hashtag that has been utilized by a creator. Secondly, there must be a process through which a creator can ask for attribution directly from their imitators. Such a system already exists for copyrighted music as YouTube automatically scans for such infringement.¹⁶⁷ If the AI should fail to identify a work, the copyright holder may report the infringing content.¹⁶⁸ Contrarily, TikTok and Instagram have mechanisms for directly adding music to posts and reels that have already been licensed by the platform.¹⁶⁹ For people who have not licensed their music to these platforms, the artist will forever have the audio attributed to them if that work is original.¹⁷⁰

Creators frequently use recognizable audio from television and movies designed to invoke feelings in a viewer. This audio is not taken from the platform itself, but typically from home recordings of copyrighted material that is scanned and can be given attribution.¹⁷¹

1. How a platform might implement Creative Commons Licensing

When the original creator posts the new work, the platform will offer options in plain English for the creator to select options from. This can be based on the Creative Commons License Generator. From this information the original work can be posted with the appropriate copyright notice and embed the metadata for the platform to keep. When uploading derivative works, the duplicator will be given options based on the original license options. These potential derivative works can be flagged based on watched videos (what we might call access), hashtags and music used. The platform will then give a gutter attribution or if not required, they may be notified of which user was first to post similar content. Disputes between creators can be mediated with a look at the metadata and the platform comparing the videos.

¹⁶⁷ *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en#:~:text=Some> [<https://perma.cc/Y7YK-PQFL>] (last visited Feb. 29, 2024).

¹⁶⁸ *Id.*

¹⁶⁹ *Add Audio to Your Post on Instagram*, INSTAGRAM, <https://help.instagram.com/570998714799168>, (last visited Feb. 29, 2024).

¹⁷⁰ *Can I Use Music in my Videos on Instagram?*, INSTAGRAM, <https://help.instagram.com/629037417957828> (last visited Feb. 29, 2024).

¹⁷¹ *Id.*

E. *Disclosure*

In the early 2010s influencer culture was booming.¹⁷² Young people with large followings of even younger consumers were being recruited by corporations to advertise products to their audiences.¹⁷³ Influencers' payments from these videos were determined by the size of the following and other reach.¹⁷⁴ The benefit of advertising with these influencers was simple: reach and subtlety. Many of these young influencers had devoted followings who wanted to be like them.¹⁷⁵

The disparity between what white and black creators/influencers were making was especially problematic. The community of creators would “call out” someone who had recreated or reinterpreted content made by another creator.¹⁷⁶ Frequently, the person being called out would claim to have no idea about the origins of the trend, and then internet sleuths would go about comparing the two versions, looking for similarities.

F. *The CASE ACT*

More recently the creation of a “small claims” court for copyright cases has been created for small authors to bring their claims in front of a claims board for cases under thirty thousand dollars.¹⁷⁷ Because all copyright lawsuits must be filed in federal court the

¹⁷² Michael Brenner, *The Rise and Fall of the Social Media Influencer*, MARKETING INSIDER GROUP, (June 8, 2021) <https://marketinginsidergroup.com/influencer-marketing/the-rise-and-fall-of-the-social-media-influencer/> [<https://perma.cc/NYE2-EQXR>] (last visited Feb. 29, 2024).

¹⁷³ Momina Asif, *5 Ways to Recruit Influencers (+ Proven Tips & Methods)*, MODASH, (Oct. 31, 2022) <https://www.modash.io/blog/influencer-recruitment> [<https://perma.cc/Z8A2-5JZC>] (last visited Feb. 29, 2024).

¹⁷⁴ Olivia Savage, *How Much do Influencers Charge Per Post in 2023?*, IMPACT.COM, <https://impact.com/partnerships/how-much-do-influencers-charge-per-post/#:~:text=Influencer> [<https://perma.cc/9SGX-AUXF>] (last visited Feb. 29, 2024).

¹⁷⁵ Peter Suci, *Young People Want to Be Influencers Even As Older Americans Say It Isn't a Real Job!*, FORBES, (Oct. 20, 2022) <https://www.forbes.com/sites/petersuci/2022/10/20/young-people-want-to-be-influencers-even-as-older-americans-say-it-isnt-a-real-job/?sh=205e6fbc5f04> [<https://perma.cc/JM7G-WJ97>] (last visited Feb. 29, 2024).

¹⁷⁶ Charlotte Colombo, *Charli D'Amelio was Criticized by the 'View' Host Sunny Hostin, who Accused Her of 'Stealing' Dances from Black Creators*, BUS. INSIDER (June 30, 2021, 8:51 AM), <https://www.businessinsider.com/tiktok-charli-damelio-sunny-hostin-the-view-black-creators-dances-2021-6> [<https://perma.cc/B7HN-Z7US>].

¹⁷⁷ *Frequently Asked Questions*, COPYRIGHT CLAIMS BD. <https://ccb.gov/faq/> [<https://perma.cc/5DML-2TRU>] (last visited Feb. 23, 2023).

process was at one point expensive and time prohibitive.¹⁷⁸ This new system may be an avenue for a creator to enforce their copyright for things such as dance. But the same problems still exist for the creators who want and need their content to go viral.

IV. HOW INFORMATION AND METADATA PLAYS INTO THE EQUATION

Regardless of what solution Congress will offer, the one constant for all is the need for platform buy-in. Platforms can (and one might say, should) act in such a way that promotes the protection of creators. The platforms have extensive access to data that can be used to solve potential disputes and inform potential infringers about how they might go about preventing that infringement.

If you cannot tell how a platform is making money, you are probably the product. None of the platforms exist to allow creators to become famous. In fact, the new media aspect of content creation exists to help the platforms curate advertising for you.¹⁷⁹ For this to work, platforms must maintain massive amounts of information and metadata to decide what content to show you next (to keep you engaged) and what advertisements are most likely to get you to click on a link such that the platform makes money.¹⁸⁰

Metadata exists that is especially helpful to this curation of advertisements that we know platforms are keeping. How many (and which) eyes landed on the content. When the content was created, the tags that were used in the content. What is the profile of someone who looks at the content for longer than average? And what type of engagement the content gets, comments, likes, sharing, etc.

How can we use this information to solve the problem? First, understand that the amount of content posted in a single day is enormous. Years of video is uploaded every day to

¹⁷⁸ Wen Xie, *The Copyright Claims Board: A Venue for Pursuing Actual or Statutory Damages Impacting Both Registered and Unregistered Works*, IPWATCHDOG (Aug. 17, 2022), <https://ipwatchdog.com/2022/08/17/copyright-claims-board-venue-pursuing-actual-statutory-damages-impacting-registered-unregistered-works/id=150947/> [<https://perma.cc/L5R4-WXDJ>].

¹⁷⁹ INTEGRAL AD SCI., *The Evolution of Social Media Advertising* (Dec. 19, 2017), <https://integralads.com/insider/evolution-of-social-ads/> [<https://perma.cc/MU7J-R9NP>].

¹⁸⁰ Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money from You*, INVESTOPEDIA (Dec. 2, 2022), <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx> [<https://perma.cc/DWB7-YGZQ>]; INVESTOPEDIA, *How Do Internet Companies Profit with Free Services* (Dec. 22, 2022), <https://www.investopedia.com/ask/answers/040215/how-do-internet-companies-profit-if-they-give-away-their-services-free.asp> [<https://perma.cc/JK5A-E2Y6>].

YouTube and other platforms.¹⁸¹ That makes hand tagging and selecting information an impractical solution. However, platforms could use machine learning to tie subsequent uses of hashtags to an originator and have that link place the originator at the top. When this process works well it could eliminate much of the need for hand review.

However, when a content creator who sees their hashtag created for a specific piece of content going viral, and there is a misattribution, the original creator ought to be able to send their original content along with the incorrect attribution and request a review by a content moderator. The evidence is as simple as the (untrue) idea of mailing yourself a copy of a work to establish a date of creation. The dates and content can be compared, and if someone acting in bad faith has altered the hashtags, the altered hashtag can be included in the linking back of the original.

A. *Non-Traditional Solutions (NFTs)*

Nonfungible tokens (NFTs) are unique tokens that stand in for digital tokens that act as a form of currency.¹⁸² Although in all meaningful ways, cryptocurrency is an investment and not an actual currency (meaning you must buy and sell it to other buyers rather than exchange it for goods and services) the Securities Exchange Commission has been hesitant to create any regulation around the new technology.¹⁸³ Normal cryptocurrency is represented by numbers on a decentralized database where “crypto miners” find codes

¹⁸¹ Maryam Mohsin, *10 YouTube Stats Every Marketer Should Know in 2023*, OBERLO (June 20, 2023), <https://www.oberlo.com/blog/youtube-statistics#:~:text=That's%2030%2C000%20hours%20of%20video,YouTube%20in%20only%20an%20hour> [<https://perma.cc/H8UU-LFZ7>].

¹⁸² Rakesh Sharma, *Non-Fungible Token (NFT): What It Means and How It Works*, INVESTOPEDIA (Jan. 28, 2024), <https://www.investopedia.com/non-fungible-tokens-nft-5115211> [<https://perma.cc/H879-N5BS>].

¹⁸³ NBCTV18, *5 Countries That Could Be Next in Line to Adopt Bitcoin as a Legal Tender* (Nov. 22, 2022, 3:57 PM), <https://www.nbctv18.com/cryptocurrency/bitcoin-as-legal-tender-5-countries-that-could-be-next-in-line-to-adopt-15228761.htm> [<https://perma.cc/3KZL-9U66>]; Murtuza Merchant, *'It's Not That Decentralized': SEC Chair Gary Gensler Hesitant on Bitcoin, Calls It 'Just an Accounting Ledger'*, BENZINGA (Feb. 14, 2024, 11:34 PM), <https://www.benzinga.com/markets/cryptocurrency/24/02/37128741/its-not-that-decentralized-sec-chair-gary-gensler-hesitant-on-bitcoin-calls-it-just-an-acc> [<https://perma.cc/2QXM-AGTP>].

that have been used by that brand of cryptocurrency.¹⁸⁴ NFTs serve as a visual aid as opposed to a simple number in a ledger being stored by a computer.¹⁸⁵

A popular form of NFT is digital artwork.¹⁸⁶ First, because it is simple to create and tie to the token.¹⁸⁷ But second because the transaction is no longer as simple as buying and selling numbers on a ledger. Instead, there is a physically represented item that may or may not have more theoretical value than another.¹⁸⁸ This has led to a lot of confusion amongst people who are investing in NFTs believing that they own the actual item and not a digital representation of the item.¹⁸⁹

There is an opportunity for creators of TikTok dances and challenges to utilize this seeming competition and differentiation between individual TikTok's. It seems that naturally the original TikTok challenge/dance would be more valuable than a TikTok done by another person, less some of the more famous creators.

There are a few problems with this approach, however. As mentioned above many people who invest in NFTs have a poor understanding of what they actually own.¹⁹⁰ This has led to confusion about whether someone can repost the TikTok, (they can), and whether TikTok has some sort of ownership in the selling of the NFTs of TikToks. Lastly, if duplicators with higher views sell the NFTs of the same work, might this be a continuation of the disparity between originators and duplicators?

B. *The Benefits of Bringing These Concepts (Mores and Law, and The Tension) Back in Line.*

In our highly capitalistic system, we tend to worry much more about patents and that “limited times” simply because the economic impact of delaying opening technology for improvement can be measured. However, art offers the community something much more difficult to measure but equally beneficial to society. Why is TikTok successful in the first

¹⁸⁴ Kate Ashford, *What Is Cryptocurrency?*, FORBES ADVISOR (Feb. 16, 2023), <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-cryptocurrency/> [<https://perma.cc/ZZP2-CBST>].

¹⁸⁵ Sharma, *supra* note 182.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ ENCHANT, *Clearing the Confusion – NFT Ownership* <https://www.enchant.com/what-is-nft-ownership#:~:text=Many%20people%20are%20confused%20because,that%20points%20to%20the%20image> [<https://perma.cc/4RK3-MKZQ>] (last visited Feb. 24, 2024).

¹⁹⁰ *Id.*

place? The answer lies in science. Humans love to imitate other humans.¹⁹¹ Our mirror neurons make us feel connected and safe.¹⁹² The resistance to the copyrightability of dance seems to intuitively understand this, dance (in contrast to painting or writing) is frequently a social activity, a way for humans to connect.¹⁹³ Why would we ever want to restrict the ability of someone to freely engage in an activity that connects us to others? During the COVID-19 pandemic, the explosion of TikTok helped people to feel connected even from across the world people were engaging in behavior that brought people together. In this case, the good news is that the creators are not even looking to prevent people from performing their works. In fact, they want and need them to perform. What these creators want is simple: credit.

Credit, especially in the context where it can be added by the offers such a minimal burden and creates an excellent way to close the opportunity gap between those that are able to capitalize on their creations is inherently fairer and in the in the interest of justice.

CONCLUSION

The changing landscape of what authors need for survival and the continued devaluation of creation has created an environment where copyright is no longer serving the needs of a sizable group of authors. Failure to act by Congress or by these platforms will ultimately disincentivize creation. Meanwhile, we see the community of creators responding in similar fashion as the choreographic community to the lack of protection, using social mores and pressure to conform with what the larger community is wanting. But this form of social pressure is likely to fail. First, the low barrier to entry means that people come in to the community without the requisite knowledge of what is expected of them. Secondly, inaction fails to acknowledge the changing incentive of these new creators. They no longer want to sell a manuscript; they need eyes on their creations and particularly for TikTok dances, they need replicability and virality. This is a solvable problem that could ultimately become a win for creators and for those that want to experience the art form.

¹⁹¹ Niall Edwards-Fitzsimons, *What's the Secret to TikTok's Success? Humans Love to Imitate Each Other*, INVERSE (Mar. 11, 2020), <https://www.inverse.com/science/whats-the-secret-to-tiktoks-success> [<https://perma.cc/N62Q-DJPZ>].

¹⁹² *Id.*

¹⁹³ *Id.*