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ONE SMALL STEP ON TIKTOK, ONE (POSSIBLY) GIANT LEAP FOR THE DANCE COMMUNITY: HOW TIKTOK SPEARHEADED A CHANGE IN THE SEEMINGLY STAGNANT FIELD OF COPYRIGHT LAW

Sydney Louise Solferino *

In an age where social-media influencers are given platforms as extensive as A-list movie stars, TikTok sensation Addison Rae's March 2021 appearance on *The Tonight Show* seemed like a routine attempt to increase the legitimacy of her career.¹ During a segment on the show, Rae performed to teach the show's host, Jimmy Fallon, and its audience the moves to eight dances that have gone viral on the app.² To avoid copyright infringement, Fallon's band played music that was different from the songs the popular dances were originally associated with on the app, instead playing its own composition with similar beats.³ Much to the discontent of other TikTok users, the dance moves that she performed did not receive the same scrupulous treatment.⁴

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¹ Natalie Morin, *Addison Rae's Dancing Isn't the Problem*, REFINERY29, <https://www.refinery29.com/en-gb/2021/03/10397403/addison-rae-jimmy-fallon-tiktok-credit-black-choreographers-backlash> (Mar. 30, 2021).

² *Id.*

³ *Id.*

⁴ *Id.*

Immediately following Rae's appearance on the show, both she and Fallon received waves of criticism from users who claimed to be the original creators of the dances, as well as their supporters.⁵ Eventually, *The Tonight Show* invited the original creators of the dances to perform, giving them full acknowledgement as the owners of the dances.⁶ This anecdote serves as a powerful reminder that with enough communal effort, effective change can occur; however, the creators' legal support lacked the weight to parallel the societal support, hence their reliance on the latter.⁷ With enough backing, creators can receive the moral "credit" that they feel they deserve, but what if they want more than that?

TikTok is an app dedicated to the sharing of content, and creators have the ability to make a short video and upload it to an algorithm that has the capacity to reach millions within a matter of minutes.⁸ The app had some success upon its inception, but its popularity skyrocketed in the wake of the COVID-19 pandemic, and today it receives regular visits from well over one billion users.⁹ Problems similar to those expressed by the creators frustrated with Addison Rae are only going to increase, and the legal framework that currently exists can be characterized as undeveloped at the most optimistic of levels.¹⁰

With the setting of the scene, the objective of this paper is to explain how to reconcile the ambivalence between the rapid advancement of TikTok's technology and the stagnant state of copyright law. In terms of the methodology employed, this paper will explore the possible avenues that the legal world could take to analyze the various copyright claims concerning choreography given the paucity of legal precedent and examine which one is the most consistent with the existing precedent. This paper will also explore the factors weighed and methods used by courts and legislatures to decide cases concerning copyright and choreography and see where the best starting place to create a uniform strategy for deciding the inevitable influx of cases that will arise. This paper will also explore the impact of society and culture, both surprisingly significant sources of authority that have affected the legal framework for choreography and are continuing to do so in the digital age. The answer (or at least the

⁵ *Id.*

⁶ Riddhi Setty, *TikTok Dance Creators Struggle to Win Credit and Copyrights*, BLOOMBERG L. 6 (Aug. 16, 2022), <https://news.bloomberglaw.com/ip-law/tiktok-dance-creators-struggle-to-win-credit-and-copyrights>.

⁷ *Id.* at 8.

⁸ 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>.

⁹ Jessica Bursztynsky, *TikTok Says 1 Billion People Use the App Each Month*, CNBC, <https://www.cnbc.com/2021/09/27/tiktok-reaches-1-billion-monthly-users.html> (Sept. 27, 2021).

¹⁰ Setty, *supra* note 6, at 4.

foundational step to finding the answer) to all these problems potentially lies in a definitive legal determination of a seemingly simple question: what is in a dance? TikTok users seeking copyright protection will be disappointed by the current answer to that question, and they will be even more disappointed that the answer should not change.

I. FUNDAMENTALS OF COPYRIGHT LAW AND HOW THEY RELATE TO TIKTOK'S FUNCTIONING

Copyright is a form of protection provided to the authors of “original works of authorship” that comes to fruition immediately upon their fixation into a “tangible medium of expression.”¹¹ Its principles date back to America’s founding, with Article I of the Constitution recognizing that Congress shall have the power “[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.”¹² To establish a successful claim of copyright, a plaintiff must sufficiently prove both “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”¹³

An original work of authorship is one that a human author independently creates and that characteristically has at least “some minimal degree of creativity.”¹⁴ Fixation of a copyrightable work occurs when the author captures the work in a “sufficiently permanent” manner to the extent that an external actor can perceive, reproduce, or communicate the work for more than a short time.¹⁵ Thus, registration on the part of the author is not required.¹⁶ Categories of works that have typically been provided protection include literature, music, drama, motion pictures, architecture, and, most relevant to this discussion, pantomime and choreography.¹⁷

Once established, copyright protection includes rights of reproduction, distribution, public performance (both digital and live), and preparation of derivative works.¹⁸ A performance is considered public when the work is performed in a “place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social

¹¹ 17 U.S.C. § 102(a).

¹² U.S. CONST. art. I, § 8, cl. 8.

¹³ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985)).

¹⁴ *Id.*

¹⁵ 17 U.S.C. § 101.

¹⁶ *Id.*; see *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986).

¹⁷ 17 U.S.C. § 101.

¹⁸ 17 U.S.C. § 106.

acquaintances is gathered.”¹⁹ A performance is also considered to be public if it is transmitted to multiple locations or across forums, such as through television and radio.²⁰ In other words, the issue that TikTok creators face is not what protections they can get if their claims of copyright infringement are successful, but how exactly they can get their foot in a courtroom door to make an initial claim.²¹

The history of copyright law as it relates to choreography is a relatively short one in comparison to other categories of copyrightable works.²² It was not until 1976 that the Copyright Act provided explicit and specific protection for choreographic works.²³ Prior to that codification, authors could only register their choreographic works for copyright protection if their works had a storytelling or dramatic component to them.²⁴ Congress long held the belief that choreography as a medium did not have social value, hence the reluctance to provide it with any sort of protection.²⁵ It took nearly half a century of cultural shifts for dance to grasp the attention of the federal legislature.²⁶ The so-called “dance boom” of the 1960s and 1970s saw the expansion of dance education in America, particularly with professional ballet and disco.²⁷ Dance was further legitimized upon the introduction of the cassette tape.²⁸ Once it became popular to record performances of popular productions, copies of these performances began to play in classrooms throughout America, encouraging an entire generation to appreciate dance as an artform.²⁹

Although it broadened the scope of copyright protections to various types of authors, the Copyright Act of 1976 failed to provide a definition for its newfound category of copyrightable works.³⁰ In fact, the only guidance the Act gives to

¹⁹ 17 U.S.C. § 101.

²⁰ *Id.*

²¹ *Id.*

²² David Sye, *Literally Stealing the Show: A Brief (and Recent) History of Dance Copyright*, INTELL. FREEDOM BLOG (June 7, 2021), <https://www.oif.ala.org/literally-stealing-the-show-a-brief-and-recent-history-of-dance-copyright/>.

²³ 17 U.S.C. § 102(a)(4).

²⁴ Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 800–13 (1952).

²⁵ See Katie M. Benton, *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, 61–62 (2008).

²⁶ See Elijah Hack, *Milly Rocking Through Copyright Law: Why the Law Should Expand to Recognize Dance Moves As a Protected Category*, 88 U. CIN. L. REV. 637, 640–41 (2020).

²⁷ *See id.*

²⁸ *See id.*

²⁹ *Id.* at 641.

³⁰ *See* 17 U.S.C. § 102.

those who rely on its protections is a list of qualities that would deem a work to lie outside of the Act's security.³¹ Qualities that exclude a work from copyright protection are social dances, commonplace movements or gestures, motor activities, and athletic movements that lack the requisite amount of authorship.³² Perhaps the closest working definition of choreography for the purposes of copyright analysis comes from the Compendium of U.S. Copyright Office Practices, Compendium II (1984) ("Compendium").³³ The United States Copyright Office produced this manual with the primary intention of providing guidance to its staff in deciding what should and should not be granted registration rights.³⁴

The Compendium defines choreography as "the composition and arrangement of a related series of dance movements and patterns organized into a coherent whole."³⁵ Analogizing choreographic works to literary ones, the Compendium suggests that choreographic works deserve similar treatment to literary ones.³⁶ In the same way that a word would not necessarily be copyrightable, but a composition of particular words would be, an individual dance move would not be copyrightable, but a combination and arrangement of dance moves would be.³⁷ By implication, choreography falls under the umbrella of dance, which the Compendium defines as the "static and kinetic succession of bodily movement in certain rhythmic and spatial relationships and in relation to time and space."³⁸

While these definitions and boundaries give choreographers some sense of confidence in how to categorize their works, that confidence does not seamlessly transfer into the legal field, as the Compendium does not have the force and effect of law, nor does it bind the U.S. Copyright Office or the Register of Copyrights.³⁹ Its effectiveness is entirely up to the discretionary application of the courts.⁴⁰

The case law on copyright protection for choreography is even less definitive, with many cases concerning the topic that arise before courts being ones of first impression.⁴¹ With the absence of a workable method to determine whether a work is a choreographic one, the scope of copyright protection is an essentially

³¹ See 17 U.S.C. § 201.

³² U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §§ 450.03(a), 450.06 (2d ed. 1984) [hereinafter COMPENDIUM (SECOND)].

³³ *Id.* §§ 450.01, 450.03(a).

³⁴ See generally PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT (3d ed. 2013).

³⁵ COMPENDIUM (SECOND) § 450.03(a).

³⁶ *Id.* §§ 302–03, 450.03(a).

³⁷ *Id.* § 450.03(a).

³⁸ *Id.* § 450.01.

³⁹ *Id.* § 101.

⁴⁰ *Id.*; see BRENT A. OLSON, MINN. BUS. L. DESKBOOK §15.5, Westlaw (database updated Nov. 2021).

⁴¹ *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 158 (2d Cir. 1986).

uncharted area of the law.⁴²

Despite the fact that no standard currently exists for choreography copyright on TikTok specifically, the concept of choreography copyright posing a legal issue for the digital world as a whole is not a new one.⁴³ As early in the digital age as 1998, Congress passed the Digital Millennium Copyright Act, which vastly broadened the scope of copyright protection.⁴⁴ Specifically, the Act protected online service providers from litigation in the event that its users engaged in copyright infringement, shielded copyright owners from unauthorized access to their works in a digital format, and illegalized the provision of false copyright management information.⁴⁵

The Act essentially served as a legislative response to the fact that the Copyright Act of 1976 proved insufficient to handle problems such as the sudden surge of digital copies of tapes that are identical to the originals.⁴⁶ Congress wanted to ensure that the existing copyright that owners currently possess did not become obsolete in the new age of technology.⁴⁷ The Act was Congress' attempt to strike a balance between wanting to discourage copyright infringement and allowing space for people to express themselves.⁴⁸ Clearly, the legislature has the capacity to take action when it notices that new problems arise with the invention of new technology.⁴⁹

That sense of urgency to respond to technological advancement has not reignited with every emergence of a new digital platform, and the legislature's hesitation to enact further copyright protections has not been immune to criticism.⁵⁰ Many have expressed concern that the Act is due for an update, particularly one that is written to prioritize the everyday digital user and not the large tech companies whose sites they frequent.⁵¹

⁴² *See id.*

⁴³ *See* 17 U.S.C. § 1201; *see* 17 U.S.C. § 512(c).

⁴⁴ 17 U.S.C. § 1201.

⁴⁵ *Id.*

⁴⁶ Mark Schultz, *Time to Revise the DMCA: The Most Antiquated Part of the Copyright May Be One of the Newest*, AEI IDEAS (Mar. 13, 2014), <https://www.aei.org/technology-and-innovation/intellectual-property/time-revise-dmca-antiquated-part-copyright-may-one-newest/>.

⁴⁷ *See* 17 U.S.C. § 1201(b); 17 U.S.C.S. § 512(c).

⁴⁸ Katharine Trendacosta, *Reevaluating the DMCA 22 Years Later: Let's Think of the Users*, EFF (Feb. 12, 2020), <https://www.eff.org/deeplinks/2020/02/reevaluating-dmca-22-years-later-lets-think-users>.

⁴⁹ *See* 17 U.S.C. § 1201; *see also* 17 U.S.C. § 512(c) (limiting the liability of service providers relating to online material and listing elements of notice for possible infringement).

⁵⁰ *See* Schultz, *supra* note 46.

⁵¹ *See* Trendacosta, *supra* note 48; *see* Schultz, *supra* note 46.

TikTok’s entire mission is dedicated to the idea of sharing.⁵² Whether it be a funny joke you heard, a new song, or a thought you just had about a movie you have watched countless times, TikTok not only encourages its users to post their thoughts, but it also generates an algorithm that allows those thoughts to spread at rapid rates.⁵³ The short video length works in conjunction with a continuous stream of videos that users can scroll through to create a technological environment that fosters creation, but not necessarily originality.⁵⁴ In fact, the rate at which content on the app is created and shared renders many of the videos that get shared “meaningless.”⁵⁵

With an app that is dedicated to the idea of literally having its users on the same “page” and sharing common experiences, the natural assumption would be that its legal team established some form of copyright protection with its invention, but that is hardly the case.⁵⁶ In fact, TikTok used to be completely reliant on community self-regulation when it came to enforcement of ownership or credit claims.⁵⁷ Creation timestamps did not exist either, so comment sections were a creator’s best bet for claiming the ownership of a dance that had gone viral.⁵⁸

TikTok has since updated its intellectual property policy, describing a policy for taking down content that infringes on someone else’s copyright; specifically, the policy prohibits “posting, sharing, or sending any content that violates or infringes someone else’s copyrights, trademarks, or other intellectual property rights.”⁵⁹ Of course, the existence of a process does not necessarily imply that said process will be helpful to everyone who invokes it, and TikTok recognizes this.⁶⁰ This duality presents a stark contrast between the technological advancements and the seemingly stagnant legal framework, leaving creators at risk of either losing ownership or losing a lawsuit.⁶¹

II. HOW COURTS HAVE TREATED COPYRIGHT CASES CONCERNING CHOREOGRAPHY ON OTHER DIGITAL FORUMS

Perhaps the social media platform that is most analogous to TikTok in terms

⁵² John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Juarez, *supra* note 8.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Intellectual Property Policy*, TIKTOK, <https://www.tiktok.com/legal/copyright-policy?lang=en> (June 7, 2021).

⁶⁰ *Id.*; *see* Juarez, *supra* note 8.

⁶¹ Juarez, *supra* note 8.

of how its users could potentially violate copyright protections for choreographers is YouTube, which also encourages its users to create video content with the intention of sharing it with others.⁶² One of the most notable cases that dealt with choreography in a digital format is *Hanagami v. Epic Games Inc.*, which saw the plaintiff suing the defendant over a sequence of movements he first posted in a YouTube video.⁶³ The defendant proceeded to use that same choreography in a purchasable emote, which is an animated movement available to users of its video game, *Fortnite*.⁶⁴ The court recognized the difference in formats early on in its opinion, noting that the plaintiff's intended audience was viewers on YouTube, whereas the defendant's intended audience was *Fortnite* players.⁶⁵ In light of the Digital Millennium Copyright Act, the court assumed that if the plaintiff could prove a valid copyright ownership, his rights would translate from one digital format (i.e., YouTube) to another (i.e., a video game).⁶⁶

Brantley v. Epic Games, Inc., is another copyright case concerning choreography where the plaintiffs' alleged choreographic work went viral on social media following their performance of the dance at basketball games at the University of Maryland.⁶⁷ The plaintiffs in this case claim that the defendant, Epic Games, copied their dance in giving its player's avatars the option to perform an emote that resembles their dance.⁶⁸ The plaintiffs accused the defendant of "digitally copying" the dance they originally performed at the University of Maryland basketball games.⁶⁹ The court recognized that the case, if successful, fell "squarely within the rights protected by the Copyright Act."⁷⁰ *Pellegrino v. Epic Games, Inc.* provides a similar instance in terms of the transference of a choreographic work from a live to digital format, with the plaintiff first performing the work live on stage and the defendant subsequently using those similar moves in an emote.⁷¹ Even though the dances in *Brantley* and *Pellegrino* were performed live originally, neither their online virality nor

⁶² *Hanagami v. Epic Games Inc.*, No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *5, *8, *13 (C.D. Cal. Aug. 24, 2022); see Lauren B. Patten, *From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course*, 10 VAND. J. ENT. & TECH. L. 179, 181 (2007).

⁶³ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *1.

⁶⁴ *Id.* at *2–3.

⁶⁵ *Id.* at *2.

⁶⁶ *Id.* at *4–6; *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 623 (D. Md. 2020).

⁶⁷ *Brantley*, 463 F. Supp. 3d at 619.

⁶⁸ *Id.* at 620.

⁶⁹ *Id.* at 626.

⁷⁰ *Id.*; 17 U.S.C. § 106 (granting copyright owners the exclusive right to reproduce works and to publicly perform and display those works).

⁷¹ *Pellegrino v. Epic Games, Inc.*, 451 F. Supp. 3d 373, 378 (E.D. Pa. 2020).

their copy in the form of a video game altered the court's determination that the originators would be entitled to copyright protection so long as they met its burden of proving the merits of their respective claim.⁷²

These cases all find a court giving deference to the digitized world and working under the assumption that the plaintiffs would be protected if the courts were to find that the works at issue were substantially similar to those used by the defendants.⁷³ Stated another way, the cases turned on the merits of the claims, not whether the plaintiffs had one in the first place.⁷⁴

It is evident that courts have been doing their part to enforce the provisions of the Digital Millennium Copyright Act, specifically in the instance of choreography being transformed from a live format to a digital one, so choreographers on TikTok seem to have safeguards when it comes to the general transference of choreography from one platform to another.⁷⁵ As was intended by the formation of the Digital Millennium Copyright Act, courts do not question the format where a choreographic works originates when determining the validity of a claim.⁷⁶ Put more plainly, the Digital Millennium Copyright Act works.⁷⁷

III. THE DISTINCTION BETWEEN A MERE SOCIAL DANCE AND A COPYRIGHTABLE CHOREOGRAPHIC WORK

If courts do not have issues in determining how to implement the statutory requirements of digital copyright protection for choreographic works, the next step in the line of inquiry is to determine where potential copyright claimants in the digital age might run into a roadblock.⁷⁸ Courts are clearly not averse to employing the Digital Millennium Copyright Act from digital to in-person forums or across two different digital platforms, so why has this security not extended to similar situations on TikTok?⁷⁹ Despite the protection that the Digital Millennium Copyright Act provides and its support from the judiciary,

⁷² *Brantley*, 463 F. Supp. at 626.

⁷³ *Id.*; 17 U.S.C. § 106 (granting copyright owners the exclusive right to reproduce works and to publicly perform and display those works); *Pellegrino*, 451 F. Supp. 3d at 380.

⁷⁴ *Hanagami v. Epic Games Inc.*, No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *5 (C.D. Cal. Aug. 24, 2022); *Brantley*, 463 F. Supp. 3d at 624; *Pellegrino*, 451 F. Supp. 3d at 378.

⁷⁵ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *12; *Brantley*, 463 F. Supp. 3d at 624.

⁷⁶ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *5; *Brantley*, 463 F. Supp. 3d at 619.

⁷⁷ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *5; *Brantley*, 463 F. Supp. 3d at 619.

⁷⁸ *See* 17 U.S.C. § 1201; 17 U.S.C. § 512(c); *see Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *12; *Brantley*, 463 F. Supp. 3d at 628.

⁷⁹ *See* 17 U.S.C. § 1201; 17 U.S.C. § 512(c); *see Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *2; *Brantley*, 463 F. Supp. 3d at 619–20.

it means nothing if a plaintiff does not have a successful claim to begin with.⁸⁰ One, if not the most common, issue in cases of copyright protection for choreographic works is determining whether the contested work falls within the scope of choreography.⁸¹ Recall that the Compendium places social dances, commonplace movements or gestures, motor activities, and athletic movements that lack the requisite amount of authorship outside of the definition of choreography.⁸²

Despite the law's attempt to answer questions about what is protected and what is not, the result, as usual, raises more questions than answers, and, with the absence of a bright-line rule, courts rely on an ad hoc approach.⁸³ The line between a social dance and a choreographic work bears little resemblance to a line at all, but rather to something that more closely resembles a continuum.⁸⁴ To provide some guidance as to the functionality of this spectrum, the Compendium explains:

[a]t one extreme are ballets, modern dances, and other complex works that represent a related series of dance movements and patterns organized into a coherent compositional whole. At the other extreme are social dances, simple routines, and other uncopyrightable movements Many works fall somewhere in between.⁸⁵

As previously mentioned, the Compendium is only as strong as courts allow it to be, and some courts have adopted its guidance in trying to determine whether a disputed work falls within the scope of copyright protection.⁸⁶

Despite the legislative motive behind the Copyright Act, the Act actually exempts more than it explicitly protects.⁸⁷ In fact, “[c]opyrightable material often contains uncopyrightable elements within it.”⁸⁸ Recognize that in the *Hanagami* case, the court held that the contested sequence constituted a choreographic work, and the case turned on the substantial similarity between

⁸⁰ See 17 U.S.C. § 1201; see also 17 U.S.C. § 512(c).

⁸¹ See *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986); *Brantley*, 463 F. Supp. 3d at 621.

⁸² COMPENDIUM (SECOND) § 805.5(B)(1)–(3).

⁸³ See *Horgan*, 789 F.2d at 161 (quoting COMPENDIUM (SECOND) §§ 450.01, 450.03).

⁸⁴ *Id.*

⁸⁵ *Brantley*, 463 F. Supp. 3d at 623 (quoting U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 805.5(B) (3d ed. 2017) [hereinafter COMPENDIUM (THIRD)]).

⁸⁶ *Brantley*, 463 F. Supp. 3d at 621–22.

⁸⁷ *Id.* at 621; see U.S. *ex rel.* *Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997).

⁸⁸ *Brantley*, 463 F. Supp. 3d at 621 (quoting *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir. 1997)).

the plaintiff's work and the defendant's emote.⁸⁹ In that same holding, however, the court determined that the questioned steps in isolation would probably not be considered copyrightable, according to guidance provided by the Copyright Office.⁹⁰ It was not until the questioned moves were considered in conjunction with other elements as a whole did the court determine that they did not constitute an unprotected social dance.⁹¹

The case law demonstrates that both the length and originality of the work in question are key factors in determining whether they can be deemed "choreographic" for the purposes of copyright protection.⁹² Put another way, both words of the term "social dance" can be parsed out to explain what falls within its scope.⁹³ Neither the judicial nor legislative branches have formally adopted this test, but holdings in similar cases have mentioned both of these factors.⁹⁴ It is clear from those holdings that those two factors, whether considered in tandem or individually, play a significant role in the ultimate decision of whether a work will receive copyright protection.⁹⁵

With regards to the "social" element of the term, a significant factor that courts specifically use to determine whether a debated movement falls within the definition of a social dance is the movement's popularity.⁹⁶ If a movement is known to be used and enjoyed by the broader public, then there is a decent chance that the work could be categorized as a "social dance."⁹⁷ With regards to the "dance" element of the term, a choreographic work is found to have elements of rhythmic movements, music accompaniment, and presentation before an audience, whereas a social dance is more basic in its presentation.⁹⁸

While the case law initially seems grim for TikTok creators, the legislative history provides even less of a reason for them to be optimistic.⁹⁹ Courts will

⁸⁹ Hanagami v. Epic Games Inc., No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *5, *9–13 (C.D. Cal. Aug. 24, 2022).

⁹⁰ *Id.* at *3, *8–9, *11–14 (holding that the steps were not substantially similar because the defendant's and plaintiff's respective works shared no other creative elements than the four counts which alone did not constitute a choreographic work).

⁹¹ *Id.* at *12–14.

⁹² *Id.* at *11–12, *14.

⁹³ *Brantley*, 463 F. Supp. 3d at 622–23 (D. Md. 2020); see COMPENDIUM (SECOND) § 805.5(B).

⁹⁴ *Brantley*, 463 F. Supp. 3d at 621–22, 624; see 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>.

⁹⁵ *Brantley*, 463 F. Supp. 3d at 622–23; see Harris, *supra* note 94.

⁹⁶ See *Brantley*, 463 F. Supp. 3d at 619, 624 (discussing the potential categorization of the Running Man as a social dance because it was enjoyed widely and performed by thousands of members of the public).

⁹⁷ See *id.*

⁹⁸ *Brantley*, 463 F. Supp. 3d at 622 (citing COMPENDIUM (THIRD) § 805.2).

⁹⁹ *Id.* (quoting COMPENDIUM (THIRD) § 805.2); 17 U.S.C. § 102.

still give deference to the legislature's goal of incentivizing creativity, and, in close cases, will usually err on the side of saying that a body of work is copyrightable.¹⁰⁰ There is a policy concern on the part of courts that copyrighting many dances, especially short ones, is going to stifle creativity, and courts want to be able to have a free and open market of ideas.¹⁰¹ Essentially, the policy concern is that if something as small as a few steps is copyrightable, then entire bodies of work that incorporate those small sequences of steps will then be subject to copyright infringement, thus sterilizing potential creators.¹⁰² Because courts examine works in their entirety when they determine whether or not a defendant has committed copyright infringement, the size of what constitutes a choreographic work plays a significant role in the determination of the outcome of many, if not all, of the copyright cases arising from choreography concerns on TikTok.¹⁰³

IV. WHAT IS THE LIKELIHOOD OF A TIKTOK USER SUCCESSFULLY GETTING ONE OF HIS OR HER DANCES REGISTERED BY THE COPYRIGHT OFFICE?

If courts are willing to be more deferential and hold that works fall within the scope of copyright protection, even ones with elements that more closely resemble a social dance, why do TikTok users face such hardship in getting copyright protection? There exists an additional problem in obtaining standing to sue.¹⁰⁴ Although registration is not required to establish the formation of a copyrightable work, it is required on the part of someone who wants to make a copyright infringement claim against someone else.¹⁰⁵ *Brantley* further explains this requirement, stipulating that “to register a claim to copyright in a choreographic work, the U.S. Copyright Office requires that “the [proposed] work is a dance.”¹⁰⁶ Whether the imposed requirements are the reason behind this statistic is unknown, but the fact is that less than twenty of the more than 500,000 applications that the U.S. Copyright Office receives each year are for choreographic works, with, inferentially, fewer than twenty being for works that

¹⁰⁰ See *Brantley*, 463 F. Supp. 3d at 622–24; see also COMPENDIUM (SECOND) §§ 450.04, 450.06, 450.07.

¹⁰¹ See *Brantley*, 463 F. Supp. 3d at 622–23 (quoting COMPENDIUM (THIRD) § 805.5(A)–(B)); see 17 U.S.C. § 102.

¹⁰² See *Brantley*, 463 F. Supp. 3d at 622–23 (quoting COMPENDIUM (THIRD) § 805.5(A)–(B)); see also 17 U.S.C. § 102.

¹⁰³ *Brantley*, 463 F. Supp. 3d at 622 (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986)); 17 U.S.C. § 102; see *Setty*, *supra* note 6.

¹⁰⁴ See *Setty*, *supra* note 6.

¹⁰⁵ *Id.*; 17 U.S.C. § 411(a).

¹⁰⁶ *Brantley*, 463 F. Supp. 3d at 623 (quoting COMPENDIUM (SECOND) § 805.4).

originated on TikTok.¹⁰⁷

Successful registration, while a struggle for anyone seeking to protect his or her works, is even more difficult for TikTok users. This is precisely due to the heavily social element of TikTok dances as well as the application's central element of a continuous feed.¹⁰⁸

Given the past treatment of particular types of dances, many of the dances that TikTok users would probably like to register with the Copyright Office are likely to fall within the categorization of "social dance" and will consequently be denied registration.¹⁰⁹ Steps such as the hustle, the grapevine, or the second position used in classical ballet will not be given copyright registration.¹¹⁰ Movements so well-known that they have their own names, such as the "Floss," have been denied copyright protection by the Copyright Office.¹¹¹ A recently-deemed "variant" of the "Floss," however, was granted the coveted stamp of registration, with the work lasting a duration of about thirty seconds.¹¹² A contrasting anecdotal piece of evidence comes from the efforts of Alfonso Ribiero, the creator of the "Carlton," who was denied copyright protection from the Copyright Office because the movements required to perform it were merely found to be a "simple routine."¹¹³

As a caveat, having the movement referenced as a specific name is not determinative of whether something is a "social dance"; however, knowledge of a dance's name provides both a contextual framework as well as visuals to understand how modern technological scenarios are going to play out in litigation.¹¹⁴ In *Hanagami*, the court held that the questioned "steps," which consisted of "the two-second combination of eight bodily movements, set to four beats of music," fell outside of the umbrella of copyright protection, at least when considered by themselves.¹¹⁵ The "Carlton," in which Ribiero (or any performer) "enthusiastically swings his arms and sways his hips," can, in theory, go on for infinity, but the sequence of movements stays the same, and that duration still lasts one count of four.¹¹⁶ Since the duration of the required

¹⁰⁷ See Alexis Pinkston, *Bring It on in Real Life: Intellectual Property Law Still Fails to Protect Minority Creators*, 11 ARK. J. SOC. CHANGE & PUB. SERV. 62, 67 (2022).

¹⁰⁸ See Setty, *supra* note 6; see also Herrman, *supra* note 52.

¹⁰⁹ *Hanagami v. Epic Games Inc.*, No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *10 (C.D. Cal. Aug. 24, 2022) (quoting COMPENDIUM (THIRD) §§ 805.4(D), 805.5(A)).

¹¹⁰ COMPENDIUM (SECOND) § 450.06.

¹¹¹ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *9 (citing Cendali Decl., Ex. D, Ex. E).

¹¹² Harris, *supra* note 94.

¹¹³ *Id.*; Juarez, *supra* note 8.

¹¹⁴ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *10 (citing COMPENDIUM (THIRD) §§ 805.4(D), 805.5(A)).

¹¹⁵ *Id.* at *8.

¹¹⁶ Harris, *supra* note 94.

movements only consists of one count of four, the Copyright Office, analogizing it to a note in a composition, decided to deny Ribiero registration.¹¹⁷

While many TikTok creators upload content with the objective of achieving the level of popularity that renders it relevant to be taught on national television, it is that very level of recognition that might be their Achilles heel.¹¹⁸ All fame comes with a price, and, in this instance, that price is copyright protection. In terms of how this is going to affect TikTok users who wish to take precautionary measures to protect their dances, those users whose dances have reached a level of virality where a name is already attached to them are likely to run into trouble in securing protection.¹¹⁹

All of the dances that Addison Rae performed during her appearance on *The Tonight Show* were distinguished via a notecard containing the names of each dance, which Fallon held as Rae demonstrated each of them.¹²⁰ Again, this in and of itself is not an indicator of copyrightable status, but the fact that these dances have names associated with their movements can provide compelling testament to their virality, which is crucial to a sequence of movement's categorization.¹²¹ Furthermore, the dances were each only a couple of eight counts in length, indicating a decreased chance of copyright registration.¹²²

With this knowledge in mind and given the case law and past denials of copyright protection, we can walk through an example to see the likelihood of registration for a typical dance and examine the kinds of obstacles and/or advantages TikTok users who want to protect their dances might face.¹²³ Some dances whose movements have been imitated numerous times on TikTok and gained national recognition are referenced by their names, such as the "Renegade," "Say So," and "Attention."¹²⁴ Arguably one of the most popular dances on the platform, the "Renegade," was first featured on an upload dating back to October of 2019.¹²⁵ Since its debut, the dance has been repeated on other

¹¹⁷ *Id.*

¹¹⁸ Setty, *supra* note 6; see Alex Hern, *How TikTok's Algorithm Made It a Success: 'It Pushes the Boundaries'*, THE GUARDIAN (Oct. 24, 2022), <https://www.theguardian.com/technology/2022/oct/23/tiktok-rise-algorithm-popularity>.

¹¹⁹ Sarah Spellings, *10 TikTok Dances to Learn at Home*, N.Y. MAG.: THE CUT (Mar. 19, 2020), <https://www.thecut.com/2020/03/tiktok-dances-to-learn.html>; Setty, *supra* note 6.

¹²⁰ *The Tonight Show Starring Jimmy Fallon* (NBC television broadcast Mar. 28, 2021).

¹²¹ *Hanagami v. Epic Games Inc.*, No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *9 (C.D. Cal. Aug. 24, 2022) (citing Cendali Decl., Ex. F at 6); see COMPENDIUM (THIRD) § 805.4(D) (citing *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986)).

¹²² *The Tonight Show Starring Jimmy Fallon*, *supra* note 120.

¹²³ *Hanagami*, 2022 U.S. Dist. LEXIS 161823, at *9 (citing Cendali Decl., Ex. F at 6); see COMPENDIUM (THIRD) § 804.4(D) (citing *Horgan*, 789 F.2d at 161).

¹²⁴ Spellings, *supra* note 119.

¹²⁵ TIKTOK, *History Behind Our Most Popular Dances*, <https://www.tiktok.com/tiktok->

TikTok uploads more than 30 million times.¹²⁶

Regarding the “social” aspect of the dance, the numbers simply do not lie.¹²⁷ Not only has the dance been performed by millions of others on the app alone, but the dance’s virality has also inspired others to create dances that rival its popularity.¹²⁸ Given the fact that a TikTok dance’s popularity has reached such a heightened level, the Copyright Office would likely consider that to be a factor weighing against its registration.¹²⁹ If the court in *Brantley* was willing to suggest that the “Running Man” would be placed in the “social dance” category based on its enjoyment by a number that reaches thousands of people, a dance’s enjoyment by millions of people will naturally carry an even heavier burden to prove it deserves copyright protection.¹³⁰

In analyzing the social aspect of a dance such as the “Renegade,” it is important to stress the turnaround of content and the frequency with which the application’s design allows it to spread.¹³¹ While TikTok’s algorithm does not guarantee virality on the part of anyone who wishes to achieve it, everyone who uploads a video is at least guaranteed the opportunity to go viral.¹³² Every single video that a user uploads onto TikTok will make it onto the “For You Page” of at least one user, and, if that initial individual or batch of individuals interacts positively with that video, it could reach millions of users very quickly.¹³³ Because the algorithm works so rapidly, depending on the level of success a video has in its inception on TikTok, creators who seek protection of their works might not even get a chance to register them before they become so common that the office labels them ineligible.¹³⁴

Even if the dance does not reach a degree of common enjoyment that the Copyright Office or a court would deem it ineligible for copyright protection, there still remains the question of whether the proposed work falls within the scope of what constitutes a dance.¹³⁵ The Copyright Office has described its policy-based intention to ensure that only those choreographic works executed

rewards/history-behind-our-most-popular-dances/ (last visited Nov. 2, 2023).

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *Id.*

¹²⁹ *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 624 (D. Md. 2020) (discussing, but ultimately not deciding, the potential categorization of the Running Man as a social dance because it was “widely enjoyed and performed by thousands of members of the public”).

¹³⁰ *Id.*

¹³¹ Herrman, *supra* note 52.

¹³² Hern, *supra* note 118.

¹³³ *Id.*

¹³⁴ *Id.*; *see* Setty, *supra* note 6.

¹³⁵ *See Brantley*, 463 F. Supp. 3d at 624 (discussing, but ultimately not deciding, the potential categorization of the Running Man as a social dance because it was “widely enjoyed and performed by thousands of members of the public”).

by skilled performers before an audience are ensured protection from infringement by others.¹³⁶

This is consistent with the legislative purpose of the copyright protection for choreography.¹³⁷ Recall that prior to the Copyright Act of 1978, the legislature was intent on not registering works that were purely movement based; there needed to be a communicative element to it.¹³⁸ The justifications behind the denial of works that have sought copyright protection are also consistent with this idea, with many of the denials citing reasons such as the movement's lack of totality as a basis for denying copyright protection.¹³⁹ Because many of the movements, such as those demonstrated by Rae on *The Tonight Show*, are small enough that they could likely be used in larger bodies of works and do not claim to have a storytelling aspect to them, the likelihood of their protection is slim.¹⁴⁰ Referring all the way back to the basics with the definition of a choreographic work, remember that it requires the formation of a "coherent *whole*."¹⁴¹

V. CURRENT TRENDS AND ATTITUDES TOWARD EXPANSION OF COPYRIGHTABLE MATERIAL

In recent years, small "victories" for the dance community have been made in the legislature when it comes to expansion of copyright protections.¹⁴² For example, JaQuel Knight, the mastermind responsible for Beyoncé's dance moves in her iconic "Single Ladies (Put a Ring on It)" video, was recently granted copyright protection for his work.¹⁴³ This makes him one of the first choreographers to be awarded protection for a choreographic work of a genre other than ballet, which has traditionally been the primary beneficiary of copyright protection.¹⁴⁴

Inspired by the Copyright Office's grant of protection for his work, Knight

¹³⁶ *Circular 52: Copyright Registration of Choreography and Pantomime*, U.S. COPYRIGHT OFF. 3 (Oct. 2022), <https://www.copyright.gov/circs/circ52.pdf>.

¹³⁷ *See id.* at 1; *see* Leon I. Mirell, *Legal Protection for Choreography*, 27 N.Y.U. L. REV. 792, 800–13 (1952).

¹³⁸ Mirell, *supra* note 137, at 800–13.

¹³⁹ *See* Harris, *supra* note 94.

¹⁴⁰ *Id.*; *see* *Brantley*, 463 F. Supp. 3d at 622 (quoting COMPENDIUM (THIRD) § 805.5(A)–(B)); *see generally* 17 U.S.C. § 102 (providing the definition of what constitutes copyrightable material).

¹⁴¹ *Brantley*, 463 F. Supp. 3d at 622 (quoting *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986)) (emphasis added); 17 U.S.C. § 102.

¹⁴² *See* Pinkston, *supra* note 107, at 71.

¹⁴³ Yola Robert, *JaQuel Knight Is Paving the Way for the Future of Copyrighting Dance*, FORBES (Nov. 23, 2020), <https://www.forbes.com/sites/yolarobert1/2020/11/23/jaquel-knight-is-paving-the-way-for-the-future-of-copyrighting-dance/?sh=59e240cfe72e>.

¹⁴⁴ *Id.*

decided to create his own business that will function similarly to a music publisher.¹⁴⁵ His emphasis is on the commercial aspect of copyright infringement, so the company will broker licensing deals and protect intellectual property, overseeing the rights to dance moves.¹⁴⁶ Acknowledging the ease with which content can be uploaded in today's world, he explains, "On social media, people think they can take our work, travel with it, copy it, attach and earn a larger dollar from it, and that's not fair or right. Artists need to own their work."¹⁴⁷ Cultural chorographical norms have garnered legislative response once before; who is to say that it cannot happen again?¹⁴⁸ One thing about history is that it is bound to repeat itself.

While some might see this as a jumpstart toward a massive rule-rewrite, there is a plausible explanation that JaQuel Knight's story, while inspiring, is an exception to the established rule.¹⁴⁹ Hip-hop choreography certainly lacks the formalities of ballet, and thus, less training, if any at all, is required to repeat its movements.¹⁵⁰ Scholar Elijah Hack advocates for the recognition of dance moves as a protected category of choreography, and he goes so far as to suggest that the reason hip-hop as a genre is not given the same copyright security as ballet is precisely because of its repeatability.¹⁵¹ Its ability to be repeated, however, does not detract from its narrative characteristics.¹⁵² Knight himself emphasized this point in an interview in which he describes how he was able to get protection for his work.¹⁵³ When describing what he has learned through his experience in obtaining copyright protection, Knight explains, "The copyright office isn't so much worrying about steps as they are looking to allow you to have ownership of a sequence."¹⁵⁴ In other words, Knight's explanation of what he learned about the Copyright Office's rationale for affording him protection confirms that genre is not a determining factor in the decision.¹⁵⁵ The Copyright

¹⁴⁵ Jazz Tangcay, *Beyoncé and Megan Thee Stallion Choreographer JaQuel Knight Launches Company to Copyright Dance Moves*, VARIETY (Apr. 22, 2021), <https://variety.com/2021/artisans/news/beyonce-choreographer-jaquel-knight-copyright-dance-moves-1234957578/>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *See generally* 17 U.S.C. § 1201 (exemplifying how the legislature has implemented measures to protect copyrighted works in the wake of generally available software tools).

¹⁴⁹ *See* Pinkston, *supra* note 107, at 69; Hack, *supra* note 26, at 650.

¹⁵⁰ *See* Pinkston, *supra* note 107, at 69.

¹⁵¹ Hack, *supra* note 26, at 650.

¹⁵² *See id.* at 640.

¹⁵³ Ngozi Ekeledo, *Beyoncé's Choreographer JaQuel Knight Talks 'Single Ladies,' TikTok and Creative Control for Black Artists*, LX NEWS (Nov. 1, 2021), <https://www.lx.com/culture/entertainment/beyonces-choreographer-jaquel-knight-talks-single-ladies-tiktok-and-creative-control-for-black-artists/44709/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Office is indifferent to a work's genre; it cares about the expressiveness and originality of its sequence.¹⁵⁶

Furthermore, the most recent edition of the Compendium does not discriminate based on genre.¹⁵⁷ As previously mentioned, while ballet is specifically named as a type of work that was more likely than not to receive protection, the Compendium acknowledges the evolution of dance and is open to offering protection for works that involve styles of dances with more modern roots.¹⁵⁸ Artists have also made efforts themselves to increase the legal protection of their craft.¹⁵⁹ To foster more creativity in the dance community, Knight has started The JaQuel Knight Foundation, which provides grants to dancers and other creators impacted by the COVID-19 pandemic.¹⁶⁰

A work of hip-hop choreography, such as Knight's, can thus be distinguished from the likely-categorized "social dances" on TikTok because, regardless of the way that the dancers move, it is long enough in duration to convey a message to its audience and tell a story.¹⁶¹ The shorter dances that go viral on TikTok are not, and that could very well be because of the nature of the application.¹⁶² Those kinds of dances are designed to be repeated, not designed to tell a story.¹⁶³ There is a difference between something being *able* to be repeated and it being *designed* to be repeated.¹⁶⁴

In an analysis of Knight's legal victory, Lateef Mtima, the founder and director of the Institute for Intellectual Property and Social Justice and a professor of law at Howard University, cites the dance's storytelling and length as reasons for its protection.¹⁶⁵ In terms of the storytelling element, Mtima explains that the "overall artistic *mélange*" shows lots of creativity and blending of different elements to create one unique work of art.¹⁶⁶ Mtima continues to elaborate on the impact of length in the analysis of the dance, explaining that, while there is no exact science to determining how many individual steps will constitute a choreographic work, the fact that the Copyright Office examines

¹⁵⁶ *Id.*

¹⁵⁷ COMPENDIUM (THIRD) § 805.5(B).

¹⁵⁸ *Id.*

¹⁵⁹ Ekeledo, *supra* note 153; Robert, *supra* note 143.

¹⁶⁰ Ekeledo, *supra* note 153; Robert, *supra* note 143.

¹⁶¹ Hack, *supra* note 26, at 650.

¹⁶² Herrman, *supra* note 52.

¹⁶³ *Id.*

¹⁶⁴ *See Id.*

¹⁶⁵ Rebecca Milzoff, *Inside 'Single Ladies' Choreographer JaQuel Knight's Quest to Copyright His Dances*, BILLBOARD (Nov. 5, 2020), <https://www.billboard.com/music/music-news/jaquel-knight-beyonce-megan-thee-stallion-billboard-cover-story-interview-2020-9477613/>.

¹⁶⁶ *Id.*

each submission as a coherent work gives it a greater chance of protection.¹⁶⁷

Choreographic works have more to prove in terms of receiving protection, since dance has historically been viewed as a “second-class” form of artistic expression.¹⁶⁸ After all, copyright protection is not just awarded to dances; it is awarded to paintings, novels, and movies, which typically require a substantial amount of time to create.¹⁶⁹ These different mediums receive the same degree of copyright protection, so it makes sense that there would be a similar level of effort required to earn that high degree of protection.¹⁷⁰ There is another characteristic shared amongst these mediums which could potentially explain the inferior status of choreographic works.¹⁷¹ Perhaps the relevant similarity of these mediums is the obviousness of their narrative ability.¹⁷² The aforementioned “dance boom” involved an increase in the amount of dance companies and, in turn, the willingness of audiences to see their performances.¹⁷³ At the time of this cultural revolution, most of the companies exclusively performed American ballet.¹⁷⁴

Even when that style of dance was used in mediums beyond a stage performance, such as in a Broadway performance or a movie musical, there was strong emphasis on the narrative significance of the movements.¹⁷⁵ A platform such as Broadway demonstrates to audiences that “dancing could be a part of the plot itself, a perfectly natural medium for the delineation of character, the evoking of mood, the heightening of incident.”¹⁷⁶ From a commercial perspective, an audience is essential to legitimization, and the value of something is only as high as the price that someone is willing to pay to experience it.¹⁷⁷ Ballet and Broadway patrons may pay hundreds of dollars to watch those performances.¹⁷⁸ Granted, they are paying for other parts of the

¹⁶⁷ *Id.*

¹⁶⁸ See Kathleen Abitabile & Jeanette Picerno, *Dance and the Choreographer’s Dilemma: A Legal and Cultural Perspective on Copyright Protection for Choreographic Works*, 27 CAMPBELL L. REV. 39, 54 (2004).

¹⁶⁹ See 17 U.S.C. § 201.

¹⁷⁰ See *id.*

¹⁷¹ 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. MIA. L. REV. 287, 291 (1984).

¹⁷² See Cheryl Swack, *The Balanchine Trust: Dancing Through the Steps of Two-Part Licensing*, 6 VILL. SPORTS & ENT. L.J. 265, 273 (1999).

¹⁷³ Benton, *supra* note 25, at 77.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 77 n.107.

¹⁷⁶ *Id.*

¹⁷⁷ See Pinkston, *supra* note 107 at 65 (citing COMPENDIUM (THIRD) § 805.2(A–F)); see Benton, *supra* note 25, at 77 n.107.

¹⁷⁸ David P. Willis, *Why Are Broadway Tickets So Expensive? What You Pay for, How to Get Them Cheap*, ASBURY PARK PRESS, <https://www.app.com/story/entertainment/theater/2021/08/16/broadway-tickets-2021-deals/5468856001/> (Aug. 28, 2021).

experience aside from the dance, but the ticket prices nevertheless symbolize a recognition of the labor of everyone involved in the performance, including the choreographers.¹⁷⁹

The obvious contrast with a platform such as TikTok is its accessibility.¹⁸⁰ Neither creating nor watching a TikTok requires any money.¹⁸¹ To put it more bluntly, it is free.¹⁸²

It seems that a certain degree of popularity is required to gain the necessary level of respect to legitimize an artform, but if that popularity is taken just a bit too far, the reputability can just as easily diminish.¹⁸³ If it took decades for works such as ballets and dances used in Broadway musicals to gain the same level of public reputability as novels and plays, then short “social dances” are naturally in for an even more rigorous battle.¹⁸⁴

To summarize, the core issue of a “social dance’s” inability to receive copyright protection stems back to its length.¹⁸⁵ That is not to say that length alone is the determining factor in the decision to grant copyright protection; however, length is crucial in deciding whether a dance tells a story.¹⁸⁶ The narrative aspect of the dance is key, and that aspect strengthens with the increasing length of the dance.¹⁸⁷ There are examples of compilations that do not constitute a narrative work worthy of copyright protection.¹⁸⁸ Yoga routines, aerobic activities, and even dance movements used in fitness instructions all lack the necessary storytelling component of a choreographic work.¹⁸⁹ Assuming, for example, that the Copyright Office took the “Carlton” as a

¹⁷⁹ *Id.*; see Benton, *supra* note 25, at 77 n.107.

¹⁸⁰ Stephanie Osmani, *Think TikTok Is Just About Dance Moves? Think Again! Here’s What the TikTok App Is All About and How It Works*, PARADE (Mar. 23, 2023), <https://parade.com/935680/stephanieosmani/what-is-tiktok-app/>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Singer, *supra* note 171, at 291; see generally Benton, *supra* note 25, at 64 (citing Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS IN INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. OF L. 4, 4–10 (1999)) (explaining that modern copyright law has roots that date back to early European law and society).

¹⁸⁴ See Singer, *supra* note 171, at 291; see generally Benton, *supra* note 25, at 64 (citing Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS IN INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. OF L. 4, 4–10 (1999)) (explaining that modern copyright law has roots that date back to early European law and society).

¹⁸⁵ See Pinkston, *supra* note 107, at 69.

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 66.

¹⁸⁹ *Id.*

coherent work, it tracks that the move did not receive copyright protection.¹⁹⁰ As a whole, the move is just that, a move; it expresses nothing.¹⁹¹

If, however, the move was to be just one step in a sequence that included the “Carlton,” then that sequence, as a whole, would have a much higher chance of receiving protection.¹⁹² Recall that one of the reasons behind the “Single Ladies” dance receiving copyright protection was the fact that it was a culmination of many different elements.¹⁹³ While many of the steps were repeated, the dance moves, when considered with the music, lighting, and costuming, conveyed a story to those who were watching it.¹⁹⁴ Further recall that some of the elements are a “defined spatial environment,” such as a stage, and a “presentation before an audience.”¹⁹⁵ Though neither element is a necessity, they are both key to the form of dance that has traditionally received copyright protection: ballet.¹⁹⁶ Perhaps there is something to be said in terms of society’s demand, at least from a monetary standpoint. Society’s economic demand legitimizes a dance, and, in turn, Congress’ willingness to protect a dance.¹⁹⁷

VI. HOW TIKTOK HAS CHANGED THE LEGAL WANTS AND NEEDS OF CHOREOGRAPHERS

Even two decades into the digital age, neither choreographers themselves nor copyright law scholars anticipated the perspectives that people have today.¹⁹⁸ In fact, the demands of choreographers are almost the exact opposite of what they were just fifteen years ago.¹⁹⁹ A widely held belief among the dance community used to be that copyright protection functioned to provide authors with the ability to receive the economic benefits of their creations, meaning that choreographers were less concerned with profits and more concerned with merits.²⁰⁰ In today’s world, however, profits seem to be the first thing on choreographers’ minds.²⁰¹ When describing his feelings toward the initial lack of credit for his work on the “Single Ladies” dance, Knight explained that “[y]ou’ve created something that you can see on huge motion pictures, TV shows across the globe. People are

¹⁹⁰ See Harris, *supra* note 94; COMPENDIUM (SECOND) § 450.03(a).

¹⁹¹ See Harris, *supra* note 94; COMPENDIUM (SECOND) § 805.5(B).

¹⁹² See *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 623–24 (D. Md. 2020); *see also* 17 U.S.C. § 102.

¹⁹³ Milzoff, *supra* note 165.

¹⁹⁴ *See id.*

¹⁹⁵ Pinkston, *supra* note 107, at 65 (quoting COMPENDIUM (THIRD) § 805.2(A–F)).

¹⁹⁶ See Swack, *supra* note 172, at 273.

¹⁹⁷ Benton, *supra* note 25, at 61.

¹⁹⁸ *Id.* at 110.

¹⁹⁹ *Id.* at 82; Ekeledo, *supra* note 153.

²⁰⁰ Benton, *supra* note 25, at 99.

²⁰¹ Robert, *supra* note 143; Ekeledo, *supra* note 153.

doing it online and getting and receiving funds from the platforms, and here I am, the guy who created it, I'm seeing nothing."²⁰²

The intentions of creators who share this viewpoint are not necessarily greedy.²⁰³ In response to raised concerns about whether people will be sued for repeating one of his dances on TikTok or YouTube, Knight insists that the point of copyrighting his work is to "protect the creator from these huge corporations that come in and take advantage."²⁰⁴ There is a tacit understanding amongst the dance community that their legal adversary should not be each other, but rather, these large corporations, as the foundation of success in the dance community is largely built on reputation.²⁰⁵ Stated another way, because the professional dance community is so small, there is a disincentive for choreographers to blatantly copy someone else's work, barring the need for legal means of enforcement.²⁰⁶

Just because choreographers, such as Knight, are not currently targeting TikTok users now does not mean that they will not wish to do so in the future.²⁰⁷ If the rationale behind choreographers targeting corporations is to ensure that no one is making a profit off their works, and if TikTok users are making money off creating videos, why would Knight *not* want to seek legal enforcement against them?²⁰⁸ It is important to distinguish between Knight's ability to enforce his rights on someone who is using TikTok as a means to spread his own choreography and someone generating a specific type of dance on TikTok and claiming that it has the same legal weight as Knight's choreography.²⁰⁹

TikTok as a platform is not the problem.²¹⁰ Its design, however, does foster a certain type of dance that, while popular, simply does not have the same length and, in turn, narrative quality as other works that the Copyright Office wants to protect.²¹¹ Knight would easily be able to enforce his copyright protection on a user who performs his choreography on TikTok because that user would be attributing Knight's work to him or herself.²¹² Choreographers such as Knight do not create their respective dances on TikTok specifically to be used on

²⁰² Ekeledo, *supra* note 153.

²⁰³ See Ari Shapiro et al., *He's Choreographed 'Single Ladies' and 'WAP.' Now He's Got a Bigger Mission*, NPR (Nov. 16, 2020), <https://www.npr.org/2020/11/16/934603252/he-choreographed-single-ladies-and-wap-now-hes-got-a-bigger-mission>.

²⁰⁴ *See id.*

²⁰⁵ Milzoff, *supra* note 165.

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ Shapiro et. al., *supra* note 203; see Herrman, *supra* note 52.

²¹⁰ See Milzoff, *supra* note 165.

²¹¹ See Herrman, *supra* note 52; see also COMPENDIUM (SECOND) § 450.03(a).

²¹² See Milzoff, *supra* note 165; see also Ekeledo, *supra* note 153.

TikTok.²¹³ These are professional individuals who appreciate the value of their craft and understand how the digital age is potentially compromising the integrity of their traditional form of dance.²¹⁴ “Social dances,” while not conceptually new, are experiencing a renaissance where their entire formation and use occur in the digital space, but that does not mean that they will be given the same treatment as Knight.²¹⁵

CONCLUSION

In the end, the problem is neither the platform nor the lack of legislative action. Instead, the problem is contained within the works themselves. Those on TikTok who want to receive legal protection for their dances might think that the solution to their problem is to post them on another platform, such as YouTube, first. However, this solution is only as viable as the chance of the dance falling within the legal definition of such a term. Naturally, the next solution TikTok users might seek is a change of statutory terms, specifically with respect to broadening the scope of what constitutes a choreographic work for the purposes of copyright protection.

While this might be the better solution for them, it certainly is not the best solution for copyright law in general. If moves that are equal in length to the “Carlton” or the “Renegade” can receive copyright protection after being uploaded to TikTok and receiving the opportunity to get widespread engagement, at least two drastic impacts will result: burden on the judiciary and the stifling of countless creative works. The smaller the Copyright Office allows a copyrightable work to be, the easier it is for users to make a copyright claim, especially against those whose repetition of the work does not include any originality on the part of the copying user. If even thousands of users quickly use a dance that another user originated, that original user may have a copyright claim against the thousands of people who use that same dance. Allowing for the expansion of the definition of a dance for the purposes of copyright protection will only serve as another reason to express concern against opening the floodgates of litigation that the judiciary is not equipped to handle.

Copyright is supposed to protect “works,” and that word, whether or not it was chosen for a specific reason, certainly has a significant impact on people’s understanding of its implication.²¹⁶ If something is awarded the title of being a

²¹³ See Milzoff, *supra* note 165; see also Ekeledo, *supra* note 153.

²¹⁴ See Harris, *supra* note 94; see also *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 623 (D. Md. 2020) (quoting COMPENDIUM (THIRD) § 805.5(B)).

²¹⁵ See Harris, *supra* note 94; see also *Brantley*, 463 F. Supp. 3d at 623 (quoting COMPENDIUM (SECOND) § 805.5(B)).

²¹⁶ 17 U.S.C. § 201.

“work,” it indicates to those observing it that its creator imparted a certain degree of labor into its inception.²¹⁷ As demonstrated above, the storytelling ability of a work also plays a crucial role in determining copyright protection.²¹⁸ Again, the narrative aspect of a choreographic work and the length of the dance work in tandem, so if a dance’s narrative ability becomes more apparent with the length of the dance, then the likelihood of its protection also increases.²¹⁹ A central policy idea behind copyright protection is the granting of a reward for effort, and a social dance consisting of only a few steps simply does not possess the requisite amount of effort required to earn the title of a “work.”²²⁰

Thinking a little more broadly to the central tenants of American values and governance, a smaller requirement to constitute a dance will only deter others from making their own works out of fear of litigation. In a country with a First Amendment that protects freedom of speech and with a consistent history of protecting the right to own one’s work from its inception, any legislative act that will negatively impact those rights will only go against longstanding tradition.²²¹

There has been recent concern among tech consumers that TikTok could cease to be available in the United States, following Congress’ ban of its use on government devices.²²² Even if data privacy concerns mobilize Congress to ban use of the app in its entirety, the legal concerns expressed today are not dependent on the existence of TikTok.²²³ Experts have already predicted increased use in features such as Instagram Reels and YouTube Shorts in the event of a TikTok ban.²²⁴ Both of these applications are similarly designed to TikTok, so the related functioning would likely generate related copyright problems.²²⁵ The popularized version of TikTok is the result of a merge with another social media service that had video-sharing and soundbite elements.²²⁶ Furthermore, as previously demonstrated, the problems that creators on TikTok

²¹⁷ See David Sarokin, *Why Are Copyright Laws Important?*, CHRON (Apr. 24, 2019), <https://smallbusiness.chron.com/copyright-laws-important-52601.html>.

²¹⁸ Benton, *supra* note 25, at 81–82 (quoting 17 U.S.C. § 102(b) (2000)).

²¹⁹ See Pinkston, *supra* note 107, at 69; see also *Brantley*, 463 F. Supp. 3d at 623 (quoting COMPENDIUM (SECOND) § 805.5 (A)–(B)).

²²⁰ See Sarokin, *supra* note 217.

²²¹ See U.S. CONST. art. I, § 8, cl. 8.

²²² Ashley Capoot, *TikTok’s Potential Ban in U.S. Could Be Boon for Meta and Snap*, CNBC (Mar. 1, 2023), <https://www.cnbc.com/2023/03/01/tiktoks-potential-ban-in-us-could-be-boon-for-meta-and-snap.html>.

²²³ See *id.*

²²⁴ *Id.*

²²⁵ See *id.*

²²⁶ Kishalaya Kunda, *Musical.ly App to Be Shut Down, Users Will Be Migrated to TikTok*, BEEBOM, <https://beebom.com/musical-ly-app-to-be-shut-down-users-will-be-migrated-to-tiktok/> (Aug. 2, 2018).

are facing originated, albeit at a smaller degree, on other media platforms.²²⁷ Thus, the popularization of one particular application does not mean that the death of that application will end the issues that came with it.²²⁸

Technology moves fast, and with the death of one platform will inevitably come the genesis of another.²²⁹ Wanting credit for one's work is a natural desire for an individual who has put in the time and effort to create it. TikTok users frustrated by Jimmy Fallon and Addison Rae's actions, however, have not exerted enough time or effort to create something that could legally constitute a "work," thus moral credit is likely the best that they can, and should, receive.

²²⁷ See *Hanagami v. Epic Games Inc.*, No. 2:22-cv-02063-SVW-MRW, 2022 U.S. Dist. LEXIS 161823, at *12 (C.D. Cal. Aug. 24, 2022); see also Lauren B. Patten, *From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course*, 10 VAND. J. ENT. & TECH. L. 179, 181 (2007).

²²⁸ See Gerrard Kaonga, *Can the U.S. Ban TikTok? Here's What Would Happen If They Tried*, NEWSWEEK (Nov. 8, 2022), <https://www.newsweek.com/can-us-ban-tiktok-fcc-commissioner-social-media 1756590>.

²²⁹ See *id.*

